

# MAKING JUSTICE WORK FOR WOMEN

## *Kenya Country Report*

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RITA SHACKEL  
& LUCY FISKE



Making Transitional Justice Work for Women:  
Rights, Resilience, and Responses to Violence  
Against Women in Democratic Republic of the  
Congo, Northern Uganda, and Kenya



THE UNIVERSITY OF  
**SYDNEY**

IN CONJUNCTION WITH



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Rita Shackel and Lucy Fiske

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Kenya

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## LIST OF ACRONYMS

ADRAS	Australian Development Research Awards Scheme
AUD	Australian dollar
CAR	Central African Republic
CBD	Central Business District
CEDAW	Convention on the Elimination of Discrimination Against Women
CEI	Centre for Education Initiative
CIPEV	Commission of Inquiry into the Post-Election Violence
CSI	Crime Scene Investigation
DFAT	Australian Department of Foreign Affairs and Trade
DRC	Democratic Republic of Congo
DPP	Director of Public Prosecutions
EACC	Ethics and Corruption Commission (Kenya)
ECK	Electoral Commission of Kenya
EHRP	Emergency Humanitarian Response Plan
FIDA	Federation of Women Lawyers
GBV	Gender based violence
GSU	General Service Unit
GVRC	Gender Violence Recovery Centre (Kenya)
HIV/AIDS	Human immunodeficiency virus/Acquired immune deficiency syndrome
HRW	Human Rights Watch
ICC	International Criminal Court
ICC OP	International Criminal Court, Office of the Prosecutor
ICTJ	International Centre for Transitional Justice
IDP	Internally displaced person
IPOA	Independent Police Oversight Authority (Kenya)
IREC	Independent Review of the Elections Commission
KANU	Kenya African National Union
KCPE	Kenya Certificate of Primary Education
KDHS	Kenya Demographic and Health Survey
KES	Kenyan shilling
KHRC	Kenya Human Rights Commission
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission for Human Rights
KNDRA	Kenya National Dialogue and Reconciliation Accord
KPR	Kenya Police Reserves
KRC	Kenya Red Cross
NACC	National AIDS Control Centre
NCRC	National Crime Research Centre
NGO	Non-government organisation
NPSC	National Police Services Commission (Kenya)
ODM	Orange Democratic Movement
ONU	Party of National Unity
PEP	Post-exposure prophylaxis
PEV	Post-election violence
PNU	Party of National Unity
PTSD	Post-traumatic stress syndrome

SALWs	Small arms and light weapons
SGBV	Sexual and gender based violence
SLDF	Sabaot Land Defence Force
SRC	Salaries and Remuneration Commission (Kenya)
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
UN	United Nations
UNAIDS	United Nations Programme on HIV/AIDS
UNDP	United Nations Development Program
UNICEF	United Nations International Children's Emergency Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNHCR	United Nations High Commissioner for Refugees
UNSG	United Nations Secretary-General
USD	United States dollar
WHO	World Health Organisation





# CHAPTER 1: INTRODUCTION AND BACKGROUND

## 1.1 Background to the project

In a series of three country reports, we present the findings of the project, *Making Transitional Justice Work for Women: Rights, Resilience and Responses to Violence Against Women in Democratic Republic of Congo, Northern Uganda and Kenya* (Grant ID: G160214). This report details findings from Kenya; the other two country reports present findings from northern Uganda and the DRC.<sup>1</sup> Summary reports for each country are also available.<sup>2</sup>

The Australian Department of Foreign Affairs and Trade (DFAT) funded this project under the Australian Development Research Awards Scheme (ADRAS) 2012.<sup>3</sup> The scheme, which is no longer available, funded primary research into Australia's priority development themes, with the purpose of informing policy development. This research project addressed the priority themes of "Gender" and "Africa." It was a multi-partner collaboration between the University of Sydney (Sydney Law School), University of Technology Sydney (Arts and Social Sciences), and ActionAid Australia, DRC, Uganda, and Kenya. The project ran from April 2013 to October 2015.

The research was designed to investigate transitional justice processes for addressing women's rights and justice priorities in three countries in sub-Saharan Africa: Democratic Republic of Congo (DRC), Uganda, and Kenya. This regional focus reflects the priority accorded by the international community to transitional justice, as a means to address past human rights violations experienced during civil war and other mass violence, and to promote lasting peace and stability. The countries for study were selected because: each has transitional justice processes in place; Gender Based Violence (GBV) is significantly prevalent in each conflict; and the researchers had existing partners on the ground who could facilitate a logistically feasible, meaningful, and culturally - and gender-sensitive research process.

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<sup>1</sup> Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Democratic Republic of Congo Country Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5332962~S4>; Lucy Fiske and Rita Shackel, "Making Justice Work for Women: Uganda Country Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5336181~S4>.

<sup>2</sup> Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Democratic Republic of Congo Summary Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5365440~S4>; Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Kenya Summary Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5365443~S4>; Lucy Fiske and Rita Shackel, "Making Justice Work for Women: Uganda Summary Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5365444~S4>.

<sup>3</sup> This grant scheme was originally administered by the office of Australian Aid for International Development (AusAID).

## **1.2 Project methodology**

### *1.2.1 Introduction*

This project investigates the efficacy of transitional justice for women in conflict and post-conflict contexts in eastern Democratic Republic of Congo, northern Uganda, and Kenya. The research sought to identify women's priorities for justice, their experiences when seeking justice, and both enabling factors and obstacles in justice processes. Justice was defined in a fluid, broad, and holistic way to include legal, health, economic, social, and psychological elements (Olsen et al. 2010b, 983; Fischer 2011, 412; Szablewska and Bradley 2015, 261). The project has developed a rigorous, reliable, and substantive evidence base of the experiences, views, and opinions of women affected by violence in the research sites. The project entailed researchers travelling to multiple locations within each country, including major regional towns and villages in remote and difficult to access areas. This was done to enable women who are rarely, if ever, able to participate in research, consultations, and decision-making processes to contribute to this project. The extensive fieldwork, conducted over a two-year period and engaging 274 women affected by violence, provides unique insights into women's access to justice, and the efficacy of different justice strategies and mechanisms in conflict and post-conflict sites. These insights are extended further by interviews with 68 key informants, including local community leaders, prosecutors, judges, health and welfare workers, policy workers, and development workers, as well as those working in transitional justice, human rights, and women's rights internationally.

### *1.2.2 The research questions*

The research addressed the following key research questions:

1. What do women in northern Uganda, Kenya, and eastern DRC identify as their priorities in relation to justice?
2. What efforts have been made to provide justice and rights protection for women who have experienced violence in northern Uganda, Kenya, and eastern DRC?
3. How have women responded to these justice interventions, and what impact have these had on addressing women's rights and justice priorities?
4. How can transitional justice interventions be adapted to better address women's rights and justice priorities, build resilience, and prevent violence against women?

The research partners, in consultation with in-country researchers, formulated the research questions for this project.

### *1.2.3 Methodology*

#### **Epistemology and paradigm**

The research is qualitative, feminist, and phenomenological. It was designed to capture and interpret women's experiences and opinions of justice in conflict and post-conflict settings. The methodology recognises that the voices of women are often muted by social, economic, and political factors, which are further enlivened during war, and then systemically embedded in justice processes. This project proactively sought to understand transitional or post-conflict justice from the perspective of women affected by conflict and post-conflict

justice initiatives. A phenomenological method was selected as it is particularly suited to research of this kind, where the aim is to make women’s perspectives a central concern in policy development and practice. Phenomenological enquiry begins with individuals’ unique accounts of a shared experience, and uses multiple individuals’ accounts to discern key structural characteristics of the meanings the participants ascribed to the experience, in order to situate personal experience within a broader political context (Dukes 1984, 198; Gatta 2010, 12). Individuals’ experiences and perspectives are then triangulated with key informant perspectives, and with existing literature and research. It is in this way that phenomenological enquiry mediates the transition of private experience to public political concern. Phenomenological research requires in-depth interviews with multiple participants, and secondary research and analysis to enable the generation of knowledge with relevance beyond the anecdotal.

### The research team

The research was conducted by a multidisciplinary and multi-country research team with expertise in a range of fields necessary to conduct a rigorous, high-quality research project with vulnerable and difficult-to-access populations.

### **Researchers**

<b>Name</b>	<b>Organisation/Position</b>	<b>Role in Project</b>
<b>Associate Professor Rita Shackel</b>	Sydney Law School, The University of Sydney	Principal Investigator, Project Lead
<b>Dr Lucy Fiske</b>	Social and Political Sciences (Sociology), University of Technology Sydney	Principal Investigator (2)
<b>Carol Angir</b>	ActionAid Australia, Senior Policy and Program Coordinator	Principal Investigator (2)
<b>Casey McCowan</b>	ActionAid Australia, Partnership Co-ordinator (April 2013 to September 2015)	Program Manager
<b>Michelle Higelin</b>	ActionAid Australia. Deputy Executive Director	Advisor
<b>Miriam Chelo Huguet</b>	ActionAid DRC, Consultant	Transcription and Interpreting
<b>Nicole Iafola</b>	ActionAid DRC, Youth Advisor	Researcher
<b>Serge Kalubi</b>	ActionAid DRC, Consultant	Transcription
<b>Clement Kone</b>	ActionAid DRC, Country Director	Advisor
<b>Adalbert Lumpali</b>	ActionAid DRC, Consultant	Transcription
<b>Anne Songa Murekatete</b>	ActionAid DRC, Consultant	Interpreting
<b>Justine Ndabugi</b>	ActionAid DRC, Administrative and Logistical Assistant	Administration and Logistics Support

<b>Raisa Ndogole</b>	ActionAid DRC Policy and Campaigns Coordinator	Researcher
<b>Mireille Ntambuka Nzigire</b>	ActionAid DRC, Consultant (September 2013 to April 2014)	Researcher
<b>David Abwang</b>	ActionAid Uganda, Local Rights Program Coordinator Amuru	Field Research Assistant
<b>Kevin Aciro</b>	ActionAid Uganda, Local Rights Program Coordinator Pader	Field Research Assistant
<b>Martha Wanda Mercy Achiro</b>	ActionAid Uganda, Research Assistant (April 2013 to December 2014)	Researcher
<b>Hellen Malinga Apila</b>	ActionAid Uganda, National Women's Rights Coordinator (April 2013 to October 2015)	Principal Researcher, In-Country Uganda
<b>Okello Emmanuel</b>	ActionAid Uganda, Lango Language Board	Translator
<b>Josephine Laker</b>	ActionAid Uganda, Women Protection Centre Project Officer Amuru/Nwoya	Field Research Assistant
<b>Arthur Larok</b>	ActionAid Uganda, Country Director (April 2013 to October 2015)	Co-Researcher and Advisor
<b>Hope Masika</b>	ActionAid Uganda, Women Protection Centre Project Officer Gulu	Researcher
<b>Nickson Ogwal</b>	ActionAid Uganda, Director, Partnership Funding and Sponsorship)	Advisor
<b>Lucy Atieno</b>	ActionAid Kenya, Consultant	Transcriber
<b>Mabel Isoilo</b>	ActionAid Kenya, Consultant	Lead Researcher (Kenya)
<b>Alice Kimani</b>	ActionAid Kenya, Project Officer (August 2013 to August 2014)	Researcher
<b>EllyJoy Kithure</b>	ActionAid Kenya, Women Rights Coordinator (June 2013 to September 2014)	Researcher
<b>Lawrence Mwachidudu</b>	ActionAid Kenya, Local Rights Program Manager	Translator
<b>Makena Mwobobia</b>	ActionAid Kenya, Acting Country A/Director (August 2013 to March 2014), Head of Programs	Researcher, In-country Coordinator, Kenya
<b>Naomi Wambui</b>	ActionAid Kenya, PO Women Rights (July 2013 to August 2015)	Researcher, Administration and Logistics

A number of other people also participated in the project in various roles. Appendix A lists all research assistants that contributed to, and were a part of, this research project.

### **Research management and process**

Associate Professor Rita Shackel, Dr Lucy Fiske, and Ms Carol Angir designed and coordinated the research project. ActionAid's Country Directors and Women's Rights Coordinators in Uganda, DRC, and Kenya provided context-specific input throughout the project; coordinated activities in each country; participated in data gathering; and assisted with aspects of data analysis. The two academic researchers made numerous fieldwork trips, and provided mentoring, research methods, skills training, and support to in-country researchers, as well as conducting a large number of research interviews and focus groups in all three countries. Several strategies were established to ensure consistency, quality, and integrity of data across a large and diverse team; these included:

- Regular Skype meetings between researchers throughout the project
- Regular and ongoing email correspondence
- A week-long intensive induction and training program involving Australian and country researchers (Nairobi, September 2013)
- Collaborative pre-test fieldwork in each country, with one-on-one mentoring and debriefing between in-country and academic researchers (September– November 2013)
- A follow-up skills and inception workshop with Australian, DRC, and Kenyan researchers (Goma, November 2013)
- A public stakeholder forum including Australian, DRC, and Kenyan researchers (November 2013)
- A follow-up interview skills workshop with Australian and Ugandan researchers (Kampala, April 2014)
- Multiple fieldwork trips (3–4 each year) by academic researchers working with in-country researchers in each country (2013–2015), including detailed planning and exit meetings
- Development of a comprehensive “Fieldwork Handbook” tailored for each country (available at <http://www.justiceforwomen.net.au>)
- Staged collection and transcription of interviews, with written and verbal feedback on interviews, data quality, and emerging themes for further probing provided after each transfer of data
- Additional in-person team meetings in New York (March 2014), Netherlands (April 2015), and Sydney (September 2015) with researchers from ActionAid Australia, Kenya, Uganda and DRC

The multidisciplinary and multi-country collaboration enhanced the quality of the research, as it enabled the team to draw on expertise in several different fields, including social and legal theory; legal frameworks; qualitative research methods; development work; and country- and culture-specific knowledge. The collaboration with in-country ActionAid offices meant that otherwise difficult-to-reach populations and locations were included in the research. The project's reach beyond larger regional towns, into remote villages, is a distinguishing feature of this research.

## **Definitions**

In recognising justice as fluid, we defined it broadly and in a holistic way to include legal, health, economic, social, and psychological elements (Olsen et al. 2010b, 983; Fischer 2011, 412; Szablewska and Bradley 2015, 261). This definition was expanded and refined through the input of women participants, who were invited to reflect on what was necessary for them to feel justice had been done. This open question led to a rich understanding of justice as understood or desired by women participants, and forms the backbone of the reports. Justice was often expressed as a process spanning the past, present, and future, with the elements of, and demands for, justice varying in each temporal phase. Restoration, however, was consistently viewed as a key element; women wanted to be restored to a position which resembled, at least subjectively, their pre-conflict state. For example, truth-telling was important to establish recent history and acknowledge wrongs done; reparations, health, and detraumatization were required in the present; while education of children and enabling them to have a “better future” was almost universally cited as central to justice.

## **Data collection**

Data was gathered from three distinct sources:

- Women affected by violence
- Key informants with experience in justice related initiatives
- Documentary and other secondary sources

Primary data was gathered using semi-structured interviews and focus group discussions with both women affected by violence and key informants. Documentary and secondary data was gathered through extensive literature reviews addressing the conflicts in each country, the histories of each country, justice interventions, and reform in each country; these were supplemented by thematic searches addressing transitional justice, justice, gender, human rights, development, poverty, violence, and related themes in law, anthropology, sociology, psychology, history, and women’s studies. Documentary and secondary material included academic articles and books, policy and research reports, relevant public databases, case law, legislation, reports of government and non-government inquiries and investigations, and media reports.

### Women affected by violence

The project interviewed a total of 274 women affected by violence, with 113 women in DRC, 98 in Uganda, and 63 in Kenya. Women were selected for inclusion in the project if they met the following criteria:

- They were 18 years of age or older.
- They were living in a conflict affected area and a selected research site.
- They had been affected by conflict, either directly or indirectly.
- They had experience of some form of transitional justice process (including criminal prosecutions, truth commissions, amnesties, reparations, informal traditional approaches, or community-based initiatives).
- They were willing and able to speak about their experiences.

Fieldwork in Kenya was conducted in multiple sites in Bungoma, Nairobi, Marafa/Tana Delta, and Kisumu. A total of 63 women in Kenya participated in the research – 8 through individual interviews, and 55 through focus group discussions (a breakdown by site is included in Table 1). Ages ranged from 18 to 66 years. Women participants were married, cohabiting, never married, separated, divorced, and widowed. Most of the women participants in Kenya had children (ranging from 1–11 births). Women’s educational levels were varied (ranging from no education to university graduate); the majority of women had at least some primary school level education. Appendix B shows the demographics (including age, marital status, and level of education) for women participants in Kenya.

Table 1

	<b>By site</b>	<b>Number of interviewees</b>
<b>FGD WAV</b>	<b>TOTAL</b>	<b>55</b>
	Bungoma	13
	Kisumu	13
	Marafa/Malindi <sup>4</sup>	16
	Nairobi	13 (4 Kibera and 9 Mukuru)
<b>IWAV</b>	<b>TOTAL</b>	<b>8</b>
	Bungoma	2
	Kisumu	2
	Marafa/Malindi	1
	Nairobi	3 (Kibera)

All interviews were conducted in a language in which the participant self-assessed as proficient. The majority of interviews used a female interpreter, sourced locally through ActionAid networks. Interviews and focus groups lasted between 45 minutes and almost three hours, with most taking 90 minutes to two hours. Most focus groups had between two and ten women participants.<sup>5</sup> Interviews were conducted in stages, to ensure a broadly representative sample of women was recruited (age, marital status, ethnicity, experience of conflict, experience of justice [i.e. formal and informal]); to enable transcription of data and feedback to non-academic researchers from the academic researchers; and to enable identification of emerging themes and further probing of particular issues that emerged. Interviews in Kenya were conducted from November 2013 to June 2015, both by ActionAid Kenya staff members and by academic researchers. Most participants consented to interviews being audio recorded and transcribed. Notes were also taken by researchers during the interviews.

Interviews and focus group discussions were semi-structured, following pre-identified themes and relevant unanticipated themes that were raised by participants during the interview. Pre-identified themes were generated through consultation with ActionAid staff, a literature

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<sup>4</sup> The women interviewed at this site were from Tana Delta, but were (and currently still are) internally displaced. They were interviewed in either Marafa or Malindi, and, as such, these two locations have been combined for the purposes of this table.

<sup>5</sup> Three groups fell outside this size range, two groups had seven and ten participants, and another had only two women.



search conducted before fieldwork, and the pre-test fieldwork trip in November 2013. Initially identified themes included: legal, economic, social, political, and health justice; psycho-social and emotional well-being; traditional and/or informal justice mechanisms; roles of women in justice processes; and the effects of justice. Women were advised during the consent process that violence was not the focus of the research, and that researchers would not be asking direct questions about their experiences of violence. Participants were, however, asked indirectly about the sorts of violence experienced, in order to provide context to their subsequent discussion of justice.

The number and diversity of women interviewed provided an extensive survey of issues. The semi-structured in-depth interviews allowed for rich information to be elicited and probed thoroughly. Focus group discussions helped present women with a range of views for them to reflect upon, and compare and contrast with their own experiences, views, and opinions. The staged nature of the fieldwork enabled emerging themes to be further explored with later respondents, thereby allowing them to be tested for structural, rather than individual, significance. The resulting evidence base is rich; it is both extensive and of a high quality.

### Key informants

Interviews with key informants were conducted from November 2013 through to June 2015. A total of 68 key informants participated in the research across the three countries under study; this consisted of 28 in DRC, 26 in Kenya, and 14 in Uganda. The 26 key informants interviewed in Kenya included community leaders, health care and non-governmental organisation workers, members of the police and judicial sector, lawyers, and government officials. Interviews with key informants were conducted by the academic researchers, together with the Kenya country researchers. Most of the interviews were audio recorded and transcribed; notes were also taken. However, only 7 key informants consented to being identified by name as research participants in the reports, with a further 5 consenting to identification only by organisation and/or position. Appendix C lists the organisations from which key informants (who gave their consent) were drawn.

Interviews with key informants were semi-structured, and the focus of each interview varied depending on the participant's area of expertise and experience in justice processes. For example, interviews with judicial officers followed very different themes to those with health care workers, which were different again from interviews with community leaders and non-governmental organisation workers.

Most of the interviews with key informants in Kenya were individual face-to-face interviews.

Overall, a diverse group of key informants, with knowledge and experience of different justice sites and sectors, were interviewed in Kenya. This allowed for a spread of views and perspectives to be put forward, including regional and international perspectives.

### **Data analysis**

The majority of recorded interviews and focus groups were transcribed. The two academic researchers read and re-read these multiple times to identify themes using inductive analysis – that is, by allowing the patterns, themes, and categories of analysis to come from the data (Srivastava and Hopwood 2009, 77). This method of analysis was chosen because the primary objective of the research was to understand women's experiences and opinions on

justice post-conflict. The research did not seek to test any pre-existing theories or hypotheses; to pre-determine themes risked imposing external meanings on participants' accounts, thereby skewing the analysis and working against the feminist epistemology of the research by displacing women's views from the centre to the margins.

Themes were identified and pursued if they related to the research questions, and:

- were repeated frequently (either in a single interview, or across more than one interview);
- were discussed by several participants;
- extended existing theoretical understandings or provided further insights into literature available on the theme; or
- provided a basis for developing new theoretical insights and a contribution to understanding women's experiences of justice processes (Bryman 2012, 580).

Emerging themes were incorporated into later interviews, with women affected by violence and key informants asked to elicit their perspectives on issues or opinions put forward by earlier participants. This process of continual review and analysis of data enabled further probing of issues, as the project progressed and assisted in refining participant-generated understandings of key issues.

Identified themes then formed the basis for further secondary research, and provided the structure for the reports on each country.

Transcripts were also analysed with NVivo software for word repetition and thematic repetition. This analysis confirmed the strength of recurring issues and themes raised by women, as identified by the researchers. Despite the use of NVivo, the primary mode of analysis was manual.

This project also incorporated a novel and important step in analysis and validation of themes. The two academic researchers travelled to each country in June 2015, and, together with the ActionAid researchers, conducted "validation" workshops in Goma, Kampala, and Nairobi. In Kenya, a full day "validation" workshop was conducted with 11 women who had already participated in the research (June 22). A half-day workshop was conducted with a small group of key informants, including NGO workers and staff from FIDA and the Kenya Human Rights Commission (June 23).

Women participants for the validation workshop were selected on a number of criteria, including:

- Ensuring a spread of research site location, age, and experience of conflict
- Including all women who had asked for follow-up about the research
- Including women who were particularly articulate in their interviews
- Including women whose interview transcripts provided insight on particular themes
- Including women whose transcripts were largely emblematic of identified themes

In the workshop with women affected by violence, an overview of themes and issues identified was presented to the participants. Participants were then given the opportunity to discuss the findings in small groups, including using (non-identifiable) key, emblematic, or

potentially controversial quotes from research participants (both key informants and women affected by violence). Small group and plenary discussions were audio recorded with the women's permission, and transcribed. The benefits of this process include the ethical benefit of feeding back progress on the research to participants, and, furthermore, of including women as co-analysts (an advantage for which all women participants expressed great appreciation); providing confirmation and/or clarification of particular issues put to the group; enabling further refining of themes; and enabling researchers to hear how women spoke with one another about justice without a researcher or NGO worker present. The Validation Workshop in Nairobi confirmed the overarching themes identified by the researchers. Importantly, though, it served to highlight more of the commonalities in experiences and structural similarities in the issues raised by women in the different research sites, than initial research analysis had perceived. Women in conflict zones are more commonly engaged as recipients of services, and rarely as collaborators in problem-solving. The small group discussions among women participants were conducted without facilitation from the research team, and with a structure, time, and space provided, the women engaged in enthusiastic and insightful discussion of their own issues. Although not an objective of this research, the women's demonstrated capacity and willingness to participate in analysis and problem-solving is relevant for future engagement with this population.

The researchers presented an outline of initial themes at the workshop with key informants, distinguishing between perspectives of women affected by violence, different categories of key informants, and areas of convergence and divergence between the two. Participants were then invited to discuss issues raised in an unstructured format. This process enabled key informant participants to hear what issues and priorities women affected by violence had identified, hear what other key informants had raised, and respond to themes. This workshop provided further validation of the themes identified, and analysis of those themes. In Kenya, the key informant "validation" workshop largely echoed the views of women on barriers to access to justice for women.

The ActionAid Kenya country researchers also participated in the key informant workshops, adding their perspectives and views to discussion and analysis.

### **Ethical approval and permissions**

Formal ethics approval for this project was granted by the University of Sydney Human Research Ethics Committee (approval number 2013/380). Ethics approval was also granted by University of Technology Sydney (UTS HREC 2014000246), Uganda National Council for Science and Technology, National HIV/AIDS Research Committee (approval number ARC 144), and Kenyan National Council for Science and Technology (approval number NCST/RCD/14/013/1335). DRC does not have a formal human research ethics committee; however, an extensive consultation process was undertaken, including hosting a public inception and stakeholder workshop – the project was introduced in this forum, and stakeholders were invited to ask researchers any questions or raise concerns. Attendees provided feedback on the current state of conflict and security in the area, the project's methodology, and the recruitment of participants and site selection. Following the workshop, key stakeholders were further engaged in a consultative process through which the research sites in eastern DRC were finally selected. Approval for the research was granted by the Provincial Minister of Justice in Goma, Christophe Ndibeshe Byemero. Local permissions were also obtained as necessary during the conduct of fieldwork from relevant formal and traditional authorities in each research site.

In addition to complying with all formal ethics requirements, the researchers embedded ethical research processes throughout the project, and engaged in critical reflective practices at all stages (including design, development, fieldwork, data handling, research team relations, analysis, and writing). The well-being of individuals participating in the research (both as informants and researchers) was held as paramount at all times.

It is important to canvas, albeit briefly, at least some of the ethical issues raised in this research, and steps taken to care for people and principles that underpinned this work.

## **Recruitment processes**

This project sought the views of adult women and did not include children. Research with children requires specific design and methodology, responsive to children's levels of development, cognition, capacity to give informed consent, and particular vulnerabilities. It also requires particular knowledge and skills from the researchers. At the outset, we took the definition of adult as 18 years and over, and sought ethics approval accordingly. However, once in the field (particularly in DRC), it became clear that this age cut-off excluded some young women who were, in many respects, living adult lives, and who wanted to participate in the research. In every stage of fieldwork in the DRC, teenage girls approached the research team asking to be included. These girls were typically between 13 and 17 years of age, and were responsible for the care of younger children (whether younger siblings, their own children, or orphaned children). No girls under the age of 18 years were included in the project; chronological age was carefully scrutinised during the consent process. However, turning away young women/girls raised significant ethical dilemmas for the researchers. The concept of "adult" and "child" is contextual and contingent on a range of social, emotional, political, and individual factors. The experiences, opinions, and views of young women/girls acting as heads of households, despite being under 18 years of age, are important and need to be considered in future research projects (Arnett and Galambos 2004, 92; Nugin 2010, 49–50). Due to ActionAid's involvement in the project, underage girls who were not included in the research were able to be counselled and provided support through appropriate ActionAid services and programs, and, as appropriate, were referred to other services and agencies.

Recruitment occurred through multiple channels, including referral by health, legal, and social service providers, as well as self-referral. However, most participants were recruited indirectly through ActionAid's networks. Furthermore, ActionAid in each country provided all logistical support during fieldwork. This meant using ActionAid vehicles for transport, and ActionAid managed travel reimbursements for participants (see below). Although all researchers stressed that the research project was led by the University of Sydney, and was not an ActionAid project, it must be acknowledged that this distinction may not have been clear to some participants. Given the prominence of NGOs in essential service delivery in many of the research sites, particularly in eastern DRC where there is still live conflict and humanitarian aid is much relied upon, it is possible that ActionAid's lead role in recruitment may have impacted on expectations of prospective participants, and on populations targeted for recruitment.

These issues were addressed in a number of ways. Demographic information of participants and fieldwork included recruitment process as a standard field. This enabled academic researchers to provide feedback about diversity of recruitment sources as the project

progressed. The issue of participant expectations was addressed directly during the information sessions with women participants, and is explained in greater detail below. Nonetheless, while partnering with an NGO enabled the conduct of in-depth and extensive fieldwork with difficult-to-reach populations, the possible impacts of visible NGO participation in the project need to be considered; it is possible that some women saw participation in the research as an opportunity to also access other services and assistance.

### Free and informed consent

Particular care was taken to ensure that consent was both informed and freely given. Information about the project was provided both individually and to groups of prospective participants. Project information was provided through written participant information sheets, which participants could take away, as well as orally in a language understood by participants. Information provided to participants covered the membership of the research team (taking care to distinguish between academic and NGO organisations, and the individuals involved); the aims and methodology of the research, confidentiality; storage and security of data; the nature of questions to be asked; participants' rights to not participate, to withdraw at any stage, and to decline to answer some questions and not others; and the risks and benefits of participation. The project's public documents were translated into the languages spoken by women participants. Translated public documents were certified locally. Prospective participants were encouraged to ask questions, and any concerns raised were addressed by the research team. Participants provided consent in writing or orally, and were specifically asked if they consented to their interview being recorded. In the case of focus group discussions, it was made clear to participants that it was not possible to erase recordings if they decided to withdraw after the focus group discussion had commenced, because of the group nature of the interview. No participants withdrew from the research after consenting.

A significant number of women affected by violence in Kenya (as in the other research countries) asked how the research would benefit them, and whether the researchers would bring the research back to them later in the project. Several women said that they had participated in research before, and had neither personally benefited nor been informed of the progress or outcomes of the research. The researchers explained that there would be no direct benefit to individuals who participated in the research, and possibly not to the population of women affected by violence in Kenya (or in the other countries under study). The researchers explained that the research would produce reports with particular attention to amplifying the views and experiences of women who participated in the project, and that the reports would be disseminated widely. The academic researchers would write the reports, drawing together views of all women interviewed, and would present the analysis at a range of academic and policy forums. The NGO partner would use the reports to inform their programming and advocacy. It was explained that neither the universities nor the NGOs had the power to promise changes in the women's lives, and that, while this research would make a significant contribution to the field, it could not assure direct benefit to participants or their communities.

The researchers assured prospective participants that every attempt would be made to return and present the research to them, and to provide access to the report. This aim has been partially achieved through holding the Validation Workshops in June 2015, during which much of the initial analysis was presented to the women present. Every participant who had asked for follow up on the research was invited to attend this workshop, although not all were

able to attend. ActionAid Kenya, ActionAid DRC and ActionAid Uganda will deliver the report to women who participated in the study, when it is complete.

Reimbursement of travel costs were provided to all participants in the research. Refreshments (water and lunch) were sometimes served. No rewards that might rise to the level of inducement were offered, being particularly mindful of the particular context of poverty and need amongst participants.

### The interview

In recognition of the fine balance that people affected by violence may find talking about traumatic experiences difficult, and yet may also have a strong desire to testify to their experiences and participate in the research process, interviews with women affected by violence were designed to enable the women respondents to have as much control over the interview process as possible. All interviewers had experience working with women affected by violence. Additionally, the researcher induction to the project emphasised the primary value of participant well-being, and that the respondents' well-being was more important than eliciting data. Researcher induction also included significant training on research interviews addressing sensitive topics, responding to trauma in an interview, referral options for participants, and role plays on sensitive interviewing. This was further included in the fieldwork manual,<sup>6</sup> and embedded in all fieldwork briefings and debriefings.

#### *An example of sensitive interviewing*

Violence was not a key focus of the research; however, some information about the nature of violence experienced was necessary, in order to provide context for participants' subsequent discussion of justice. Interviewers avoided asking directly about experiences of violence, instead asking open questions to which the participant could decide how to respond. A typical phrasing of this line of questioning was to ask, "How has the conflict affected your life?" Respondents were then able to respond with as much or as little detail as they chose, and were able to avoid recounting traumatic episodes, focusing instead on the present day after-effects of the conflict. Alternatively, respondents were able to tell their stories of violation and injustice if they wanted to. Most of the women in Kenya chose to share details of their accounts of violence, to varying degrees. Some women stated that talking about their experiences was important, and they appreciated the opportunity to participate in the research:

*Me, I want to thank you. Don't stop there, keep helping women... you'll do some good work. If you keep yourselves on that track... and don't discriminate... you'll be able to help many.<sup>7</sup>*

*I am grateful having you here because there is no one who has come to listen to the problems we passed through.<sup>8</sup>*

The way in which women responded to this question provided important information to the interviewer, both about possible themes to be further explored, and about the probable

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<sup>6</sup> Copies of all fieldwork manuals for all three countries are available at <http://www.justiceforwomen.net.au/handbooks.html>.

<sup>7</sup> Interviewed in Kibera, September 30, 2014.

<sup>8</sup> Interviewed in Bungoma, April 15, 2014.

boundaries for further probing. This was an important element in enabling maximum control of the interview to reside with the respondent, while still meeting the research focus and requirements. Despite using open-ended questions to enable women to control the interview, and to choose whether or not to discuss their experiences of violence (including how, and to what extent), we initially perceived that women's responses may have reflected their pre-existing expectations about what information they should be providing in the interviews – expectations that were perhaps influenced by their previous interactions with NGOs, the media, or other researchers. However, by allowing the women to control the interview, most women, in time, moved beyond this expected script and onto opinion, emotion, the meaning of violence on their lives, and shared deep insights on a number of issues important to their personhoods. This is reflected in the length of most of the interviews. This self-constructed space for deep reflection and sharing by the women made the interviews themselves affirming, enabling them to be more than a “victim” of violent experience, and acknowledging their own persons.

### *Ongoing consent*

Even though consent was given prior to any interview beginning, this project took consent to be an ongoing and iterative process. The onus was placed on the researcher to check in with respondents periodically throughout the interview about her continued willingness to participate, particularly if a respondent became distressed during the interview. When respondents did feel upset, they were offered the opportunity to take a break, abandon the interview, or to move to a new area of questioning. Very often, enabling women to have control of the direction and depth of the interview assisted in reducing the level of distress, and, in some instances, helped participants feel better after the interview than they did before. By way of example, one woman said at the end of her interview:

*I felt it was important to come today because since we experienced all those problems, no one wants to come and ask us what happened or the problems we faced, like the way you have come. We always just close up those problems in our hearts. ... So what has made me happy is that we have met you and you have managed... You know when there is a wound in the heart and you fail to talk to your colleague, that wound continue to pain you. But when you meet someone who cares about you and talk, that issue clears up from the heart. So I am happy with this meeting and I am happy with our visitors because they have something in them; the heart of mercy.<sup>9</sup>*

A counsellor or support person was present during many interviews with women affected by violence in Kenya, to support women during and after the interview if necessary. Referral options for further counselling, if needed, were also available to all women post-interview.

### **Confidentiality and security**

Women participants were reassured in the consent process that interviews were confidential, that what they shared with the researchers would only be used for the purposes of this research, and that they would not be individually identifiable in any reports. It was explained to participants that this would be achieved by removing any identifiable information from the interview transcripts, so that they could not be identified, and that any quotes used in reports would not be attributed to a woman by name. In the case of focus group discussions, the

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<sup>9</sup> Interviewed in Nairobi, September 29, 2014.

importance of confidentiality amongst participants was stressed as part of the consent process.

Key informants were given the option of consenting to be identifiable in whole, in part, or not at all. 7 out of 26 informants in Kenya consented to being identified by name, position and organisational affiliation; 5 agreed to be identified by position and organisational affiliation, but not name.

All interviews were conducted in a safe and secure location. Interviews were rescheduled or relocated where security concerns warranted such a response.

### **Data management and security**

Interviews were recorded on high quality, hand-held digital recorders. During fieldwork, all recordings of interviews were coded and copied onto the researchers' password protected laptops, backed up onto a password protected external hard drive, and then deleted from recorders. Project materials were copied and stored on the academic researchers' password protected desktop computers, located in their Sydney offices. Project materials were at times temporarily stored on Dropbox and/or exchanged via USB sticks between researchers, and then permanently deleted.

### **Secondary trauma**

The potential for secondary or vicarious trauma of researchers (Alexander et al. 1992, 58), as well as others working with traumatic material and trauma survivors, is well recognised (McCann and Pearlman 1990, 134–35; Mouldern and Firestone 2007, 67–68). Several strategies were used to support team members throughout the project, including researchers, interpreters, transcribers, and research assistants.

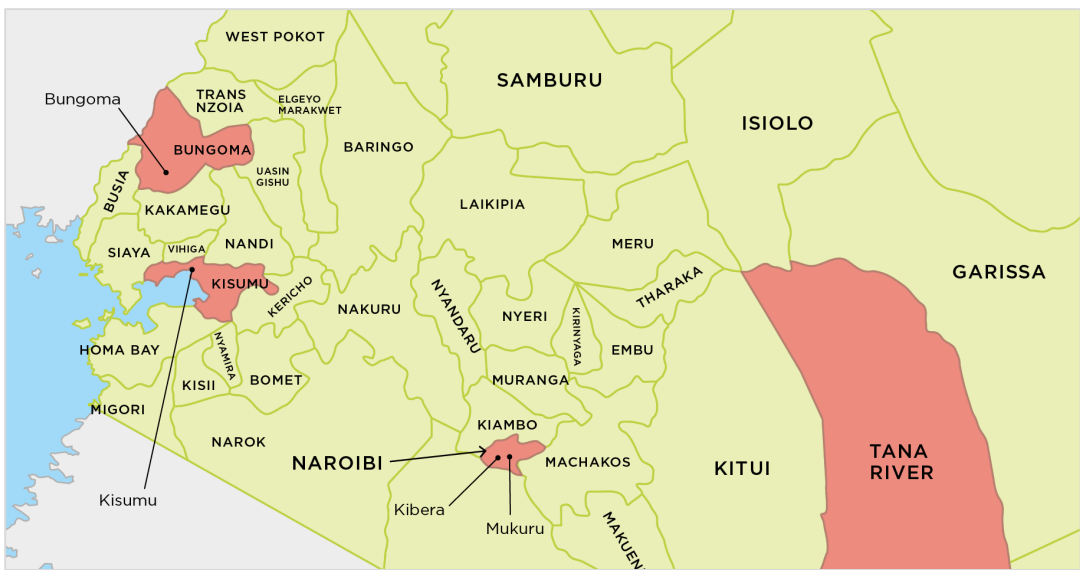
Self-care principles and practices were discussed during training and induction workshops. A section on self-care was included in the project handbooks. Most interviews were conducted by at least two people. Debriefs were integrated into fieldwork, most commonly at the end of each day, and/or when work was completed at a research site. At the end of each period of fieldwork, which typically extended for two to three weeks, an exit meeting was held; this created a space for team members to talk about their experiences of the fieldwork, their feelings, and raise any issues of concern. It also created an opportunity to check in with one another. The academic researchers also regularly checked in with research assistants through face-to-face meetings, via Skype or email, to allow issues to be raised and discussed. At the end of the validation workshops (conducted in June 2015), secondary trauma and strategies for self-care were directly discussed within the research team.

## **1.3 History and context of the conflict and transitional justice in Kenya**

### *1.3.1 A snapshot of Kenya*

Kenya lies across the equator in East Africa, with a coastline of 536 kilometres along the Indian Ocean. It shares borders with five other countries: Somalia to the north, Tanzania to the south, Sudan to the northwest, and Uganda to the west. It has a land area of 582,646 square kilometres (National Council for Population and Development 2012).





### 1.3.2 Counties of Kenya<sup>10</sup>

The Central Intelligence Agency estimated the life expectancy of Kenyans in 2015 to be 63.8 years (with 62.3 years for men, and 65.3 years for women) (2016), and the nation's birthrate to be 26.4 births per 1000 population (2016). Kenya has 42 tribes regionally distributed across the country; the five biggest tribes are the Kikuyus (constituting 22 percent of the total population), the Luhyatas (14 percent), the Luos (13 percent), the Kalenjins (12 percent), and the Kambas (11 percent) (CIA 2016).

In a recent Economic Update on Kenya, the World Bank reported that Kenya is poised to become one of the fastest growing economies in East Africa over the next three years; with an increasing growth projection of up to 7 percent by 2017, it is currently positioned as the ninth largest economy in Africa, and the fifth largest in sub-Saharan Africa (2014, 22). With a GDP per capita of US\$1,246, Kenya is now classified as a lower-middle-income country (2014, 2). This growth is driven by good performance in agriculture, and a manufacturing sector that is supported by a favourable macroeconomic environment (2014, 5–6). Women play a crucial role in the economic sector. The World Bank, in its *Gender and Economic Growth in Kenya* report (2007), recorded that women run almost 50 percent of micro-economic businesses. The report further noted that 85 percent of these businesses are in rural areas (13). However, one cannot ignore the fact that 42 percent of Kenyans live below the poverty line, with women generally being poorer than men; furthermore, 54 percent of rural women and 63 percent of urban women live below the poverty line (World Bank 2007, 10). Moreover, a weak security environment has been identified as one of the biggest threats to Kenya's projected future growth (World Bank 2014, 23; World Bank 2015a, 20-21).

A majority of the population in Kenya do not have access to basic services, such as clean water, proper sanitation, and health care. As of 2015, only 63 percent of Kenya's population have access to improved water supply sources, with 22 percent subsisting on surface water (UNICEF and WHO 2015, 65). While UNICEF and WHO nonetheless considered this good progress from 1990 levels, it noted "limited or no progress" in Kenya's sanitation facilities; only 30 percent of the population have access to improved sanitation facilities, and 12 percent still practised open defecation (2015, 64). In the realm of health care, 0.19 doctors were available per 1000 population in 2012 (KNBS 2013, 15), with over 50 percent of medical staff working in Nairobi (Bliss, n.d.). However, of particular significance to women, the 2014 Kenya Demographic and Health Survey (KDHS) records that 17.5 percent of married women, and 26.4 percent of sexually active unmarried women, have unmet family planning needs (20–21); 42 percent of pregnant women did not have the WHO-recommended number of antenatal care visits during their most recent pregnancy (23); 32 percent of births are not delivered by a skilled provider (24); and 49 percent of women did not receive a postnatal check-up in the first two days after their last live birth (27).

Kenya is ranked as one of the ten African countries with a large population – i.e. more than 10 million people – living in extreme poverty (Turner et al 2015, 7), defined by the World Bank in income terms as living below the International Poverty Line (US\$1.25 per day, according to 2005 prices) (World Bank 2015b).

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<sup>10</sup> Map sourced from Lewis (2013).

Kenya has enjoyed relative peace since its independence in 1963. Having shared borders with conflict-prone countries such as Somalia, Sudan, and Ethiopia has meant that Kenya has had to shoulder some of the repercussions of these conflicts (UNHCR 2015). This includes playing a key role in brokering peace initiatives between the different warring parties, and hosting refugees; it has been seen as a haven of hope, providing refuge to many fleeing turmoil in their countries, and has been described as possessing “strong humanitarian traditions of generosity and hospitality towards asylum-seekers and refugees” (UNHCR 2015).

However, this reputation was suddenly threatened by the events of 2007/2008, when, soon after the general elections of 2007, the country was engulfed in internal conflict. The announcement by the Electoral Commission of Kenya (ECK) that the incumbent president, Mwai Kibaki, had won the presidential elections was met with protest by the opposition, who claimed that the elections were not free and fair. They described the voting process as flawed, and argued that there were deliberate malpractices by the government and the ECK in facilitating massive vote rigging to ensure that the government of the day would remain in power. This led to conflicts across different parts of the country (Gona 2013). During outbreaks of violence that lasted for three months between 2007 and 2008, the worst affected areas were the Rift Valley region, Kisumu, Nairobi, and Mombasa; as a result, 1,500 people were killed, more than 3,000 women were raped, and over 300,000 were displaced (Press 2009, 141).

Although the conflicts seemed to have been triggered by highly contested presidential election results, earlier studies and analysis have argued that multiple historical events and contextual factors played a role (Lafergue and Katumanga 2009). To understand Kenya’s internal conflicts, it is important to understand the history of land demarcation, settlements, economic activities, and the role of politics and tribal alignments in fueling inter-ethnic conflict. Of additional significant note is that this was not the first time election violence was experienced in post-colonial Kenya. Rather, such conflicts were in evidence in 1992 and 1997; there have also been other conflicts before and after, but of lesser magnitude and limited to specific areas. Their causes, too, can be traced to an interplay of the above-named factors (Rutten and Owuor 2009).

### *1.3.3 Colonisation and post-colonial politics*

Questions of access and control of land in Kenya date back to colonial times (Rutten and Owuor 2009, 306 onwards). During the colonial rule, the British demarcated land and controlled access based on race and ethnicity. Professor H.W.O. Okoth-Ogendo (cited in Kanyinga 2009, 327) identifies the Crown Lands Ordinance of 1915 as paving the way for the alienation of land into “land for Africans” and “land for the Whites.” The land for the Whites (which came to be known as “White Highlands”) contained most of the fertile land, ideal for cash crop farming. The land allocated to Africans (referred to as “native reserves”) was divided along tribal units, and each unit was only accessible by a controlling ethnic group. As an offshoot of this, regional boundaries were drawn between native reserves. In the process, some of the communities were moved from what they perceived as their ancestral land, to pave way for the British settlers. As others have observed, this was part of the larger ploy by the British to divide and rule (Kinyanjui 2013) – they used it as a strategy to divide people and decimate traditional authorities. The colonisers simultaneously used tribal loyalties to preference certain groups over others, while at the same time ensuring a divided

and therefore weaker body of subjects to govern. In the case of Kenya, it was divided into provinces or districts, which ended up being mostly “ethnic enclaves” (Kinyanjui 2013, 115).

Boundaries set up by the colonial government have continued to define each ethnic group’s space, with little tolerance for “others” from different ethnic groups. As Zolberg (cited in Kinyanjui 2013, 115) observes, early political movements that spear-headed anti-colonial rule in Africa were hardly able to mobilise people across ethnic groups, nor were they able to sustain their influence and nationalistic approach across the already set ethnic groups. Nationhood was soon replaced by ethnicity.

Distribution of land is a highly emotive issue in Kenya, heightening social, political, and economic tensions among different groups of people. After Kenya’s independence in 1963, President Kenyatta and the ruling KANU party dismissed calls for devolution and redistribution of land to the people who had been displaced by the British settlers through colonialism (Branch 2011, 10). The affected communities have continued to claim the redistribution and ownership of this land, which they perceive as their ancestral land, and key to defining their identity (Ndiku 2015). Of particular note is the former White Highlands in the Rift Valley, over which various ethnic groups (particularly the Kalenjin, the Kikuyu and the Luhya) have been competing, and which has formed a basis for election violence such as that witnessed in post-colonial Kenya (Kanyinga 2009).

Post-colonial politics in Kenya have continued to capitalise on this differentiation, as it provides fodder for clientele politics. Control of government resources became the preserve of the political elites; leading to marginalisation and inequality based on ethnic differentiation. This was evident during the first two presidencies, and in more recent presidential campaigns and elections. Gona (2013) describes the ethnic politics surrounding Kenyatta and Moi’s presidency, noting that as soon as Kenyatta became president in 1964, he surrounded himself with those from his community (mostly Kikuyus). In addition to positioning Kikuyus in civil and public service, he also skewed the distribution of resources (including land) to favour Kikuyu regions, which fuelled antagonism between Kikuyus and other communities which felt marginalised. On succeeding Kenyatta as president, Moi set out to reverse the Kikuyu influence by reducing their numbers in the civil service and other government sectors. Nonetheless, in the footsteps of his predecessor, he similarly surrounded himself with people mostly derived from his community, the Kalenjins; favour was similarly skewed towards them.

These practices were not unique to the national leadership. Since the introduction of a multi-party political system in 1992, the numerous political parties that have emerged have typically distinguished themselves along tribal lines; party allegiance based on tribal affiliation is valued over the party’s ideologies and policies (Roberts 2009). Such was the case in the 2007/2008 elections, in which the two most popular political parties, the Orange Democratic Party (ODM) and the Party of National Unity (PNU), were ethnically aligned, mostly with the party leader’s ethnic background. The ODM was primarily associated with the Luo community, and a few other tribes mostly those from the same region; these included the Lugha, the Kalenjins, and the Kambas.<sup>11</sup> On the other hand, the PNU – led by Kibaki (of the Kikuyu tribe) – was pre-dominantly composed of Kikuyus and members of other tribes

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<sup>11</sup> Although located in a different region, the Kambas were aligned to the ODM by virtue of the fact that one of the ODM’s leaders, Kalonzo Musyoka, was of the Kamba tribe.

within the same region (most notably, the Meru and the Embu) (Rutten and Owuor 2009, 316).

Roberts (2009) further notes that one's ability to mobilise their local community is essential for political success. However, voters (in other words, the tribesmen) expect to receive superior jobs and other favours, such as contracts, in return for their support. In this cycle, it becomes evident that holding political office translates into benefits for the particular politician's tribe. A sense of obligation results; when an individual from a particular ethnic identity group ascends to power, the onus is placed on him or her to ensure that they share resources with fellow tribal mates (Roberts 2009). As can be expected, such a mutual arrangement generates inter-tribal antagonism, as well as tensions resulting from favouritism within the tribe (2009, 144).

#### *1.3.4 Ethnic identity versus national identity*

The Kenyan experience has been one in which ethnic identity does not always sit comfortably with a national identity. The above practices and attitudes are further evident in the fact that Kenyans have a tendency to identify with one's ethnic group more strongly than with their Kenyan nationality.<sup>12</sup> This further entrenches the practice of seeing people as either "insiders" or "outsiders," based on their tribal affiliation. Ndiku (n.d.) points out that most people, especially from the age of 30 onwards, define themselves in terms of their ethnic identity, lacking a coherent sense of being Kenyan. This tendency can be traced back to the practices already mentioned, in which people prioritise ethnic unity at the expense of building a sense of nationhood (Branch 2011). Ndegwa (1997) argues that ethnic identity undermines national identity due to the former's ability to "extract obligations" through social relationships – something the nation-state is unable to do as a whole. Thus, when the two come into conflict, ethnic identity is often favoured. Politicians have taken advantage of this strong ethnic identification to interpret and present all types of conflicts as ethnic conflicts, in order to promote their purposes (Omenya and Lubaal 2012). They have continued to lay claim to their tribal roots, and have created a symbiotic relationship with their tribe's people. They have deliberately used these divisions as political mileage (Bjork and Goebertus 2011), depending on ethnic backing for their own political gain by appealing to the group's collectivity, common origin, destiny, and social responsibility for their own political success (Katumanga 2013).

#### *1.3.5 Inequalities: Land and socio-economic status*

Skewed access to resources favouring a few, a high rate of unemployment, and the growing gap between the rich and the poor add fuel to the existing tensions between different groups of people. All these factors come together to trigger the inter-tribal and inter-clan conflicts experienced in post-colonial Kenya. The centrality of land in Kenyan conflicts is further intensified by the fact that Kenya's social and economic systems are traditionally agrarian, making land the most coveted resource. The KHRC (2011, 11) reports that 75 percent of Kenyans depend on land. However, only 20 percent of Kenyan land is arable, and thus suitable for farming; the rest of the land (80 percent) is arid and semi-arid, catering for only

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<sup>12</sup> In the 2009 Population and Housing Census conducted by the Kenya National Bureau of Statistics (KNBS), respondents were asked to name their ethnic or national identification. In their responses, only 1.6 percent of the population identified as "Kenyan," with all other respondents identifying their tribal affiliation (KNBS 2009, 397–398).

20 percent of the population. This means that there is a higher concentration of the population living on 20 percent of the landmass. Lafargue and Katumanga (2009) note that Kenya's high population rate further aggravates this situation, especially in the most attractive areas in Central and Western Kenya (22), which forms the block of land previously referred to as the "White Highlands."

Land allocation, especially in cosmopolitan regions in Kenya, is steeped in corruption and inequality. Allocation of public land has been used for political patronage, to reward "politically correct" individuals (Kamungi 2009, 347). According to a KHRC status report (2011), the groups most affected by these land injustices include: squatters or landless poor; the unemployed; women; children and youth; the aged; subsistence farmers; pastoralists; hunters and gatherers; minority communities; forest dwellers; persons with disabilities; persons living with HIV/AIDS; orphans; and people living in informal settlements (slums), and on the streets. Political violence witnessed in Nairobi, especially in slum areas, is closely related to the status of squatters or landless poor, as well as the unemployed. As pointed out by Omenya and Lubaale (2012, 15–16), the violence that erupted in Kibera and Mathare slums after the announcement of the presidential election results in 2007 quickly spiralled into violence related to rent disputes, displacement, and evictions. Some tenants took advantage of the chaos to evade paying rent, and some landlords hired gangs to intimidate, assault, and evict the tenants.

Traditional laws on land ownership among many Kenyan communities further contribute to these inequalities. Kameri-Mbote (2005, 4) notes that "the terms and conditions under which rights to land are acquired, retained, disposed of, or transmitted are nuanced by gender relations"; the ownership of land is primarily hinged on patriarchy. She further posits that, for most part, women are not allowed to own land. Rather, their access to, and use of, land is dependent on their male relatives, such as their husband or brothers. In a country where most depend on land for economic activities, Kameri-Mbote further notes that women find themselves in precarious positions in terms of their ability to earn a living for their survival, and to contribute to national development (1). Harrington (2010), similarly, notes that denying women land amounts to denying them access to economic sustenance, leaving them socially ostracised (1).

A relationship exists between violence and socioeconomic status. Violent crime is said to have greatly increased in Nairobi in the 1980s and peaked in the 1990s – a period characterised by political instability and hard economic times, especially as a result of the IMF's structural adjustment programmes (Omenya and Lubaale 2012). Of particular note in this period was the rise of militia groups, constructed along ethnic lines to serve political, ethnic, and economic interests (e.g. the Kikuyu "Mungiki" group, and the Luo "Kamjesh" group). These groups have frequently been co-opted by politicians to serve their political interests by harassing political opponents. Similarly, high rates of unemployment and poverty can potentially increase conflicts. In particular, many unemployed youth are willing to take up "arms as mercenaries," on behalf of anyone who can afford to pay them (Bjork and Goebertus 2011, 206).

The situation is further exacerbated by the growing poor–rich gap. Figures from 2012 indicated that in Nairobi, 45.2 percent of the city's income goes to the richest 10 percent of the population, while only 1.6 percent of the city's income goes to the poorest 10 percent (Omenya and Lubaale 2012). Furthermore, the rich live in the leafy environs of such estates as Muthaiga and Karen, in which the population density is four persons per hectare; the poor,

by stark contrast, live in slums such as Kibera and Mathare, where the density is approximately 800 persons per hectare (Omenya and Lubaale 2012). This disparity leads to a situation in which the poor sometimes use violent means to acquire resources from the rich, and the rich use violent means to keep the poor at bay. The poor continue to be downtrodden, while the rich continue to wield power, including political power. The powerlessness of the common citizen in Kenya, as contrasted with the dominance of the rich political elite, can be illustrated by the fact that, between 1968 and 1992, the constitution was amended 28 times, each time limiting the freedoms of the common citizen and expanding the power of the elite (Roberts 2009, 144).

### *1.3.6 Influx of firearms and formation of militia groups*

The availability of firearms among warring communities in Kenya is an important factor to consider in this context of violence. Most conflicts have involved the use of both bladed weapons (such as machetes) and firearms. There has been an increased availability of firearms, both legal and illegal, among some of the communities involved in inter-ethnic conflicts. For example, the counter-ethnic clashes on the Kenya-Uganda border have over time led to the state's deliberate arming of quasi-formal groups, as well as security and vigilante groups, for self-defence purposes (Mkutu 2006). There has also been deliberate arming of members of the Kenya Police Reserves (KPR) among communities along these borders (2006, 55). Firearms find their way into the hands of the community through many illegal channels. Mkutu notes that some of the pastoralist communities engaging in the counter-ethnic conflicts along the Kenya-Uganda border occasionally acquire arms during raids on counter groups. Some may even have gun-making skills (Mkutu 2006, 52). Porous borders between conflict-prone countries in the Horn of Africa (e.g. Somalia) have also contributed to an increase in firearm possession within communities in those regions; this is enabled by the ease with which guns find their way into the country, with populations that can easily move across the borders.

Of additional significance is the formation of militia groups in the wake of accusations of the state security agencies' inability to offer adequate protection to different communities. Unfortunately, most of the militia groups have been formed along ethnic lines.<sup>13</sup> There is a high risk that some of these groups could arm themselves heavily with anything ranging from less sophisticated weapons, such as machetes and arrows, to more sophisticated firearms (Lafargue and Katumanga 2009). This easy access to weapons, partnered with the formation of numerous militia groups, has played a part in escalating attacks and counter-attacks between antagonistic communities.

### *1.3.7 Description of conflict in the research sites*

While the 2007/2008 post-election violence (PEV) in Kenya was experienced across different parts of the country, each area experienced types of violence that were partly similar, and in other ways different and unique to their specific context. While some of the root causes of the conflicts can be traced back to the historical events discussed above (i.e. Kenya's colonial and post-colonial history and legacy), the events and circumstances that have triggered more

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<sup>13</sup> In addition to the previously mentioned Mungiki (associated with the Kikuyus) and Kamjesh (associated with the Luos) groups, such groups include the Chinkororo (associated with the Kisii), the Baghdad Boys and Talibans (associated with the Luos), and the People's Liberation Army (associated with the Kalenjins).

recent conflicts differ for each research site, and are nuanced by both the uniqueness of the groups involved, and the circumstances triggering the conflict.

## **Bungoma**

Bungoma County is in Western Kenya. It is situated on the slopes of Mt. Elgon, and shares a border with Uganda to the west. It covers an area of 3,032.2 square kilometres, with a population of approximately 1,630,934 (Safer World 2013, 10) at a ratio of 48 men to 52 women (Soft Kenya 2012, [1]). Referred to as Kenya's bread-basket, it boasts a favourable climate and good soil. The main economic activity for the majority of residents is crop farming and livestock keeping. It is further endowed with plentiful natural landscapes, including Mt. Elgon, hills, forests, rivers and hot springs (Saferworld 2013, 10). It has two main highways: the Webuye-Kitale and Bungoma-Malaba highways, both of which provide easy passage to neighbouring countries such as Uganda, Rwanda, Burundi, and even further on to the Democratic Republic of Congo (Soft Kenya 2012, [2]). However, despite these advantages, an estimated 53 percent of the population in Bungoma live below the Poverty Line (Kenya Mpya 2012, [1]).

Conflicts in Bungoma have a long history. Over time, they have endured ethnic clashes, mostly in the form of cattle rustling with the Sebei, Pokot, and Karamojong of Uganda. However, in the post-colonial era, the conflicts have been primarily based around issues of land and boundary disputes with neighbouring communities (Psiwa et al. 2014). Some of these land-related issues can be traced back to the land policies of the British government, which involved the movement of communities from their ancestral land to make room for British settlers (Wachura et al. 2010). Even in post-independence Kenya, the Sabaot (the dominant community in Bungoma) lost more of their land to non-Sabaot communities, who moved into their region in search of fertile land for farming; some moved in legally by buying land from the Sabaot, while others settled illegally along the forest fringes (Psiwa et al. 2014, 1281). Among these "settlers" were the Bukusu, a sub-group of the Luhya community.

The Human Rights Watch, in its *Divide and Rule* report (1993), records the first post-colonial conflict in this region as having taken place in November 1991. The Kenya National Commission for Human Rights (KNCHR) also speculated that, helped by the Sebei from Uganda, Sabaot warriors launched attacks against the Bukusu who had settled in what Sabaots claimed to be their ancestral land (2008, 63). During March and April, 1992, an estimated 2000 people were displaced in Bungoma District; in one attack, on April 12, 1992, 14 were killed, 120 houses set alight, and 37 cattle stolen (HRW 1993, 29–30). Another spate of violence erupted in Chepkube in July 1992. A village predominantly occupied by Kalenjins (70 percent) (Bukusus constituted 20 percent of the population, and the Teso 10 percent), the violence has been largely perceived as retaliatory in nature, believed to have been perpetrated by members of the Luhya [Bukusu] community. The attackers were described as "wearing black coats and caps, using guns, pangas, and spears" (HRW 1993, 32). As a result of these attacks, 14,000 people were displaced (1993, 32).

Lynch and Anderson (2014) note that local politicians were instrumental in inciting the Sabaots to expel non-Sabaots from Mt. Elgon if they refused to vote for KANU. They used violence to disenfranchise those in the opposition, and to build a strong political base for the ruling party (85). Over time, the conflict shifted from one between the Sabaots (a subgroup of Kalenjins) and Bukusu (a subgroup of the Luhya) to one between two Sabaot clans – the



Mosop and the Soy (Lynch and Anderson 2014, 83). Perceived favouritism by the government, which shifted between the two clans, escalated animosity within the larger Bukusu group. The ratios at which the government initially allocated land to both groups favoured the Mosop, but the second round of allocations allegedly favoured the Soy; this perceived favouritism led to more aggression and animosity between the two groups (Psiwa et al. 2014, 1281). To date, this region remains deeply divided around the issues of accessing and controlling land.

Conflicts in this area have been further exacerbated by the proliferation of small arms and light weapons (SALWs), and the formation of militia groups. The region's porous borders with Uganda have made it possible for the residents around Mt. Elgon to acquire weapons (Psiwa et al. 2014, 1281), while the security situation was worsened by the formation of the Soy-dominated Sabaot Land Defence Force (SLDF). This militia group formed to counteract what the Soy saw as the control of the Mosop group, and to resist the forceful eviction of squatters in the Chepyuk Settlement Scheme. Conflicts in Chepyuk escalated between 2006 and 2007; during this period, the Human Rights Watch estimates that the SLDF killed approximately 600 people; raped and tortured many others; destroyed property; and forced the displacement of over 66,000 people (HRW 2011). Ryanga (2013, 37) cites the Mount Elgon Resident Association as estimating 1,600 deaths in Mount Elgon. They also extorted money from the residents of Chepyuk; non-compliance led to the perpetration of further atrocities, such as the forced enrolment of their sons into the SLDF, mutilations, and murders (MSF 2008, 4). There were also reports of the SLDF gang-raping women; the KNCHR (2008) points out that Moi Referral Hospital in Eldoret attended to 21 cases of rape, amongst which the youngest victim was an 18-month old baby, and the oldest 70 years old (142).

Lynch and Anderson (2014) give a chronology of the events that followed. They noted that, as the 2007 general elections approached, the violence in the area escalated. The SLDF began making political statements and demands (MSF 2008). Furthermore, there were intimidations and assassinations of politicians and their family members, especially those politicians who were supportive of the Kibaki government. Other government representatives at the local level were also targeted. There was extensive destruction of property, including burning houses, leading thousands to flee their homes. Some residents relocated within Kenya, while others fled to neighbouring Uganda.

After initial denials by Michuki, then Minister for Internal Security, about the extent of atrocities taking place in Mt. Elgon, the government did finally start responding to the crisis. They offered amnesty for locals who agreed to surrender their weapons to the police. By November 2007, they had set up a Rapid Response Force comprising mainly administrative and regular police, and those from the General Service Unit (GSU). There was a heavy security presence in Mt. Elgon during the December 2007 parliamentary and presidential elections. Despite low expectations as a result of widespread displacement, voter turnout reached 68 percent. In the aftermath of the 2007/2008 violence, the Kenyan army launched an assault in the region, and a state of emergency was declared over the area; the Kenya Air Force bombed suspected SLDF hideouts, and young men were rounded up and interrogated for any information that they might have about the militia group (Lynch and Anderson 2014).

Many accusations were levelled against the military, including of harassing, intimidating, and physically assaulting locals, journalists, and human rights activists who ventured into this territory. Activist groups and the media were not allowed access to the areas in which the Kenyan military was operating. Access to these areas, even by medical teams, was controlled

(MSF 2008). Eventually, the military operation led to peak violence, which included accusations of extra-judicial killings. Many more residents fled the area into neighbouring districts and Uganda as a result of these military operations, and claims of increased sexual violence against both men and women were reported (MSF 2008, 9). On the other hand, the Kenyan military had termed its operation as successful by mid-2008 after many of the SLDF's leaders came forward and surrendered to security forces. Others were captured, or appealed for peaceful negotiations surrounding issues of land allocation. The military also investigated those suspected of having financed the militia group; prominent on their list were politicians and political activists. They further urged the government to hasten the pace of allocation of title deeds, to ensure more conflicts do not erupt in the area.

## **Kisumu**

Kisumu is the third largest city in Kenya, located in Kisumu County within the larger Nyanza region. As of April 2014, Kisumu County as a whole has an estimated population of 968,909, with a gender proportion split of 49 percent males and 51 percent females (KIRA 2014, 1–2). Kisumu city is considered Western Kenya's main economic hub, developed as a result of its strategic position along Lake Victoria; this position offers an internal port connecting Kenya with Uganda and Tanzania (UN-HABITAT 2006, 4). The dominant ethnic group in Kisumu is the Luo, with significant Kisii, Luhya, Nubian, and Asian populations (KIRA 2014, 2). However, despite its diverse range of natural resources, UN-HABITAT describes Kisumu as one of the poorest cities in Kenya (2006, 4).

Kisumu is described as a politically volatile area. Conflicts in Kisumu are usually triggered by politics, marginalisation, and land issues (Safeworld 2013). Given its strong support for the opposition party (ODM), it was considered a stronghold of Raila Odinga, Kibaki's closest competitor during the 2007 parliamentary and presidential elections; it was therefore unsurprising that protests broke out in Kisumu as soon as the presidential results were announced in favour of Kibaki. Crowds of ODM supporters took to the streets to protest the outcome of the elections. In Kisumu, this PEV involved ethnic cleansing, mainly targeting communities who were presumed to be supportive of PNU and Kibaki. This included Kikuyus, Amerus, and Kisiis; Asians were also targeted because they were perceived to support the status quo, the government of the day. Businesses and property belonging to these communities were destroyed, looted, or set on fire (KNCHR 2008, 88–89; Shackle 2015). The youth barricaded the roads, only allowing passage to ODM sympathisers, and set tiles on fire in the middle of the CBD to express their anger. KNCHR further reports that the minority communities also launched retaliatory attacks, thereby escalating the violence; many others fled Kisumu out of fear for their lives (2008, 64).

Being a politically instigated conflict, the influence of politicians in escalating the violence was widely reported. Respondents to a KNCHR investigation alleged that some senior politicians incited the locals to violence both before and after the elections, but especially during public political rallies (2008, 92). References to “‘visitors’ [that] had taken away business from the locals,” and “madoadoa”<sup>14</sup> who were not wanted in the region, were used to incite locals against other communities (KNCHR 2008, 91–92). Such statements led to the forceful eviction of ethnic minority members from Kisumu. Some of these evictees, most of whom fled and sought refuge in police stations, reported to KNCHR (2008, 95) that the

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<sup>14</sup> The Swahili term for “black spots” (KNHCR 2008, 132).

evictions were carried out by groups of youths who seemed to have some form of organised leadership.

A second wave of protests occurred in Kisumu in March 2013, following the ruling by the Supreme Court upholding the 2013 election results. Human Rights Watch (2013) notes that Kisumu was already under tight security in the lead-up to this ruling. The ethnic alignments in Kisumu present a unique situation. The Luo and Kalenjin have a history of inter-ethnic rivalry; however, in the run up to the 2007 elections, both communities supported the ODM, which provided a period of unity between the two communities. After the elections, however, there was a fall-out between Raila Odinga and William Ruto, as a result of which the rivalry resumed (CRECO 2012). Following the Supreme Court ruling, youth reacted violently; just as in earlier riots, they barricaded roads, burned tiles, and looted businesses.

According to multiple human rights organisations, the security response was flawed. On both occasions, in 2007/2008 and 2013, law enforcement officials used excessive force – including, as in the Nairobi situation, the use of live bullets to control the surging crowds of protesters (KNCHR 2008, 93; INCLO 2013, 40–41). They were also accused of shooting at people that were not part of the riots (INCLO 2013, 40), and of attempting to cover up the shootings by intimidating both the injured and medical staff (HRW 2013). In 2007/2008, some witnesses even reported seeing security personnel engage in looting (KNCHR 2008, 89–90, 94). Overall, excessive police force saw 115 deaths in the 2007/2008 PEV, and five deaths in 2013 (HRW 2013; INCLO 2013, 41).

Churches played a critical role in hosting those displaced from their homes in Kisumu (KNCHR 2008, 96). They provided the first temporary shelter for fleeing residents, but this was not always the safest option given that violent attacks were sometimes carried out in church premises. The Kenyan Red Cross Society (KRC) was also instrumental in handling the injured and offering counseling to those traumatised by the violence, by providing venues whereby interested institutions (such as the KNCHR, and other similar agencies) could meet with victims whose rights had been violated. The Law Society of Kenya was also instrumental in gathering information on the violence, to assist in the potential prosecution of individuals found to be implicated in perpetrating the violence (KNCHR 2008, 96).

Initial responses to the crisis, conducted under an Emergency Humanitarian Response Plan (EHRP), were built on an inter-agency “triangular approach” (Diagne and Solberg 2008, 2), whereby the Kenyan Ministry of Special Programs worked alongside designated UN agencies and the Kenya Red Cross (KRC) to administer forms of assistance (UNOCHA 2008, 1). The three agencies conducted a funding appeal which generated US\$31.2 million from donors for urgent humanitarian activities (UNOCHA 2008, 1), with the KRC additionally raising 43 percent of total funds received outside the appeal (9).

With regards to its specific duties, the KRC was charged with running the relief operation alongside the government’s National Disaster Operations Centre; this partnership “offered the Government a good opportunity to deploy in the worst affected areas whilst handling the problems of acceptability and legitimacy that government officials were facing” (2008, 2). Among the various clusters and sectors within the EHRP,<sup>15</sup> the KRC was designated the lead

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<sup>15</sup> In addition, the KRC worked under other lead agencies within the following clusters: Early Recovery and Food Security; Education; Food Aid; Logistics; Shelter and NFIs; Water, Sanitation and Hygiene; Protection; and Nutrition. In fact, the only cluster which did not feature the KRC’s involvement was the Emergency Telecommunications cluster (UNOCHA 2008, 19).

agency in Camp Coordination and Camp Management (UNOCHA 2008, 20; Diagne and Solberg 2008, 2). The program designated three objectives: to ensure that IDPs hosted in camps had their protection and assistance needs met; to ensure that IDPs participated in camp life through a community and rights-based approach; and to register and profile IDP numbers, protection needs, and intentions (UNOCHA 2008, 20). There is evidence that under its leadership, some conditions within IDP camps improved (Diagne and Solberg 2008, 9–10).

## **Nairobi**

Nairobi is the capital city of Kenya, named by the Maasai, the original settlers of the area in pre-colonial Kenya, with their word for “the place of cool waters.” Founded in 1899, it has grown into a cosmopolitan population, measured to be 3,138,369 in the most recent population census (KNBS 2009, 19). Nairobi reflects the national ethnic composition described earlier – the Kikuyu people constitute the majority, followed by the Lugha, Kalenjin, Luo, and Kamba peoples (Omenya and Lubaale 2012).

While the city has its own unique conflicts, other conflicts experienced in other parts of the country have also been played out in Nairobi, often agitated by the same ethnic divisions and contestations over land (Omenya and Lubaale 2012). Conflicts in Nairobi have also involved socio-economic dimensions, including conflicts between tenants and landlords (Omenya and Lubaale 2012, 29–30). Most 2007/2008 PEV took place in the slum areas of Nairobi. The factions involved in the conflict were split both ethnically and politically (Global Communities 2013), and sides were taken depending on the political party that one’s tribe primarily supported – Mwai Kibaki’s Kikuyu-dominated PNU, against Raila Odinga’s Luo-dominated ODM. There was heavy fighting in the two biggest slums of Nairobi – Kibera slum, a stronghold of Raila Odinga, and Mathare slum, dominated by Kikuyus who were strong supporters of the then-incumbent president, Kibaki (Omenya and Lubaale 2012). The KNCHR (2008) posited that the violence initially targeted Kikuyu-dominated areas in Kibera, before the Kikuyus retaliated by attacking Luos living in Mathare.

Conflicts were not limited to the slum areas, as the opposition, led by Raila Odinga, organised large demonstrations across the city. They sought to hold a “million people” march at the city’s Uhuru Park. Groups of young men ran all across the city looting shops and homes, destroying property, and setting fires. Many residents were displaced as a result of losing their homes, while others were displaced as they fled from the violence. Others yet were forcefully evicted; this was particularly evident in Kibera, Mathare, and Dandora (KNCHR 2008, 42–43).

The violence in Nairobi also involved ethnic militia groups, the most popular of which were the Mungiki for the Kikuyus, the Taliban for the Luo, and the Chinkororo for the Kisii; they were typically comprised of the youth members of the respective communities. While these groups usually have an array of interests that go beyond ethnicity and politics, they organise during periods of political upheaval for attacks and counterattacks against their opponents (KNCHR 2008). In the case of the 2007/2008 conflicts, they armed themselves with clubs, machetes, stones, and other crude weapons, and attacked those that were perceived to be sympathisers of rival candidates. The Mungiki group was said to have forcibly circumcised men from the Luo community (KNCHR 2008). The gangs were said to have had economic interests as well; to that end, they frequently organised themselves into cartels to extort money from the public (Omenya and Lubaale 2012; KNCHR 2008).

The conflicts in Nairobi also took on a socio-economic dimension, played out particularly between landlords and tenants in lower socio-economic areas. Populations were forcibly evicted from their homes; in slum areas such as Kibera, there were claims of tenants evicting landlords (who were mostly Kikuyus), and either taking ownership of their homes or renting them out at cheaper rates (Omenya and Lubaale 2012, 16). Many retreated to neighbourhoods that were popular with their ethnic community. However, of significant note is the fact that some of the atrocities experienced during the 2007/2008 PEV in Nairobi were not unique to this period.

Over the years, those living in slums have engaged in housing and land related conflicts (Omenya and Lubaale 2012). In most cases, these conflicts escalate during political campaigns, and are exacerbated by ethnic affiliations. Ethnic violence inflamed by politicians (and other political interference) has been identified as a common type of violence in Nairobi's Kawangware, Kibera, and Mukuru slums (Omenya and Lubaale 2012, 28). Furthermore, residents in Mathare slum have spoken of politicians paying gangs to intimidate opponents' supporters (van Praag 2010), while a decade of violence in Kiambiu slum was instigated by a landlord-tenant dispute that divided along ethnic lines and drew in gang involvement (Wairimu 2014). When outbreaks of violence occurred, responses by security agencies in Nairobi are swift, but wanting; while they fought back surging crowds of protesters in the city, there were cases of police intimidation and assault on the population, especially in Mathare and Kibera slums. They were additionally accused of engaging in extra-judicial killings, the use of live bullets on protesting crowds, throwing tear gas canisters into homes and of sexually assaulting women (Omenya and Lubaale 2012, 17, CIPEV 2008, 244 and 249).

The KNCHR (2008) also identified gender-based violence experienced in Nairobi. It noted that there was widespread rape in various parts of the city, but especially in areas such as Kisumu Ndogo in Mathare slum. A doctor who runs a clinic in Mathare reported having attended to women who had been raped, especially from members of an opponent's support base; the victims were predominantly Kikuyu women. Incidences of gang rape in Dandora were also reported. A woman and her two daughters were raped by 20 men (2008, 46). There were also cases of undressing of women in miniskirts by the Kikuyu-dominated militia group, Mungiki (2008, 128).

## **Tana River**

Tana River County was part of the former Coast Province, which was dissolved after the separatist Mombasa Republican Council initiated attempts to secede from Kenya (IRIN 2012). It is named after the longest river in Kenya, the Tana River, which flows from Northern Kenya, across the central part of the country, to the Indian Ocean. Largely semi-arid, the county it covers an area of 38,446 square kilometres, and is subdivided into 3 sub-counties: Tana River, Tana North, and Tana Delta. The main economic activity in the region is pastoralism, with farming and fishing along the Delta region of the river (Mohamed 2015).

The River Tana being an important natural resource in the county, it inevitably became central to decades old conflicts, mainly between two communities: the Pokomos and the Ormas. Both groups were said to have previously lived in peace, but their relationship declined over time. The Pokomos are mainly farmers, engaging in small-scale farming along the river, and the Orma are mainly nomadic pastoralists (Peace Bulletin 2004, 4; Weiss n.d.).

Tensions arose from the fact that, on one hand, the Orma wanted unfettered access to the water for their cattle, while the Pokomo on the other hand claimed that the land nearest to the river was theirs. The pastoralists tended to move towards the river during the dry season, and this movement became a major trigger for the conflicts (Human Rights Watch 2013; Kirchner 2013, 1; Mohamed 2015, 6, 29).

The elections of 2013, while generally calm compared to the earlier 2007 elections, nonetheless generated pockets of violence, especially in the lead up to the elections. Tana River County was characterised by ethnic conflicts based not only on tensions between the Orma and Pokomos, but also between indigenous communities and those not originally from the region. From a political perspective, new alignments were formed leading up to the March 2013 elections. Both the Pokomos and Ormas feared that losing power to the other party might catalyse the loss of their influence in the area, or might lead to them being driven out of the region altogether; consequently, both groups mobilised other communities, forming alliances to ensure that they gained power (Mohamed 2015, 69–70, 80–81). As a result of the violence, hundreds of people were killed, houses were set on fire, cattle were stolen, and approximately 1000 people were displaced. It has since been described as the deadliest massacre in Kenya since the 2007/2008 PEV (HRW 2013). The violence was only diffused after the government deployed the General Service Unit (GSU) – a paramilitary security organisation that is usually deployed when the administrative police are not able to handle a situation – to the area. The president also issued a dawn-to-dusk curfew in the area.

The conflicts in Tana River persist up to the time of writing. As recently as mid-2015, new conflicts erupted between two ethnic villages on the boundaries of Tana Delta and Kilifi County. Women and children have been most affected; displacement and rape have been widespread, and many families have lost fathers and husbands (Amin 2015). There have also been reports of children who were psychologically affected by seeing their mothers “roughed up” by attackers (Amin 2015). Other fights erupted between Giriama farmers and the Wardei over grazing land, which led to more deaths and many more fleeing to Kilifi country for refuge; goats were also reported stolen (Kenya Red Cross 2015). Similar reports of rape, including death threats to dissuade disclosure to authorities, have been recorded (Mwambui 2015).

In addition to issues related to access to land and water, there are other factors that exacerbate the tensions in Tana River – most notably, access to firearms. Weiss (n.d.) notes that, while earlier conflicts involved less sophisticated weapons such as clubs, spears, bows, and arrows, there has been a proliferation of SALWs across the conflict-prone Somali border today. This has led to increased intensity during conflicts, and to higher casualty rates than previously experienced.

The Tana River is important not only to the people of the region, but also to the whole country, as it is a major source of electricity. This resource has attracted both private and government agencies as an ideal investment area. For example, the area is said to have large deposits of titanium; Tiomin Kenya Limited is said to be in the process of excavating this mineral. Oil companies are also exploring the possibility of oil mining in the region. All these projects have the potential to alienate locals, as they are relocated from their settlements to alternative places (Muriithi 2013, 17). Other grievances include the resettling of people from up-country (commonly referred to as “Wabara”); the lack of title deeds to land; perceptions of favouritism by the government; perceptions of inequality among the different ethnic groups; and a mutual sense of victimisation (Sentinel Project 2013, 11).

The influence of the political class has also been adversely noted, with politicians being blamed for inciting the locals against “outsiders”; this incitement was intended to drive away sections of the population that would otherwise have voted their rivals to victory in the 2013 elections (Muriithi 2013). Human Rights Watch reported that some residents of Tana River spoke of political incitement fuelling the conflicts (2013, 21). Local MPs were subsequently arrested in connection with the conflict, although all proceedings were later dismissed by the courts on the basis of a lack of evidence (25).

Over time, locals from both the Pokomo and Orma communities have complained about the police force’s repeated failures to protect them, or to investigate and bring culprits to answer for the crimes (HRW 2013). They felt that the police and administration units (Chiefs, District Officers and District Commissioners) did not act to avert the conflicts, even after prior warnings of possible attacks. They posit that it is out of frustration with security agencies’ inaction that led them to fight to protect themselves and their property (2013, 22–23).

### *1.3.8 Gendered violence*

The history of discrimination against, and subordination of, Kenyan women dates back to pre-colonial days. This discrimination was somewhat reinforced during the processes of colonisation (Nyokabi 2013, 23). Omondi (1988, 4) notes that in the traditionally patriarchal societies of Kenya, violence against women was both expected and excused; a man could beat a woman and get away with it because he had a bad temper, and additionally be excused with the simple reason that “they are men.” On the other hand, women were expected to persevere, for the equally simple reason that they were women. Such attitudes remain prevalent today; in the most recent Kenyan Demographic and Health Survey (KDHS), 40.7 percent of ever-married (i.e. married, divorced or separated) women aged 15 to 49 years reported having been physically or sexually violated by their husbands or partners, with 14.0 percent having experienced sexual violence specifically (2014, 59). A recent study by the Kenyan National Crime Research Centre reported that 94.5 percent of women and 95.7 percent of men believe that “Men are heads of families and must control their families” (NCRC 2015, 49). The same study reported that 52.4 percent of women and 58.3 percent of men believe that it is a man’s right to discipline a woman (NCRC 2015, 49).

Another crucial issue is the subjection of women to sexual and gender based violence (SGBV). During periods of political upheaval, in addition to the loss of land, property, and loved ones, women are also often the targets of rape and sexual crimes. Spangaro et al. (2013, 2) posit that perpetrators of such crimes take advantage of both the fact that individuals are unprotected by family or authorities during such incidences, and the environment of impunity that characterise conflict periods. Thomas et al. (2013) note that the suspension of the rule of law during such times leads to increased sexual violence (520), and further noted that this violence can occur leading up to, during, and in some cases even after conflict. There was also a clear increase in sexual assaults during the PEV of 2007/2008, with the Nairobi Women’s Hospital Gender Violence Recovery Centre attending over 650 cases of gender-based violence related to this conflict, and observing a threefold increase in the number of cases of women who had suffered sexual crimes (Thomas et al. 2013, 525). These attacks have been connected to ethnic affiliations, with political opponents seeking to humiliate and punish men as failed protectors, and to punish women for their particular political or ethnic affiliation (2013, 526–528). Cases of sexual violence were reported almost everywhere that

violence occurred. Roberts' (2012) conflict analysis of the 2007/2008 PEV reports that an estimated 3000 women were raped, even and despite the estimate that as much as 80 percent of women who experienced sexual violation did not report it to medical staff or authorities (Thomas et al. 2013, 525). Those raped ranged in age; the Nairobi Women's Hospital reported that about 48 percent of victims were children below 18 years old, with the youngest victim treated being 18 months old, and the oldest 70 years of age (KNCHR 2008, 142). After the PEV conflicts had subsided, women living as IDPs continued to experience gender based violence through rape and other sexual violations (Atanda and John-Mark 2011, 178), and many women continue to live in fear of sexual violations due to their prior lived experiences.

There are credible reports of sexual violence against men and boys during the PEV, including allegations that Kikuyu men forcibly circumcised Luo men (HRW 2008, 50–51; CIPEV 2008, 239). Some of these accusations were directed against militia gangs such as the Mungiki and the SLDF. In most cases, these attacks were targeted at women from ethnic groups that supported the opposing political party; however, in this case, rape was used to persecute other tribal groups. It was also a product of the breakdown of law and order, as some criminals took advantage of the chaotic situation to effect these crimes (KNCHR 2013).

Outside times of political upheaval, there are still other forms of sexual violation experienced in Kenya. It has become unsurprising to come across cases of public stripping or groping of women that are perceived to be indecently dressed (Amnesty International 2014/15). In many cases, this is done by a mob of men or in public places in view of everyone else. The same report documents that, in one incident, a policeman was among the group of men that groped a woman, and threatened her with rape (2014/15, 215).

### *1.3.9 Justice or culture of impunity*

The state machinery's apathy in addressing incidences of violence was evident in almost every period of violence experienced during or after the general election. Human Rights Watch noted that successive governments "have failed to end widespread impunity for past crimes" (2013, 15); this was so even after individuals directly involved in inciting the violence had been named. Many, however, have not been brought to account for their role in the conflicts. For example, numerous claims have been recorded, whereby the victims of the 1993 violence reported attacks, and yet no action was taken by the police; some victims even reported that they visited police stations, and the police on duty refused to record their statements (HRW 1993, 71).

What responses there were have also been described as uneven. Following the 2007/2008 conflict, this was most evident in Kisumu, Nairobi, and Mt. Elgon, where the police were said to have responded with excessive force; they failed altogether to intervene in places such as Naivasha, Nakuru, and Eldoret (HRW 2013). The same report concludes that such discrepancies in police responses have led to perceptions that "corruption, political interference, or collusion with criminal gangs with the police play a role in shaping the police response to violence" (17).

After the 2007/2008 PEV in Kenya, some steps were taken to address the violations experienced during that period. However, to date, all except a few have been unsuccessfully implemented (see further discussion in Chapter 4).



Following the outbreak of violence in 2007/2008, there was an internationally mediated effort, led by the former Secretary-General of the UN, Kofi Annan. This mediation resulted in a power sharing agreement between the two conflicting political parties, as well as an agreement to establish three commissions – namely, the Commission of Inquiry on Post-Election Violence (“Waki Commission”); the Truth, Justice and Reconciliation Commission; and the Independent Review Commission on the General Elections held in Kenya on 27 December 2007. The “Waki Commission”, chaired by Judge Philip Waki, was the first to be set up specifically to look into the violence. This Commission was charged with the responsibility of, among other things, identifying the perpetrators of the violence, and to this end compiled a list of those suspected to have been its instigators. One of the Waki Commission’s main recommendations was that a special tribunal should be established to try these perpetrators. To ensure that the recommendation was followed through, they handed over the list of names to Kofi Annan, with the caveat that he was required to hand over the list to the ICC if the government did not establish the recommended tribunal by January 30, 2009 (Sriram and Brown 2012, 224).

After two extensions of the Waki Commission’s deadline, to allow the government to act on the recommendations filed, Annan finally handed over the list of names to the ICC, and the process of prosecuting those alleged to have instigated the violence began to take shape (Sriram and Brown 2012, 224). The list was comprised mostly of high profile politicians, permanent secretaries, top police officials, and high-ranking opposition leaders. Among them were the current president, Uhuru Kenyatta, and his deputy, William Ruto. With time, most of the charges against those accused were dropped, except for those against President Kenyatta, Ruto, and the one journalist (Joshua Arap Sang) on the list of accused. On December 5, 2014, the ICC Prosecutor, Fatou Bensouda, provided a notice of withdrawal of the charges against President Uhuru Kenyatta, citing insufficient evidence to prove his involvement in the crimes against humanity beyond a reasonable doubt (ICC 2014), and the proceeding was formally terminated by the ICC Chamber on March 13, 2015. Bensouda further explained that efforts to gather sufficient evidence were hampered by non-cooperation by the Kenyan government, and/or the death or intimidation of witnesses (ICC OP 2014a). However, the joint trial of Deputy President William Samoei Ruto and journalist Joshua Arap Sang continued but following successful applications by both defendants to have the case dismissed on the basis of “no case to answer” proceedings was terminated, though the Chamber made it clear that the case could be prosecuted afresh (ICC 2016). This case, too, was fraught with allegations of witness intimidation and bribery, leading witnesses to withdraw their statements (Amnesty International 2014/15, 213).

Some of the efforts in addressing the conflicts in Kenya have included traditional or local strategies. For example, the Pokomo and Orma of Tana River have frequently used the Gasa and Matadeda Councils of Elders to resolve disputes between the two groups. However, growing differences between communities jeopardises these traditional forms (Muriithi 2013, 24; Cuppen 2013, 85–86). These processes have also occasionally being hijacked by political cadres to influence outcomes (Muriithi 2013). There have also been collaborative government and local initiatives in addressing the conflicts; among these, the Witu Convention of 2009 was an agreement between three warring communities (the Orma, Pokomo, and Wardei) on some issues of common interest – e.g. the sharing of common resources, the restriction of movement of animals, and limitations on the number of herds during droughts (Muriithi 2013, 25). Psiwa et al. (2014) point out that mitigation of conflict in Bungoma has similarly required a collaborative effort between various stakeholders, including the government, civil society, religious institutions, elders, and community

members. Non-governmental organisations (e.g. Amnesty International) and civil society (e.g. the KHRC) have also been vocal in calling for justice for victims of violence.

Processes to ensure justice for victims of sexual violence are particularly weak (see further Chapter 4). Thomas et al. decry the complexity of addressing cases of SGBV, partly due to the way it has consistently been excused as a normal part of Kenyan society (2013, 525–526). After analysing sexual violence in three countries (South Africa, Kenya, and Zimbabwe), the authors concluded that in each country there are high levels of impunity for the perpetrators. Kenyan women interviewed in their research expressed a lack of confidence that the ICC would address the kind of violence (sexual or rape) that they had experienced, which Masinjila (2012) speculated was because they were only interested in pursuing high profile political figures (cited in Thomas et al. 2013, 528). A study by Anastario et al. (2014), analysing sexual assault case characteristics during the 2007/2008 violence, reported that some rape victims waited up to a month before presenting themselves to a health facility. This delay was attributed partly to the victim's lack of knowledge about the need for immediate medical attention, while others experienced material barriers and prioritised competing demands (e.g. meeting basic needs such as security, shelter, food, and childcare) (2014, 8).

The silence that surrounds topics related to sex in Kenyan cultures may also play a part in the way SGBV is addressed. A lot of stigma is attached to the topic, leading many women to shy away from describing, let alone reporting, cases of sexual abuse, for fear of venturing into topics that are normally not open for public discussion (Thomas et al. 2013, 527); indeed, the process of disclosing rape to insensitive police officers, and other prosecuting authorities, can engender a feeling of “double rape” within a culture that both stigmatises and condones rape (IRIN 2005; UNICEF and KNBS 2012, 14). If the rape results in pregnancy, many women, out of fear of stigmatisation, opt to “flush” away their problems” by obtaining a (sometimes unsafe) abortion (Ryanga 2013, 57). Perhaps most alarmingly, female children and young adults have a high degree of belief in the right of men to commit sexual violence against females; a joint UNICEF and KNBS report recorded that over 75 percent of women aged 18 to 24 condoned such violence, with an equivalent statistic of 65 percent for girls aged 13 to 17 (2012, 90–92). There is also limited accountability for sexual crimes in Kenya; despite expansive documentation of SGBV in the PEV of 2007/2008, not one prosecution has occurred in relation to that violence (ICTJ 2014, 1).

Barriers to women's access to justice are not limited to issues of sexual violence, but extend more broadly across a spectrum of injustices. This includes the denial of rights to property, and especially to land. This, again, is as a consequence of a highly patrilineal society that has a tendency to favour men over women in all respects. A World Bank report, *Gender and Economic Growth in Kenya*, notes that, due to the patriarchal nature of Kenyan society, there is a tendency for women not to find justice outside the High Court. This is especially because disputes over land or property are often referred to local chiefs and councils of elders, who, more often than not, will effect judgments nuanced by traditional dispositions that favour male dominance on issues of access and ownership of property (World Bank 2007, 66).

## CHAPTER 2: WOMEN IN KENYA SPEAK TO JUSTICE

*You know, if justice is done to you, you will remove that wound from your heart. But when you stay like this and nothing is being done, there is no way you will remove that wound from your heart.*<sup>16</sup>

### 2.1 The research focus

In examining the efficacy of transitional justice approaches for women, this research project asked women participants some broad questions about what constitutes justice, and how it works for women within their communities. Understanding how women see justice – its role, and how they experience different justice processes – is important for informing the development of justice mechanisms and strategies that are responsive to women’s needs and priorities for justice. This is especially the case within the specific context of communities transitioning from conflict to post-conflict states, during the course of rebuilding communities. In Kenya, 63 women shared with this research project their experiences, understandings, and views of justice.

This chapter presents the voices of women speaking directly to justice. It presents how the women in this research project have thought and felt about justice, as well as how they have experienced it. Women’s voices alone are presented here, so that they are clearly heard and not muted by the voices and views of others. The following chapters of this report situate the voices of women participants within broader discourses on justice, by drawing also on the views of key informants interviewed in this research, the opinions of other commentators, and the findings of other research studies.

### 2.2 Post-election violence: A continuum of violence against women

This research project sought to examine the effects of the Post-Election Violence of 2007/08 (PEV) on women in Kenya, and their experiences of both violence and justice. In discussions with women across four principal research sites, however, it became clear that drawing a neat line around the PEV was neither possible nor helpful to understanding women’s access to justice. Women spoke of a continuum of violence and subjugation; while this violence erupted dramatically following the election, it had been present to varying degrees for many years before, and it continues to be present today. For the two years preceding the election, Bungoma was already experiencing high levels of violence, including killings, violence against women, and internal displacement, likewise, the Tana River region experienced particularly acute clashes between 2012 and 2013 which resulted in many killings, and the internal displacement of approximately 13,500 people (overwhelmingly women, children, and the elderly). In Nairobi’s Kibera and Mukuru slums, the daily lives of women are marked by high levels of violence and poverty; women are targeted for all forms of violence, but for sexual violence in particular. There also remain in Mukuru and Kibera a number of people internally displaced by the PEV who have fallen through the cracks, and who have received neither assistance to return to their homes, nor compensation for their losses; this has led some IDPs to self-organise to have their plight recognised and responded to by the national government. Kisumu has also witnessed sporadic violence, particularly around elections (local and regional), in which women have been both directly and indirectly impacted.

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<sup>16</sup> Woman impacted by violence, interviewed June 22, 2015.

Each research site has quite different populations and dynamics between groups, making it difficult to present a unified account of “Kenyan women’s experiences.” Across these four sites, the women with whom we spoke described a range of diverse drivers and experiences of violence, and of trying to access justice and secure redress. Nonetheless, there are commonalities in the gender dynamics with regards to both violence and justice across the different sites. Importantly, when the women came together from the different research sites for the Validation Workshop in June 2015, the participants strongly identified with each other’s experiences, seeing consistent impacts on the status of women between their communities, as well as structural similarities between the different sites:

*The violence started and when it ended it ended with deaths. And the results were that us women we remained helpless as a result of conflict.*

*Where will I talk to be heard if I don’t have a husband? And we came to realise that, if you are a woman who does not have a husband, you are looked down upon.*

*As women we have realised that we do not get our rights. They should listen to us and give us our rights.<sup>17</sup>*

In particular, women identified shared experiences of grief and intense emotional distress; sexual and gender based violence (SGBV) both during and after the post-election period; internal displacement and its deep social, economic, and emotional effects; the very low social and political status of women; and other profound gender based barriers to justice. The inequality and violence faced by many women with whom we spoke has left them despairing and feeling hopeless, and yet also able to articulate a social and political critique which is at times striking in its insight:

*Right now we’re staring down a case of anarchy, because lawlessness is being strengthened... At the highest level.<sup>18</sup>*

*I think that many of our problems are really social justice issues, but if we address the social justice issues, the cohesion and everything else will fall into place.<sup>19</sup>*

Several women expressed *both* hopelessness *and* a clear vision for changes needed. Furthermore, many women with whom we spoke are either in groups or part of local efforts insisting for their rights:

*We should start with knowing our rights. Because if you do not know your rights then you cannot move, what do you do? Mobilisation and sensitisation should be done to women so that they can know their rights.<sup>20</sup>*

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<sup>17</sup> Interviewed during Validation Workshop in Nairobi, June 22, 2015.

<sup>18</sup> Interviewed in Nairobi, October 1, 2014.

<sup>19</sup> Interviewed in Nairobi, October 1, 2014.

<sup>20</sup> Interviewed during Validation Workshop in Nairobi, June 22, 2015.

### 2.3 Gender in context in Kenya: The very low status of women

Gender relations in Kenya, as revealed through both interviews with women affected by violence and key informants, and our own experiences and observations while undertaking fieldwork, are complex and filled with dualities. Women are simultaneously making important advances in gender equality, *and* remaining very much second-class citizens. There is a strong women's movement in Kenya, with a long-standing and proud history; it has achieved many significant improvements to the status of women, particularly at the institutional level. In spite of these achievements, however, there remain serious threats to women's well-being within their daily lived realities, particularly for those women living in poverty and with little access to power.

The women with whom we spoke in all four sites described lives shaped by misogyny and a dangerously low status in their communities, as well as in society more broadly. The discrimination and violence that women face occurs within this context of low regard, sometimes expressed overtly, and other times insidiously embedded within the narrative of women's stories. A 42-year-old widow living in Kisumu spoke directly about the status of women:

*I can say that men should regard women like other people, not that they are looking down upon women. Women are really looked down upon by men and that is why they are doing those injustices to women.*<sup>21</sup>

Many women from all research sites spoke of the very low status of women in general (and widows in particular) as a core obstacle in efforts to establish a tenable life. One woman explained that this low status makes her job as a parent difficult, saying that her sons do not respect her: "*Sometimes our male children see that you are a woman and just a woman.*"<sup>22</sup> She told us that

*in school when they are told to go and call their parents, they only think it is the father who can be regarded as a parent. The youngest always tell me that, "Now who will I call?" He forgets that I am also a parent. ... He feels a parent is a father ... this child is not even seeing that I am a parent.*<sup>23</sup>

The son is likely reflecting the same attitudes towards women that he perceives in the community. Another woman told us that a woman is not seen as a "person" in her own right before the community; rather, her only chance to have her views heard is if she has a husband willing to speak on her behalf:

*No-one will listen to you... because you do not have a husband. ... And you, as a woman, if you are faced with a problem who will stand up with you? They see you as if you are not a person in front of other people.*<sup>24</sup>

In Nairobi, several women living in Mukuru and Kibera districts (two extremely low income areas, commonly referred to as "slums") described lives tightly proscribed by both gender

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<sup>21</sup> Interviewed in Kisumu, January 23, 2014.

<sup>22</sup> Interviewed in Bungoma, April 14, 2014.

<sup>23</sup> Interviewed in Bungoma, April 14, 2014.

<sup>24</sup> Interviewed in Bungoma, April 15, 2014.

and poverty. Most had experienced sexual violence, both during the PEV and at other times. One woman was abducted and repeatedly raped and tortured, as “payback” for helping another woman who was fleeing violence from her husband. The perpetrator, a policeman, and the husband of the woman she had helped, told her, “*I will teach you never to meddle in other people’s affairs’ and that ‘he will teach me a lesson’.*”<sup>25</sup> A second woman reported that her rapists had said, “*Woman! We will kill you!*” She went on to say that, when she reported the assault to the police, she was not taken seriously; this led her to identify, as key to the possibility of women receiving justice in Kenya, that “*policemen [must] stop despising us.*”<sup>26</sup> She was further disheartened when explaining that, the day before we interviewed her, she had attended a public meeting in her community in which the Chief “*stood and declared that he couldn’t see how an adult could be raped. A real Chief! In front of people....*”<sup>27</sup>

While speaking about specific sexual violence experienced, women’s accounts broadly reveal an underlying contempt for women. This deeply embedded misogyny is not limited to perpetrators, but extends to the community more generally (including, particularly worryingly, officers of the state and community leaders). While some women in Kenya are making important gains – and such efforts must be lauded – the lived reality for a great many Kenyan women is one of profoundly low status, misogyny, and violence.

## 2.4 Psychological aftermath of violence

Most women participants spoke of a deep despair and hopelessness in the aftermath of violence, due both to the violence itself, as well as the lack of justice. Women in Bungoma, Kisumu, and Nairobi expressed profound emotional distress, sometimes rising to the level of feeling suicidal (and, in at least one instance, of planning suicide). Although the distress experienced by the women had peaks and troughs, the despair was spoken about as a long-lasting phenomenon.

One woman from Kibera who had survived multiple separate rapes described a deep physical depression, repeating often, “*I am so, so tired,*” and “*I am tired. I just want to be okay, a normal life. I want to be the <name> I used to be... but I am tired, very tired. I have to push my body to work.*”<sup>28</sup> Another woman was also struggling with the emotional aftermath of her assault, and said she sometimes “*think(s) it would have been better if I died in the house.*”<sup>29</sup> Sexual violence, in particular, causes deep emotional and existential pain; one woman conveyed this pain by saying, “*I find these memories painful. I feel disgraced as a human being.*”<sup>30</sup>

Several women talked about feeling suicidal at various times and to various degrees, ranging from wishing they would simply die, through to contemplating possible ways to die:

*[Y]ou better deal with your issues alone. When the children are sick, it is you alone, whatever you’re alone. So sometimes, such things even give you stress for no reason in the house, until one day I was stressed, I almost drank poison with my children.*<sup>31</sup>

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<sup>25</sup> Interviewed in Kibera, September 30, 2014.

<sup>26</sup> Interviewed in Kibera, September 30, 2014.

<sup>27</sup> Interviewed in Kibera, September 30, 2014.

<sup>28</sup> Interviewed in Kibera, September 30, 2014.

<sup>29</sup> Interviewed in Kibera, September 30, 2014.

<sup>30</sup> Interviewed in Kibera, September 30, 2014.

<sup>31</sup> Interviewed in Bungoma, April 14, 2014.

During the Validation Workshop, one woman comforted another by saying

*yes, what I can advise you, do not think of dying. You know there are many people who have killed themselves. Someone feels that, instead of observing my children suffering, I better kill myself you see. And the time you kill yourself, you give children a double problem. If the children are suffering when you are present and what about when you are not there? They will be street children now. It is better to be present.*<sup>32</sup>

A woman from Bungoma described psychological distress that may have previously escalated to the point of psychosis. She said that she lacked insight into how badly affected she was, and that it was only after receiving assistance that she could look back and see its true extent:

*I reached a point where people were telling me that it was as if I was not psychologically well. But I did not see, I believed that I was fine.*<sup>33</sup>

Another woman from Bungoma said that she continues to struggle with the pain of her experiences in the PEV:

*How will we remove that wound, because whatever you do or no matter how you stay that issue in the heart? It is as if it was done yesterday. The memory is fresh in our minds everyday... It is as if it happened yesterday.*<sup>34</sup>

Women from Kisumu conveyed similar feelings of overwhelming hopelessness and despair. One woman spoke of her steady decline in both economic and emotional well-being as a result of the post-election violence of 2007/2008; both she and her husband were severely beaten during the violence, resulting in lasting ill health and disability. She said that her primary goal in life is to ensure her children receive an education; however, her injuries mean that she is often unable to work, and, consequently, she cannot pay school fees:

*For real, I have tried. When I am going to work my back is paining and I am not able to work. And even my husband has pain when he works. So there is no way my children can get support. I lost hope after that violence and said [to myself], "There is no need to stay in this world if you cannot work and feed your children."*<sup>35</sup>

When women from the different research sites came together in Nairobi for the Validation Workshop in June 2015, held to discuss their experiences and the research analysis to date, one group reported back that

*we realised that in our group our challenges are not the same, but it brings us together because we have the one from Mount Elgon where they witnessed when their people were being killed, we have the one for the Internally Displaced and the one for <the Coast> whose son was killed when she was in school in Tana River. Then mine. If you look at them, they are different but the trauma is the same.*<sup>36</sup>

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<sup>32</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>33</sup> Interviewed in Bungoma, April 14, 2015.

<sup>34</sup> Interviewed in Bungoma, April 15, 2014.

<sup>35</sup> Interviewed in Kisumu, January 23, 2014.

<sup>36</sup> Interviewed during Validation Workshop, June 22, 2015.

Little formal assistance is available to women attempting to recover psychologically after violence. One woman explained that she received medical help for the physical injuries and illnesses following the sexual assault, but that without counselling, *“The services which are in the health system do not bring you to your normal self, you remain half way.”*<sup>37</sup> This woman was eventually able to access counselling, and urged that counselling be included in post-rape care services as an essential, rather than additional, form of treatment. Some women had received some assistance after experiencing violence, but the standard of that treatment is questionable; nonetheless, women simply took what was available to them:

*The counselling post-rape care services are free in government hospitals. They are free but not the best, so you just take it because it is what is available.*<sup>38</sup>

Much after-violence care was provided by church and voluntary organisations, and consisted primarily of advice that women should forget and move on. As one woman in Bungoma said,

*[s]o they talked to us and told us to persevere and move on after the death. That we just forget and get a way of healing from the pain. Only that and we do not know the ways which can help us to heal the wound.*<sup>39</sup>

Another woman, based in Nairobi, explained that, when she went for counselling at the hospital, she was attended to by a different person on each visit, and had to re-tell her story: *“I feel that is like traumatising someone two times.”*<sup>40</sup> Several women also complained that confidentiality had not been kept, and that their trauma had become known throughout their communities:

*You would call err... “Where is that” ... Look at the cards and ask, “Where is that lady... where is so and so who was raped?” And you are talking in an open place in the office where there are other people there.*<sup>41</sup>

*And sometimes you talk to the counsellor and you are confiding in her. Like for me, they all know me in that centre and you hear them talk about your issue aside and it was not something making me happy.*<sup>42</sup>

Despite several bad experiences, the women still wanted counselling. Women asked for help to recover from trauma and grief, recognising that talking allows *“those issues [to] come out little by little.”* Therefore, through counselling, *“You can be removing those things from your heart. But now if you continue to say that is your secret, it is your secret – you will just stay like that you see. So I would request those people bring counselling services.”*<sup>43</sup> Such counselling needs to be long-term and of a professional standard, as one widow from Bungoma explained:

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<sup>37</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>38</sup> Interviewed in Nairobi, September 30, 2014.

<sup>39</sup> Interviewed in Bungoma, April 15, 2014.

<sup>40</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>41</sup> Interviewed in Nairobi, October 2, 2014.

<sup>42</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>43</sup> Interviewed during Validation Workshop, June 22, 2015.



*For us who are affected in Mount Elgon, we would like to be given trauma healing and counselling. Because for sure, you cannot be talked to today and you get healed same day, it takes more time. Healing is a process whereby one needs to take time.*<sup>44</sup>

## 2.5 Displacement

Many of the women that we met had been forced to flee their homes due to violence; in policy and academic circles, this experience is captured in the term “IDP” (or “Internally Displaced Persons”). Such bureaucratic shorthand, however, fails to adequately capture the implications of being displaced, and the cascading social, economic, and political difficulties that follow. Women told us that being displaced from their homes meant a dramatic drop in status, entrenched poverty, ill health, loss of social networks, and a loss of political voice. One woman in Mukuru in Nairobi tearfully explained that

*[t]oday it is seven years and eight months. We have nothing to say because we are poor IDPs. I. D. P. I – Ignorant. D – Disease. P – Poverty. In another place, it is “Internally Displaced Persons.”*<sup>45</sup>

A group of women originally from the Tana Delta region, displaced to Gong’oni in 2012 and still yet to return, tried to explain the inter-connected difficulties that displacement has caused for them. One woman explained that displacement from the land meant that she was thrust into a cash economy at precisely the time she had lost all her capital:

*The difference is, everything is bought you see. You buy food, water and firewood or charcoal. You have to rent a house, everything is money. If you don’t have money, you cannot get food or anything. Every bill in the house is yours. Water is twenty shillings every month because there is a borehole. And at home in Tana Delta, firewood was free, if you want to make charcoal you make it and if you want firewood you bring it from the forest then you cook. But here there is no place to make firewood, no place to make charcoal everything for you is money. In Tana Delta, if you do farming you have food, even if you are doing business, you only buy paraffin, soap you see. ... [A]nd now here I buy everything from the shop and if you don’t have [money], you stay like that [without].*<sup>46</sup>

Being thrust into a cash economy has added to her burdens: “*It is me to struggle with everything with selling my bread to get money to buy food for them (children) and school fees. ... Life is very difficult.*”<sup>47</sup> The displaced women with whom we spoke told us that they were compelled to spend long hours every day seeking casual jobs (such as washing people’s clothes or carrying luggage for small cash payments), or making small food items (such as bread or pancakes) to sell on the street. Most displaced women had been separated from their family and social networks, and thus had little support; one woman expressed her worry at having to leave her children alone while she went in search of money:

*The situation was just like that when people came here. The husband was not at home, so you leave the children as you go to look for work. Because you came, you were a*

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<sup>44</sup> Interviewed Bungoma, April 15, 2014.

<sup>45</sup> Interviewed in Nairobi, September 29, 2014.

<sup>46</sup> Interviewed in Malindi, June 12, 2015.

<sup>47</sup> Interviewed in Malindi, June 12, 2015.

*visitor and did not have food at home and the environment is bad. ... It forced you to leave the children alone without knowing what will happen to them. So it is forcing you to leave and look for food.*<sup>48</sup>

Several women told us that, when they were displaced, they lost whatever political status and recognition they previously had – a social and political fall that was exacerbated when coupled with their additional widowhood. This loss of political status manifested in several ways; one woman described how she was unable to register as an IDP immediately following the outbreak of PEV, as she originated from a different tribe to the other IDPs in that area:

Woman: *When I was in Naivasha, people were being registered but I was not. I looked this side and this side but there is no one who helped me. I found some people had been registered. So I was not registered (as an IDP). I experienced so many problems in that place because other people were helped and I was not helped.*

Interviewer: *And what was the reason why you were not helped?*

Woman: *Because people ... were looking for tribe to write.*<sup>49</sup>

Failure to register meant exclusion from later assistance to help IDPs return home; for many, this meant that they have still been unable to return home eight years later. A group of IDP women in Nairobi, exasperated by their invisibility, have formed a community organisation to try and establish a political voice for people still displaced some eight years after the PEV:

*Imagine for seven years now and eight months, we still continue to cry to the government as Nairobi IDPs. Our Certificate of Community Based Organization is called the United Internally Displaced Persons of Nairobi. They know us, but no one looks at us. We are very many who are suffering in our village, Madhare. I am a leader here, yes I am a leader, but I have nothing. Even if I can get that woman crying because she does not have any food to take, I am the same I don't have. ... But the government have closed their ears and do not want to listen to the issue of the Internally Displaced Person. ... We just want the government to listen to us.*<sup>50</sup>

## 2.6 Widows

Women told us of the particularly low status of widows, and how the death of one's husband often precipitates a calamitous drop in economic and social well-being. While women occupy a very low status in many communities, widows are seen to hold even less value. Several women told us of being evicted from their homes and stripped of all property by their in-laws upon the death of their husbands. One woman from Bungoma told us that, since her husband died, she has been forced into a life of dire poverty due to her inability to realise her inheritance rights:

*Like me, I don't have an alternative because, since my husband was killed, we are living a very shaky life. My father-in-law sold the land which was for my husband.*

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<sup>48</sup> Interviewed in Malindi, February 5, 2014.

<sup>49</sup> Interviewed in Kisumu, January 23, 2014.

<sup>50</sup> Interviewed in Nairobi, September 29, 2014.

*They even took the plot I bought and sold it. They sold that plot in 2010 and it was finished.*<sup>51</sup>

Another woman in Marafa said her sister had been “chased away” by her in-laws:

*There is a sister of mine whose husband died and the people of the husband took everything home, to the extent that the children were left with her and everything was taken. They left her like that. ... The parents of the husband took everything.*<sup>52</sup>

Some widows who were not evicted were “inherited” by a brother-in-law, or are pressured to re-marry regardless of their wishes. One widow in Mukuru, Nairobi, explained that she cannot return to her home (where she has property) because she will be given to a brother-in-law. She is HIV positive, and wants neither to disclose to her family, nor to infect her brother-in-law. Instead, she is living in poverty in a Nairobi slum.<sup>53</sup> One woman in Bungoma described widowhood as being “as if you are disabled, but it’s because you don’t have a husband.”<sup>54</sup> She spoke of being discriminated against, stigmatised, and excluded by her community, while “hearing them [community members] throw words at you.” She told us that she believes her community needs to rethink its attitudes towards widows, pointing out that widowers do not face the same rejection, and that

*[d]eath is for everyone. It can be that the husband goes first or sometimes the wife goes first. They should love the one who remains, just the same way they loved them when they were a couple.*<sup>55</sup>

Another widow from Bungoma asked that the community

*try to take care of us. We are requesting the community that, if they were the brothers of our husbands, why do they hate us now?*<sup>56</sup>

## **2.7 Children**

All the women participants were very concerned about their children. Women told us very clearly that their own well-being and justice needs cannot be separated from their children’s. While concerns for their children included access to food, health care, and safety and security, two issues emerged as overwhelmingly dominant in women’s minds – their children’s education, and healing from trauma.

Women told us that, amid the violence and chaos of conflict, they had largely been unable to prevent their children from witnessing traumatic events and violent attacks on family and community members. One woman from Kisumu whose husband was murdered, and who was herself gang raped and infected with HIV, said that her children had witnessed the attack and now cry at night time. She said that they are now fearful of her leaving the house, and they do

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<sup>51</sup> Interviewed in Bungoma, April 15, 2014.

<sup>52</sup> Interviewed in Marafa, February 5, 2014.

<sup>53</sup> Interviewed in Nairobi, September 29, 2014.

<sup>54</sup> Interviewed in Bungoma, April 14, 2014.

<sup>55</sup> Interviewed in Bungoma, April 14, 2014.

<sup>56</sup> Interviewed in Bungoma, April 14, 2014.

not want to return to their home village (and the site of the attack).<sup>57</sup> A woman from Kibera, Nairobi, was gang raped during the PEV, and said that

*[w]hat saddened me most, my child was present... who was then two years old... that is what hurt me most. They raped me under the eyes of the child. When they finished, they went out and left. When they left I was there despising myself, weeping... "Which kind of a person am I?"*<sup>58</sup>

Another woman from Kibera who was struggling to manage her daily routine expressed concern about the effects of her post-rape depression on her daughter:

*My daughter seems disturbed. She is ten going to eleven. But the way she looks at me she doesn't want to make me angry... she chooses the right words to talk and she doesn't go out to play at all. And I feel sad that she can't be a normal child, but again, I don't know what to do.*<sup>59</sup>

This concern for protecting children was shared across all the research sites, as a woman from Bungoma expressed:

*Imagine and tell me if that issue will ever leave the memory of those children. Your father's head being cut, separated from the body as you watch him. Tell me if that thing will ever come out of those children.*<sup>60</sup>

In addition to their children's present-day emotional well-being, women told us that they are struggling to ensure their children get an education. While some women reported that they are able to pay school fees, they more commonly are not, and their children's education is disrupted and left incomplete. When asked about what would help them feel a sense of justice had been achieved, overwhelmingly, the most common answer was for their children to be educated. One woman simply said, "School is all. There is nothing as important as that one";<sup>61</sup> another was very clear that education for children was her first priority for justice: "I feel the community should put education of children ahead of all needs. They should look at education especially for the children."<sup>62</sup>

Women told us of going without meals, selling the last of their livestock, and taking out loans in order to pay their children's school fees. Women explained that their own and their children's futures were dependent on their children getting a good education. As one woman explained:

*Yes I have two children <in high school> and now I give maize. Now, it would be good if the government would have helped us in education of our children because we can hustle to get other needs but if children are educated they can rescue us some days. So for me I feel education is something very important.*<sup>63</sup>

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<sup>57</sup> Interviewed in Kisumu, January 23, 2014.

<sup>58</sup> Interviewed in Nairobi, September 30, 2014.

<sup>59</sup> Interviewed in Nairobi, September 30, 2014.

<sup>60</sup> Interviewed in Bungoma, June 22, 2015.

<sup>61</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>62</sup> Interviewed in Bungoma, April 14, 2014.

<sup>63</sup> Interviewed in Bungoma, April 14, 2014.

Another woman stated the following:

*Now when you start thinking this life has become difficult and children are not going to school, how will life be, it will be very bad because they have not gone to school... They have not gone to school and these days someone must go to school for life to be good.*<sup>64</sup>

Some women were unable to find enough money for all their children to go to school, and consequently had to choose which child(ren) to send. This decision sometimes carried gender implications, as boys remain with their natal families even after marriage. One woman told us that she could afford for only one of her two children to attend school, after becoming internally displaced:

*[My] children who were going to school, now one of them is at home and one is trying his luck. I do not know if I will manage because I do not have any source of income. The girl remains at home and the boy continues with his education.*<sup>65</sup>

Several women recognised their own lack of education as exacerbating their current difficulties, and their inability to escape a life of poverty and vulnerability to violence and exploitation. One woman in Nairobi said that she advises her daughter to “go to school because I would not want her to stop where I left school and that men should not cheat her.” When asked what rights women should have, she replied,

*[o]nly education, education. Because it is only education which always helps women. If you have education in your brain, you cannot fail to get support. Those who are helping themselves are those who are educated. And it is because you are low there is no place you have reached in education.*<sup>66</sup>

## 2.8 Accessing justice

When asked about obtaining any kind of justice for their experiences, women expressed almost universal despair, repeating that “there is no justice,” variously formulated:

*Justice is never served here at Kibera.*<sup>67</sup>

*If it happened to your mother, it will happen to you. And so I feel there is no justice being done. There is no justice.*<sup>68</sup>

*In relation to this violence, no-one would help us, because the people from human rights office came and they saw how the houses were being burned and property taken. They only asked questions. When they are gone, they are gone. Nothing was being done. ... So we are orphans, we do not have a government.*<sup>69</sup>

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<sup>64</sup> Interviewed in Validation Workshop, June 22, 2015.

<sup>65</sup> Interviewed in Marafa, March 27, 2013.

<sup>66</sup> Interviewed in Nairobi, September 30, 2014.

<sup>67</sup> Interviewed in Kibera, September 30, 2014.

<sup>68</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>69</sup> Interviewed in Marafa, March 27, 2014.

*As women, there is no justice we've got.*<sup>70</sup>

Women identified a plethora of obstacles to justice, including the low status of women; ignorant and misogynistic attitudes within both formal and traditional structures; the prohibitively high costs associated with seeking justice; a lack of knowledge about justice systems and processes; widespread bribery and corruption; fear of reprisals from perpetrators and community leaders; and a lack of confidence that justice can ever be attained by women.

Women observed consistently poor police responses to reports made by women, whether about sexual assault, physical violence, or property offences. As one woman from Kibera explained,

*the first thing we really deserve is for these policemen to give us our rights. If someone goes and reports they should stop considering it as a joke... or they look at you and despise you... or they would tell you: "Buy some fuel for our car, and we'll go and arrest your aggressor!" So the first thing is about those policemen. Let them stop despising us. You go there to seek help and they don't provide any.*<sup>71</sup>

A woman from Bungoma spoke of a similar police response there. She said that, *"When we are giving police our information, they should take action and look at it carefully and as a priority on the issues of women, not that when you are reporting they handle it as if it did or did not happen."* She continued, explaining that police usually inform the perpetrator of the identity of the complainant who made allegations against them: *"They even say the name of the person who reported. ... So the police are the ones bringing problems."*<sup>72</sup>

Women repeatedly cited a lack of confidence in government authorities' willingness and ability to protect them, upon receiving reports of crimes, as a major deterrent in seeking justice. In both locations, perpetrators have threatened women with murder if they report to the police or hospital – threats which continue to frighten and silence women several years after the peak of the conflict: *"Again we fear for our lives because, like me, I have not accepted to open up so much because we stay with those who violated us."*<sup>73</sup>

Women seeking justice through traditional mechanisms reported that traditional leaders did not take complaints by women seriously, and too often saw violence against women, particularly domestic violence, as a "private matter" to be dealt with from within the family:

*You find that a woman is violated in the house, the man even says that, "This woman I will beat you to death." If you take your complaints to the Chief, he chases you away and tells you that, that is a case to be sorted at home and when you continue staying you get that the husband beats you to death and you were reporting about it. Now, when will justice be done?*<sup>74</sup>

Another woman said that she reported her husband to the police for domestic violence, but that the village elders intervened and encouraged her to withdraw the complaint *"as he was*

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<sup>70</sup> Interviewed in Nairobi, September 30, 2014.

<sup>71</sup> Interviewed in Nairobi, September 30, 2014.

<sup>72</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>73</sup> Interviewed in Bungoma, April 14, 2014.

<sup>74</sup> Interviewed during Validation Workshop, June 22, 2015.

now looking miserable.”<sup>75</sup> The woman withdrew her complaint, and now continues to live with violence from her husband.

The patriarchal attitudes of both traditional leaders and police are exacerbated by widespread corruption and women’s weaker economic position relative to men. As one woman from Kisumu explained,

*[t]he reason why their behaviour is difficult to deal with is because... if you go to the Chief, he tells you to go to your village elder. And your village elder has been given bribes by the perpetrator and he has been released in a clever way. Then he takes him to the Chief’s camp, where the Administration Police (APs) are, then he gives bribes there again and comes back. And ... so you are left wondering what you can do.*<sup>76</sup>

Women in all research sites repeated that corruption and the inability of women to pay bribes was a major obstacle to getting justice. As a woman from the Tana Delta said, “*An empty hand is not licked.*”<sup>77</sup> Another woman from Nairobi explained that

*you know a poor person has “got no right” (a poor person has no voice). Our Kenya has become “a Kenya of something small” (bribes). It has become a Kenya of something small (she repeats). I can be violated but when I report that; maybe that person has done that to me because he has money. But because I am a poor person, when I take my complaints there, I will not be heard. But with him, once he goes and gives money, even if you arrest that person and put him in prison, that person will take two days and you see him outside (one of the respondent agrees with her). Because he has money.*<sup>78</sup>

Women respondents told us women have less money than men, and that corruption throughout most systems disproportionately disadvantaged women. Women told us that repeated failings by the system to respond to women’s justice needs discouraged them from even attempting to seek justice:

*Many cases regarding women just get stuck in the air because they are weak people who do not have money. So this will make those who are coming behind with such cases view it as “this first person did not succeed, so why should I report?” So and so reported, where did it reach? It just got stuck.*<sup>79</sup>

Corruption, misogyny, poverty, a lack of protection, and a lack of knowledge on how systems work all combine to put justice beyond the reach of a great many women in Kenya. One woman from Mukuru, Nairobi, had tried all avenues within her (limited) reach, and simply concluded that “*I tried all the means and left it for God to be my help, because when you run after a human being you feel tired.*”<sup>80</sup> A woman in the Marafa area reached the same conclusion: “*Where will we get our rights? Maybe we look for it from God?*”<sup>81</sup>

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<sup>75</sup> Interviewed in Kisumu, November, 2013.

<sup>76</sup> Interviewed in Kisumu, March 20, 2014.

<sup>77</sup> Interviewed in Marafa, February 5, 2014.

<sup>78</sup> Interviewed in Nairobi, October 1, 2014.

<sup>79</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>80</sup> Interviewed in Nairobi, September 29, 2015.

<sup>81</sup> Interviewed in Marafa, March 27, 2014.

The lack of justice for women has led to many of the women participants expressing a profound lack of confidence in the Kenyan government. A group of women from all research sites told us during the Validation Workshop that it would be futile to take the research report to the Kenyan government:

- Woman 1: *They [the government] know everything, they know where you were staying, they know that you were violated, they don't care.*
- Woman 2: *The government is not helping with anything. We will continue crying just like that. No one will listen to the voice of the weak. We will remain weak like that.*
- Woman 3: *Because we have talked until we are tired. We have even demonstrated here in Nairobi. There is nothing we have not tried, you see. We have even gone to those offices, but nothing.<sup>82</sup>*

## 2.9 Resistance

Notwithstanding their ongoing distress and their despair at the belief that justice is beyond their reach, we also met women in each of the research sites who are determined to overcome their low status, and who are willing to engage in justice systems, community-based women's empowerment groups, and in political lobbying. We met several women who, despite the serious risks to their personal safety, had testified to commissions of inquiry (such as the Truth, Justice and Reconciliation Commission), and who expressed a willingness to testify in legal proceedings. When asked what gave her the strength to testify, one woman responded by stating the following:

*First, I have pain, there are people who died when I was seeing. Secondly, I am now using medicine, which I was not using...I was doing business and now I have gone backwards. So that is something that has become a wound because even if you have support, you cannot go to someone with one cup every day to give you tea. He may help you once or twice. I may have my tea today, but who will I go and beg from tomorrow? So I have pain in my heart and such issues are the ones which can drive me to go, stand and speak the truth.<sup>83</sup>*

Another woman in Bungoma explained that, although her community sees women as holding little or no value, she rejects that position:

*As women, most of the time we are just regarded as nothing at all. But if you look at it deeply, we are very much of importance. ... You will always find men in a meeting talking to each other about issues in the community and the government. They don't involve women, but women have a good contribution [to make]. And so we deserve respect as any other human being.<sup>84</sup>*

While we met women whose energy is entirely consumed in daily survival, and who feel "tired" and "cheated" by multiple government agencies and other organisations repeatedly

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<sup>82</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>83</sup> Interviewed in Nairobi, September 30, 2014.

<sup>84</sup> Interviewed during Validation Workshop, June 22, 2015.



failing them, we also met a significant number of women in all four research sites that are engaged in such women's empowerment activities as participation in financial and emotional mutual support groups, and lobbying of the government and other leaders for improvements in women's lives. For example, we interviewed a woman who is a co-leader of the "United Internally Displaced Persons of Nairobi," an organisation started and run by people displaced to Nairobi during the PEV, and who have not received any justice or recognition of their continued displacement. The group have lobbied several government agencies, and, in August 2014, were invited to testify to a Parliamentary Committee.<sup>85</sup> Another woman had started a therapeutic group for women following sexual violence, and a third was actively engaged in awareness raising around HIV/AIDS.

While many of the problems that women face are deeply embedded within Kenyan social, political, and legal norms, there are also strong foundations among the women themselves for building movements which seek to raise women's status across regional, ethnic, and class differences. The women that contributed to this research continue, for all the failings of justice mechanisms, to see justice as a goal worth striving for; in the words of one participant,

*I would just request that justice be done, you see. Justice be done. Justice be done to everyone who was violated. You know if justice is done to you, you will remove that wound from your heart.*<sup>86</sup>

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<sup>85</sup> Interviewed in Nairobi, September 30, 2014.

<sup>86</sup> Interviewed during Validation Workshop, June 22, 2015.

## **CHAPTER 3: WOMEN’S NEEDS AND PRIORITIES FOR JUSTICE IDENTIFIED**

Seeking to identify women’s understandings and experiences of “justice” were core objectives of this research. While there were a range of views and experiences of justice, there was also significant coherence across the views of women interviewed. Justice is universally held as very important, with a high level of agreement about the constitution and objectives of justice. Women also reported similar obstacles and difficulties in accessing justice.

The conflicts in Kenya have caused massive harm to the physical, emotional, social, and economic well-being of many Kenyan women, as attested to by the women participating in this research. While accountability measures are critical forms of justice, they are insufficient per se. Several women wanted their attackers to be prosecuted, and many raised systemic failings in Kenyan politics and justice institutions (the police and courts in particular) as obstacles to their attaining justice. Overwhelmingly, however, women spoke about justice as reaching far beyond legal and political rights, and firmly centred economic, social, and cultural justice. Laplante and Theidon proposed that justice mechanisms which focus on criminal prosecutions and other retributive justice mechanisms may replicate class privilege:

[A] preference for retributive justice may follow class lines and is a luxury afforded only to victim-survivors without economic hardship. Among the rural poor, demands for justice are overwhelmingly expressed in an economic idiom: the struggle to survive results in practical considerations such as the need for farm animals, suitable housing, or education for their children. (2007, 243)

This was echoed strongly by women in this research, who, when asked about what would help them feel a sense of justice had been achieved, overwhelmingly responded with measures that would help them re-establish a sustainable economic base for themselves and their children, and support mechanisms to enable them to attain an acceptable level of physical and emotional health. In addition to legal justice needs (addressed in Chapter 4), women in this study identified their justice needs for:

- Safety and security;
- Health;
- Education; and
- Economic justice.

Gender sensitive social and economic justice needs to be centrally included in Kenya’s transitional justice programmes.

### **3.1 Safety and security**

Women in this research shared with us harrowing stories of violence, including: sexual assault; domestic violence; attacks using guns, pangas and other weapons; violent home invasions; and sexual and physical attacks on their children, siblings and husbands, many of which resulted in serious injury/illness or permanent disability, and even death. This occasioned lasting trauma and grief. Women identified a wide range of perpetrators of this

violence, including rival ethnic groups and clans, militia (often youth) associated with different political parties, policemen, the GSU, army personnel, employers, neighbours, husbands, sons, and other civilians.

While some of this violence occurred during the 2007/2008 post-election violence (PEV), the violence that women in Kenya experience extends well beyond that crisis period. Violence is directed against women in Kenya on a daily basis and severely curtails their ability to gain an education; earn an income; participate in social, cultural, and political processes; raise their children; enjoy good health; and lead peaceful, fulfilling lives. Violence against women is a scourge, and all women in this research want their society to take it seriously and act to ensure women's safety.

Women told us of violence in their homes, workplaces, and on the streets. One woman told us that her husband and two older sons (aged 23 and 25 years) all drink heavily and beat her: *"They have beaten my eye, my head, they removed my teeth."*<sup>87</sup> Another woman said she often has to sleep in the bush, to escape her husband's violence. This woman made a complaint to the police, but later withdrew it for fear that her husband would be jailed and she would be thrust further into poverty; this was so because she has a permanent injury following an attack from her husband, using a panga: *"I am not able to work well because of my (injury)."*<sup>88</sup> Instead, she went to her parents for help, but they refused, saying that they *"had paid dowry, go back and stay with him."*<sup>89</sup> She has also taken the matter to the traditional elders who *"sat down with him... and the man apologised."*<sup>90</sup> She said *"the case ended there,"* but the violence did not; the violence *"is still there. Even today, he chased me and I slept outside the house."*<sup>91</sup>

During the Validation Workshop in Nairobi, a group of women (one from each research site) discussed the lack of regard for women's safety among the community, traditional leaders, police, and political leaders:

- Woman 1: You know these days women are even violated by their husbands in the house. You find that a woman is violated in the house, the man even says that, "Woman I will beat you to death!" If you take your complaints to the Chief, he chases you a way and tells you that it is a case to be sorted at home and when you continue staying you get that the husband beats you to death and you were reporting about it. Now, when will justice be done?*
- Woman 2: Like there was a widow (in Mount Elgon) who got another man and the man was frustrating her and so she left the man and rented a house. She lived a very difficult life. In the end that husband followed her and killed her and five children are now just left alone like that, their father died and that man again killed their mother. He slaughtered her at night.*
- Woman 3: You see that is a problem and may be that woman used to talk about it, she may have been going to report that case but when she goes no one was taking action.*

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<sup>87</sup> Interviewed in Kisumu, March 20, 2014.

<sup>88</sup> Interviewed in Kisumu, January 23, 2014.

<sup>89</sup> Interviewed in Kisumu, January 23, 2014.

<sup>90</sup> Interviewed in Kisumu, January 23, 2014.

<sup>91</sup> Interviewed in Kisumu, January 23, 2014.

- Woman 1: *And imagine that area has police men.*
- Woman 2: *They are there, the police officers are there.*
- All: *There is no justice.*
- Woman 2: *The report can be taken everywhere and then they say that we are playing with the government, then that can also bring us problems because everyone talks about the government, later they will say that we are playing with them. If this report is taken we will not survive.*
- All: *Yes.*
- Woman 3: *Because we have talked until we are tired, we have even demonstrated here in Nairobi. There is nothing we have not tried, you see. We have even gone to those of their offices but not yet.*
- Woman 1: *When you start demonstration many people die because they threw tear gas and many people die. There was a day people were demonstrating in Malindi and a woman died.*
- Woman 2: *I would just request that justice be done, you see. Justice be done. Justice be done to everyone who was violated.*<sup>92</sup>

A young Nairobi woman told of being raped on three separate occasions. The first was an opportunistic attack by a stranger, the second by her employer and two of his friends, and the third by a policeman. She explained that her last two rapes were particularly violent and left her with serious physical injuries in addition to the psychological harm caused. She explained that even though she was in a sexual assault support group, she felt unable to tell her group members about her most recent attack:

*It has happened to many, many women and people just choose not to talk about it because either it is too shameful or I don't know, it is something that the society first judges you. They will ask you, "Why didn't you scream? What were you wearing? Where were you?" And now, like me, it has happened to me three times and they are like, "Eeh! You are cursed!" you know. And they just tell you in your face. And to avoid all that, I rather not talk about it.*<sup>93</sup>

Like almost all the women interviewed, she has never received justice for any of the attacks, stating that *"there is no prosecution in Kenya."* She believes that prosecution is essential for women's safety, and for social attitudes around rape to be changed; if *"there are more and more people being prosecuted in a shorter period. It will give even more strength to come out and to also instil fear in the men."*<sup>94</sup>

These accounts are supported by other studies into physical and sexual violence in Kenya, both during the PEV and more broadly. Reliable statistics are not available, as no institution in Kenya collates comprehensive statistics on violence against women or on sexual violence (McEvoy 2012, 22). Nonetheless, there is an abundance of qualitative and quantitative data which points to extraordinarily high levels of physical and sexual violence directed against women and girls on a daily basis. Johnson et al. (2014, 5) found that 26.1 percent of 916 households surveyed experienced at least one sexually violent attack during the PEV, and that 32.9 percent of women reported having experienced sexual violence in their lives. The International Rescue Committee reported that 43 percent of Kenyan women aged 15–49 years have experienced either physical or sexual violence in their lives, and that 13 percent

<sup>92</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>93</sup> Interviewed in Nairobi, September 30, 2014.

<sup>94</sup> Interviewed in Nairobi, September 30, 2014.

had experienced sexual abuse within the preceding 12 months (IRC 2014, 19). McEvoy (2012, 10) reports that 45 percent of Kenyan women have experienced sexual or physical violence, and, concerningly, that 72 percent of 240 participants surveyed thought that “rape, defilement and battering were not serious crimes.” There is a broad consensus that the incidence of rape rose dramatically during the PEV (Johnson et al. 2014, 5; McEvoy 2012, 11; CIPEV 2008, 237), with Amnesty International and CSI Nairobi estimating that some 40,000 rapes were committed between December 2007 and June 2008 (CSI 2008, 3; Amnesty International 2014a). UNAIDS reported alarmingly high levels of violence against women and girls in 2006, one year before the PEV; it reported that 83 percent of women and girls experienced at least one episode of violence during childhood, and 46 percent of women and girls reported at least one episode of sexual assault during childhood (UNAIDS 2006, 6). Johnson et al. (2014, 6) found that, while incidents of violence have decreased after spiking during the PEV, they have not returned to pre-PEV levels, and now occur at a rate of 42.0 incidents per 1000 persons per day. This elevated new “norm” is of particular concern, as there is a positive correlation between normalisation of violence in society and rates of violence against women (McEvoy 2012, 11).

Both sexual and physical violence against women in Kenya is at epidemic proportions, and ought to be seen as a national emergency. Women told us that they want and need safety as a basic right, and as a pre-requisite to be able to earn an income, access healthcare, move freely, and raise their children; however, they have little confidence in their government making their safety a priority.

One woman from Kibera in Nairobi explained that violence affects “*many women,*” and asked that authorities “*consider rape as a serious offence. When you are raped and report the case, you seem to be responsible for your own predicament.*”<sup>95</sup> A second woman in the group agreed, adding that “*there (should) be agents patrolling around and watch out for people who might get molested... so that if they come across such cases, they take the person where she can be attended to.*”<sup>96</sup> The women explained that safety and security in Kibera is so bad that, even if a child is acutely ill during the night, they must wait until morning before they can leave their homes and seek help. Several women, particularly in Bungoma, Kisumu, and Nairobi, said that an acute lack of security during the PEV (and preceding violence in Bungoma) prevented them from accessing medical help after being attacked. This was raised most prominently by women who had been unable to access Post-Exposure Prophylaxis (PEP)<sup>97</sup> treatments within 72 hours of a sexual assault, and who consequently were infected with HIV.

Women from the Tana Delta region reported that “*our biggest challenge is security. If there was security our properties would not have been destroyed, people would not have been killed and the women would not have been raped, some lost.*”<sup>98</sup> During the Validation Workshop, a group of women from all research sites expressed their despair that the government and its agencies do not take their experiences of violence and injustice seriously:

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<sup>95</sup> Interviewed in Nairobi, September 30, 2014.

<sup>96</sup> Interviewed in Nairobi, September 30, 2014.

<sup>97</sup> PEP (Post-Exposure Prophylaxis) is a medical treatment programme involving a range of medications aimed at preventing unwanted pregnancies, and reducing the chances of a sexual assault survivor contracting HIV (or other STIs). To be effective, PEP treatment must begin within 72 hours of the assault. For more information about the treatment, see Chacko et al. (2012).

<sup>98</sup> Interviewed during Validation Workshop, June 22, 2015.

- Woman 1: *They (the government) know everything, they know where you were staying, they know that you were violated. They don't care. The weak ones do not have their rights.*
- Woman 2: *They know everything.*
- Woman 1: *They have every information but they don't want to use it.*
- Woman 3: *You know with me sometimes, I always stay alone like this, then I start thinking, should I leave Kenya so that I can stop being called a Kenyan?<sup>99</sup>*

Many key informants confirmed that violence against women is not taken seriously, and recognised the need for comprehensive action to ensure women's safety. A conflict prevention and peace-building consultant told us that *"there has not been acknowledgement (of sexual violence against women). And I would say that truth and acknowledgement... would be a top priority (among women survivors)."*<sup>100</sup> A community worker and elder in Mukuru told us of her frustration at trying to get local authorities and traditional leaders to take both sexual and physical violence against women seriously. After explaining the failure of several initiatives, she concluded that *"the community is ignorant, the police are corrupt... and in the community, the woman can never stand and say anything."*<sup>101</sup> A lawyer with a government agency based in Kisumu explained that *"the systems we rely upon to protect them actually are the same systems that violate them."*<sup>102</sup> She outlined many of the difficulties for women seeking criminal justice following violence, and urged a more holistic approach that incorporated women's refuges, as well as legal, medical, psychosocial, and economic supports, but said that *"[t]he systems have to be put in place by the government itself, not by NGOs. The government should take the lead in these issues... If they (women and girls) are not protected then we don't have a society."*<sup>103</sup>

In spite of the overwhelming evidence of the extraordinarily high rates of physical and sexual violence against women in Kenya,<sup>104</sup> there remains no central database recording typologies or trends in violence against women, nor any central agency with the mandate and responsibility to coordinate and drive multi-sectoral reform and intervention to reduce violence against women (NCRC 2014, 69). While some local offices of government agencies and non-government organisations are running programmes in a range of sectors (such as health, criminal justice, community outreach, and development), the impact of such programmes will necessarily be limited while working at the margins, without clear, consistent, and resourced leadership from the Government of Kenya. Government acknowledgement of the gravity of violence against women is a necessary pre-condition for any substantive improvement to women's safety. The Government of Kenya needs to immediately task and fund an existing statutory body to create and maintain a national database on violence against women, with a view to establishing a comprehensive picture of the typologies of violence, prevalence, and incidence; this would constitute an essential step in seriously targeting violence through policy and law.

<sup>99</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>100</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>101</sup> KI, interviewed in Nairobi, September 29, 2014.

<sup>102</sup> KI, interviewed in Kisumu, March 20, 2014.

<sup>103</sup> KI, interviewed in Kisumu, March 20, 2014.

<sup>104</sup> See, e.g., UNCEDAW (2011); NCRC (2014); CIPEV (2008); Heise et al. (1999); Kamari-Mbote (2000); OMCT (2008); TJRC (2013c).

## 3.2 Health

Women in Bungoma, Kisumu, and Nairobi told us of catastrophic health consequences resulting from violence, particularly from sexual violence. A very high proportion of women interviewed had been infected with HIV due to sexual violence, and many had lasting pain and injuries (including disabilities); some are now carrying the additional burden of caring for orphans, and for children and husbands severely injured and/or disabled due to violence. In addition to the major physical health consequences of violence, women spoke to us about lasting trauma, grief, and depression, and the near-total absence of any effective psychosocial services, particularly outside the capital. Sexual and physical violence creates major lasting health problems, both physical and emotional. Access to holistic and effective healthcare services following violence is critical for women's legal, economic, and social justice. The health needs reported by women participants in this study primarily relate to needs arising from sexual assaults, physical assaults, and the mental health consequences of violence.

### 3.2.1 Health needs after sexual assault

The impacts of sexual violence on women are well documented (WHO 2003; WHO 2002, 147–74; Liebling et al. 2012). Health impacts associated with sexual violence are wide ranging, and include: HIV-AIDS; reproductive and gynaecological health problems, such as unwanted pregnancies, unsafe abortions (and pregnancies carried to term); fistulas; infertility; genital injuries; vaginal bleeding and infection; physical injuries, most commonly urinary tract infections; pelvic pain and pelvic inflammatory disease; bruising following blunt-force trauma; incised and stab wounds; abrasions (e.g. grazes and scratches); bruises and contusions; lacerations; ligature marks on ankles, wrists and neck; pattern injuries (e.g. hand prints, finger marks, belt marks, and bite marks); anal or rectal trauma; and sexual dysfunction (WHO 2003, 12–13, 39–44, 51–52; WHO 2002, 101, 162–68; Ohambe et al. 2005, 39). Sexual assault can also cause cardiopulmonary and neurologic symptoms, including “shortness of breath, palpitations, cardiac arrhythmias, chest pain, asthma, hyperventilation, choking sensation, numbness, weakness or faintness, insomnia and fatigue” (Jina and Thomas 2013, 18).

A significant number of women participating in this study had been raped. They attested to wide ranging and severe harms, including long-lasting injuries and pain, infections, unwanted pregnancies, and HIV infection:

*I was injured in that way of raping by more than three people but my body has not healed... I still have problems since that time they did that to me. (My period) stopped at once... and I am now feeling pain, my back, my stomach is paining. So I do not know if it is sickness or what.*<sup>105</sup>

*He got hold of me and raped me inside that plantation. When he heard those people he was putting the panga on my neck that he was killing me if I make noise. Since that day I do not have good health. I get sick on and off, my health is not in good condition.*<sup>106</sup>

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<sup>105</sup> Interviewed in Bungoma, April 15, 2014.

<sup>106</sup> Interviewed in Kisumu January 20, 2014.

*I went to Masogo hospital and was tested if I was having HIV. I was tested three times and it was found that there was no disease but my heart has not been in peace, I have a heart problem. Even now if I receive abrupt information, I feel I am trembling.<sup>107</sup>*

*Because it was like a struggle, you want to come out and he wants this and I don't want and that is when he violated me by raping me. Women had a big problem because... ooh my goodness. And you could not know who that person was... It is now seven years and eight months. It was like five years, I did not stop feeling pain here. I have never seen even anybody coming to help me, I was left with stress and again I started being treated for fungal infection. In a way, I don't know where it came from and now I am a sick woman and I don't know where I got that disease, my God no one can help me.<sup>108</sup>*

Many women told us that they either had not sought treatment for injuries, or that there had been a long delay (several months, or even years) before they accessed medical treatment. There are a host of reasons for this (addressed in Section 3.3). Several women reported that their assailants used severe violence during the rape, including weapons such as pangas and guns. Several women who were raped, both during the PEV and more recently, reported gang rapes. Jina and Thomas (2013, 21) reported that rape during conflict is often “more aggressive,” and that “gang rapes are also more common,” both of which result in increased genital trauma, risk of HIV infection, and psychological trauma.

A woman from Bungoma described what is likely an untreated fistula, almost ten years after she was raped by four men:

*After that I started experiencing in my private part, that when I sit, air is coming out, and if I feel like urinating and I fail to go quickly, it just comes out by itself.<sup>109</sup>*

One woman in Nairobi spoke of how she became pregnant from rape and did not want to have the baby. She did not have the money to go to hospital, and so attempted to abort the pregnancy herself:

*I tried abortion the local way of taking strong tea. At one point I took some bleach. I took very funny, funny stuff expecting the pregnancy to come out but it didn't. After all these tries, all these methods refused and I now attempted suicide you know, because it is cheaper than doing an abortion.<sup>110</sup>*

The Gender Violence Recovery Centre in Nairobi observed an increase in the number of gang rapes reported to it by patients (GVRC 2012, 11), and an increase in the number of children needing its services:

[T]he data reflects a worrying trend; year on year, the GVRC is now treating more female children than adults, indicating that large numbers of minors are being targeted for defilement. (GVRC 2012, 9)

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<sup>107</sup> Interviewed in Kisumu, January 23, 2014.

<sup>108</sup> Interviewed in Nairobi, September 29, 2014.

<sup>109</sup> Interviewed in Bungoma, April 15, 2014.

<sup>110</sup> Interviewed in Nairobi, September 30, 2014.



Several women in this study recounted multiple sexual assaults; for some, the first attack occurred when they were a child. One woman told us that she was first raped at age twelve: “He was a very big man... I was really very scared.”<sup>111</sup> Other women told us that their children had been sexually assaulted. One woman told us that both she and her eldest daughter were gang raped together during the PEV; her daughter died from injuries sustained during the rape. She and her surviving children spent eight months in an IDP camp, and moved to a Nairobi slum when the camp was closed and the people forced to leave. She was too frightened to return to her home village. Her life in Nairobi, however, is extremely precarious:

*We were chased out of that place and we went to the camp and we stayed there for eight months. So when we were removed from there, that's when we went to rent houses (in Mathare, Nairobi). We had nothing; no front or behind (future or past). That house was for rental and sometimes the owner of the house come knocking asking for money and there is no money. So for me my job was now hand jobs. If you bring clothes, I wash for you so that I can get food. Sometimes that child always stays the whole day without food. In case I get a job to do, we eat but in case I do not get, we sleep without food.*<sup>112</sup>

About two years after moving to Nairobi, a man broke into her home and raped her six year old daughter, leaving her permanently disabled:

*A girl child, she was six years old. When that person got hold of her, people shouted at him. When they shouted at him, the child was in a pool of blood. That is when we rushed her to the hospital but he split these veins. I have suffered a lot with that child to date. She cannot eat alone, she cannot do anything for herself she is like a young child. ... She cannot help herself in any way because the memory was lost and up to now it is like she is like an infant. There is a tube in her neck and I must always stay with her very closely because it gets blocked from the inside and in case it blocks she lacks oxygen. And so I cannot leave her behind. I must always be close to her because that child is like an infant who is born and is being done for everything. I give her food using a spoon, I wash her, everything. I can say as at now she is ten years old but she cannot do anything for herself even turning by herself, she is not able to. She cannot even pick anything for herself.*<sup>113</sup>

Another woman, also in Nairobi, told us about her twelve year old son who was raped:

*Yes, he's my first born. Now at first I hadn't known that he had been victim of rape. I learned very late. One woman revealed that to me and told me: “You should take the child to the Women's Hospital.” The tests revealed that he had been raped. I had thought that it was some indigenous disease and had been making the child to sit down in a basin of water... The intestines would come out of the body... so when the child was tested, it transpired that that man had sodomised him. And when he was interrogated at the hospital, he revealed that the man had threatened to kill him if he ever talked about it. That is the finding they got when they visited the hospital.*<sup>114</sup>

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<sup>111</sup> Interviewed in Nairobi, September 29, 2014.

<sup>112</sup> Interviewed in Nairobi, September 29, 2014.

<sup>113</sup> Interviewed in Nairobi, September 29, 2014.

<sup>114</sup> Interviewed in Nairobi, September 29, 2014.

Her son had surgery to repair his intestines, but continues to have problems. He was also infected with HIV from the rape, and now, in addition to needing a range of medicines, also requires a special diet. The cost of both the medications and his dietary requirements are often more than his mother can manage:

*I'm so stressed that I sometimes pray to God to take me or to take him, to end the suffering... because the child would tell you, "Mother I'm feeling unwell..." or people would come and fetch you because the child is suffering. And you are obliged to carry a grown up boy on your back. So I condemn this administration... but my voice is unheard.*<sup>115</sup>

### 3.2.2 HIV

Several women interviewed had been infected with HIV from rape. A number of women reported that their child(ren) also had HIV, contracted either through mother to baby transmission, or through being sexually assaulted themselves. Kenya has a "high burden of HIV infection," and is among 22 priority countries targeted for assistance from UNAIDS (UNAIDS 2013, 16). There are an estimated 1.6 million people with HIV in Kenya, the fourth largest HIV epidemic globally (AVERT 2015). HIV in Kenya disproportionately affects women and girls; women are more likely to be infected with HIV than men (HIV prevalence among women is 7.6 percent, compared to 5.6 percent among men), and are less able to access treatment than men (an estimated 99,500 HIV positive women are not accessing treatment, compared to 64,900 men) (Ministry of Health 2014a, 4). Of the 88,620 new HIV infections in Kenya in 2013, some 50,530 (57 percent) were women (Ministry of Health 2014a, 5). In the same year, 27,310 women died from HIV/AIDS in Kenya (20,765 men and 10,390 children also died from HIV/AIDS) (Ministry of Health 2014a, 6).

The Government of Kenya recognises that there is a strong link between violence against women and women's over-representation in HIV statistics. In its *AIDS Strategic Framework 2014–2019*, it stated that

[s]exual and gender violence increases biological vulnerability to HIV, reduces ability to negotiate for safer sex, with long-term psychosocial outcomes that impact sexual risk taking behaviour. About 33 percent of girls and 17 percent of boys in Kenya are raped by the time they attain 18 years; 22 percent of girls aged 15-19 report that their first sexual intercourse to have been forced. And few receive treatment. Gender inequalities and cultural practices including wife inheritance, sexual and gender based violence, early marriages and high attrition in school limit effective HIV prevention. (NACC 2014, 30)

The *Strategic Framework* (NACC 2014, 17) identified women, girls, and displaced people (especially those in a "humanitarian crisis") as particularly vulnerable groups. Accordingly, it noted that "structural interventions" to reduce SGBV are needed, as part of HIV prevention policy, and specifically set the following goal:

Promote the use of Internal Security as an important contributor to an integrated response to HIV and AIDS by addressing the dangerous interaction between AIDS, drug and alcohol abuse, sex and child trafficking and sexual violence. (NACC 2014, 20)

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<sup>115</sup> Interviewed in Nairobi, September 29, 2014.

Some women with whom we spoke were able to access medical care within the 72-hour period in which PEP treatment is effective, often with the help of NGOs, faith-based organisations, and/or other individuals. Several women who were living in Kibera during the PEV told us that a woman called Mercy went from door to door, looking for women who had been raped, and helped them get to hospital:

*You see, I didn't think of hospital. There is another lady called Mercy... she came and looked for women who had been raped and I happened to be one of them. She took us to the hospital to see if we hadn't been contaminated with sexually transmitted diseases. We had to be examined and treated.*<sup>116</sup>

*I stayed for three days then there was a woman who came and told me that we should come out, those who were raped so that we could be taken to the hospital. We were more than 27 women then we were taken to Mbagathi Hospital, we were screened if we had diseases. When we went there, I was found with the disease of HIV and other sexually transmitted diseases then I was given medicine. ... I always thank that lady from Christ the King, the lady called Mercy.*<sup>117</sup>

More commonly, however, women were not able to get to the hospital within the 72-hour period for a range of reasons, including the spates of violence that made it impossible to move safely; the absence of any medical facilities within a reasonable distance; lack of money; lack of knowledge; having sustained injuries that prevented movement; fear of stigmatisation if it became known that she had been raped; and concern for the safety and whereabouts of children, husbands, or other family members, whose location was a higher priority than accessing medical treatment. The barriers that women reported in relation to accessing health care are discussed in detail in Section 3.3 below.

HIV infection has profound impacts on women's lives, and is both affected by and affects other aspects of women's lives; this includes their relationships with family members, the raising of their children, their capacity to work, housing security, income, and other physical and psychological health matters. A woman from Kisumu spoke of how her husband was killed and she was raped during the PEV; she was unable to go to hospital after the rape due to the ongoing violence, and it was a year before she sought medical help. By that time, she was very unwell from HIV, unable to work consistently, and sliding further into poverty:

*There was no way I would use going to the hospital because I would be beaten on the way. So I just stayed in the house with that of my problem, I did not go anywhere. I stayed until the police finished that problem is when I came out. Coming out, I then started looking for my husband. ... Following what happened to me during the violence there is nothing I could think or there was nowhere I could run to during that time up to now. For me to go to the hospital it took one year because I was continuing with work not knowing that I was infected. I was working in flower farm. So I continued with work, [but] I felt that I was not having strength. I was getting weaker and weaker as days went by. So I was not working well because the work I was doing was for standing and arranging flowers. We were standing most of the time and sometimes I was falling down, when I lost strength. ... In this issue I need support because I do not have enough strength because I am sick, I am taking medicine and*

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<sup>116</sup> Interviewed in Nairobi, September 30, 2014.

<sup>117</sup> Interviewed in Nairobi, September 30, 2014.

*sometimes those drugs, I do not feel so well when I take them and I cannot do hard work. Like now, I am doing the work of weeding sugarcane. Sometimes I cannot work and children are sleeping hungry and sometimes my children are not able to go to school. And I am not able to weed sugarcane and get fees.*<sup>118</sup>

A woman from Kibera explained the impact that HIV has had on her life:

*One problem I am left with is that I am now taking anti-retroviral drugs and before I was doing business. I was going to Tanzania, buying materials there and selling to the women in Kibera. All that my business stopped, all the materials were stolen during the violence and I remained like that without anything. So now I have always been washing for other women their clothes and when I remember that I always feel very bad because I am back to zero. So now when I take the medicine it is like a punishment. But I accepted because there is nothing I can do and it is my life. There is nothing I can do because it is my life so I just continue taking medicine. ... You know now when I am staying there, I cannot tell someone that I am taking medicine. But you can just see the behavior of some people like someone can just come with dirty things pouring it in front of your house then you feel these people there is something they know in them. So I left where I was staying before and went to another place and even where I am it is stress. [People] know because I started having rashes all over the body. Sometimes the first stage of taking the [antiretroviral drugs] someone can always have rashes all over the body and so I was not removing my jacket, I put on long clothes which covers all the spots. When I am walking, they have given me a nickname “kananu of sweaters” – putting on a jacket all the time. And it is true all the time I put on a jacket.*<sup>119</sup>

One woman from Mukuru explained to us how the practice of wife inheritance and her HIV positive status are combining to compel her to remain living in poverty in the slum, despite owning land in her village. She contracted HIV through sexual assault, and her young son contracted it from her:

*Sometimes I find money to travel home... But what about carrying the drugs along? I could take my Septrin in the toilet. But for this child, since I have to pound the tablets so that he may swallow the medicine they would start asking: “What are these medicines which the child is taking all the time?” For me I have set 7:00am as the time for taking drugs. So even now when they call me over the phone and ask me to go and live on my plot back home with my children... I feel very scared... You know us Luo we have very funny traditions, if I go back home and one of my in-laws wants to sleep with me, how can I tell them that we have to use a condom? They will refuse and ask the reason. The purpose is to be inherited by an in-law and to consummate the re-marriage for all purposes including having children. I pray to God to guide me on how I will go and talk to those people.*<sup>120</sup>

Many women told us that the antiretroviral drug treatment for HIV created additional financial hardship for them, both directly in terms of the cost of medication, and indirectly, as the medication must be taken with food to avoid side-effects severe enough to make it difficult (and sometimes impossible) to continue in their jobs. Women described a negative

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<sup>118</sup> Interviewed in Kisumu, January 23, 2014.

<sup>119</sup> Interviewed in Nairobi, September 30, 2014.

<sup>120</sup> Interviewed in Nairobi, September 29, 2014.

spiral of ill-health and poverty; if they were unsuccessful in making enough money to buy food, they would become unwell from the medication, making work more difficult. Such difficulties were particularly acute when non-day-to-day expenses, such as children's school fees, fell due. The financial pressure to find food is compounded for women whose children also have HIV:

*It has been that when we remember those days of post-election, we feel a lot of pain. Like me, I am always feeling pain since I was raped. At that time, I had a three month old baby, it was just few months after giving birth. I was raped and I got HIV you see. And I am on medication but when I lack food, I cannot take that medicine, you see. And for two years I was in a very bad situation and it is only recently that I started gaining a little strength because of the doctors' counselling, you see. ... And if we lack something to eat, it will force me, by four, to go to the shop... if I don't get I go to someone like her (points to another woman in the focus group) and tell her to help me with one cup of flour, cook for those children. ... But for the problem I am having, because sometimes I do not work. Like from August, I have been sick and have not done any work.<sup>121</sup>*

*The refusal by government to give [antiretroviral drugs] and food supplements. Before they used to bring us food supplements along with drugs. Nowadays, they give out only drugs. And when you as a woman you cannot afford a balanced diet for the child... So the children cannot be in good health and instead they lose weight. For example, for this child, his medicines are so strong that he requires a good diet to go with it, otherwise the side effects are unbearable. The children are constantly sick because even with the few [antiretroviral drugs] they receive, they lecture you on why the child is losing weight.<sup>122</sup>*

Together, international donors and the Government of Kenya provide approximately 84 percent of Kenya's annual expenditure on HIV treatment and prevention; donors provide a little over 68 percent of funding, and the Government of Kenya provides 15.86 percent (NACC 2014b, 33–35). However, household spending (some KES 25,471 million in 2013) accounts for 12.5 percent of national spending on HIV treatment (NACC 2014b, 35). Some women told us that they must pay for HIV medication, a cost which they cannot afford. All women who are on HIV medication, or whose children are on HIV medication, told us of the immense burden that providing adequate food to avoid the drugs' side effects could be. Often, it was not possible, and thus they needed assistance with food as a core part of their treatment regime:

*Nowadays, if you fall sick, you have to pay... They used to treat us for all sorts of diseases, but now, apart from the regular drugs, they no longer provide any additional medication for other ailments... not to mention the wrong medications. For example children are given adult versions of [antiretroviral drugs] which make them dizzy. ... Tell me now if you have an HIV positive child, for me I have two children who are positive, when they take the [antiretroviral drugs] without the food supplements, they become very dizzy and behave as if they are drunk. Personally I am asthmatic and in addition I take [antiretroviral drugs]. What will happen to these children if they have to continue taking the [antiretroviral drugs] on an empty*

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<sup>121</sup> Interviewed in Nairobi, September 29, 2014.

<sup>122</sup> Interviewed in Nairobi, September 29, 2014.

*stomach ... but I have to persevere all that. The children become constantly sick. This is not justice at all. This government needs to explain where the food supplements are taken to.*<sup>123</sup>

### 3.2.3 Psychological effects of sexual violence

In addition to the physical health impacts outlined above, sexual assault has profound psychological (and sometimes psychiatric) effects. Commonly reported psychological responses to rape include: anxiety, depression, sleep disturbances, numbing, detachment, fearfulness, poor concentration, anger, irritability, heightened startle response, suicide, self-harm, high risk behaviours, feelings of shame, guilt, worthlessness, and humiliation (Mason and Lodrick 2013, 31; Jina and Thomas 2013, 19; GVRC 2012, 19). Jina and Thomas (2013, 19) report that

Studies have shown that rape survivors are the largest group of people to develop PTSD, with rates of life-time prevalence of PTSD ranging from 30–94 percent in sexual assault survivors. Sexual violence has also been shown to predict the development of PTSD more strongly than any other trauma, including car accidents, physical attacks, robberies or natural disasters.

Mason and Lodrick (2013, 31–32) reported a strong correlation between sexual assault and both suicidal ideation and suicide attempts. Women who have been sexually assaulted are four times more likely to have suicidal ideation, and are thirteen times more likely to attempt suicide, than women who have not been sexually assaulted.

These global studies accord closely with information from the Gender Violence Recovery Centre (GVRC) in Nairobi which reported that the most common psychological effects its clients present with include:

suicidal tendencies, irritability, anger, a lack of confidence, self-blame, guilt, fear of the unknown, fear of the opposite sex, anxiety, low self-esteem, conflict in relationships, depression, feelings of helplessness, hopelessness, a lack of concentration, hallucinations, insomnia, and diminished appetites. (GVRC 2012, 19)

Women participating in this research told us of the range of emotions and traumatic responses that they had to their attacks. Almost every woman with whom we spoke had been raped, and told us that they had felt ashamed and did not want anyone to know about the rape; this included husbands, children, friends, and even health professionals. For some, these feelings of shame prevented them from seeking needed medical treatment, as one woman explained:

*If I would have known, I would have gone to the hospital. But I was feeling ashamed because I am with big people and this issue is not making me feel good. I was disturbed in my heart and I did not even eat for one week because this issue was so painful to me. ... I did not want to go because it would make my children hear those bad issues, so it made me feel so bad and I did not know the procedure.*<sup>124</sup>

Feelings of shame were prevalent among all women who had been raped. A woman in Nairobi who was raped said that *“the first thing you feel ashamed, you feel ashamed... That*

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<sup>123</sup> Interviewed in Nairobi, September 29, 2014.

<sup>124</sup> Interviewed in Kisumu, March 20, 2014.

thing is something shameful, you cannot just go and start speaking about it.”<sup>125</sup> Another Nairobi-based woman who was raped by three men said, “I find these memories painful. I feel disgraced as a human being.”<sup>126</sup> A third woman, who is now a community educator about HIV (which she contracted from a rape), explained that she finds talking about her HIV status easier than about the rape:

*I talk more freely about HIV than about rape, because rape... some talk about it, others would rather not talk... So you see for example now we talk about it... but I was very sad when I underwent that rape... I used to talk about the virus, but I wasn't speaking about rape.*<sup>127</sup>

Women also reported symptoms that are consistent with post-traumatic stress disorder, including hypervigilance, sleep disorders, and dissociative responses. One woman explained that it took her several months to stop being hyper-alert and afraid; she explained that, even when at a sexual violence rescue centre, “I was afraid... I was afraid... I would meet a man in the corridor and get scared, thinking ‘This one is probably going to rape me.’”<sup>128</sup>

A woman living in Kibera said that, with the help of a support group, she has recovered from most psychological effects of her rape, but that

*if I see that uniform I do remember what was done to me and in my heart I do feel scared. I am always staying in my house with the lights on because when there is darkness I feel as if those people are back and so I always stay with the lights on and even if there is no electricity, I light a lamp until morning.*<sup>129</sup>

Another woman who had survived multiple sexual assaults – the last of which was committed by a police officer who abducted her for three days and repeatedly tortured and raped her – explained the overwhelming physical and emotional toll of the latest rape:

*I don't even go to Church. I don't even know whether there is God. And I got so sick. I was treated for pelvic inflammatory I don't know what disease, I got into depression. It is now that I am seeing a psychologist, I am doing EMDR (eye movement desensitisation and reprocessing), I am seeing a psychiatrist. My life is not the same, I get so tired. I don't know, it is just not fair, it is not fair at all... And this is a police officer and he told me that he will teach me a lesson. I had to move from houses like three times because of my security. And each day I used to cry for justice. I just wished I was a little bit stronger because the medicine is just too much for me. By around ten a.m. I am normally so tired I can't do anything. And he is out there, probably he is taking a beer or something, enjoying his life. (And I am) struggling just to pull through the day. It is a big struggle, I can't stay at home and take my medication peacefully because I must go out and work. If I sit at home, my children will not have anything to eat.*<sup>130</sup>

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<sup>125</sup> Interviewed in Nairobi, September 30, 2014.

<sup>126</sup> Interviewed in Nairobi, September 30, 2014.

<sup>127</sup> Interviewed in Nairobi September 29, 2014.

<sup>128</sup> Interviewed in Nairobi September 29, 2014.

<sup>129</sup> Interviewed in Nairobi, September 30, 2014.

<sup>130</sup> Interviewed in Nairobi, September 30, 2014.

### 3.2.4 Psychological health needs

Women in all research sites in Kenya explicitly asked for more (and better) counselling and psychosocial care. As one woman from Bungoma said:

*For us who are affected in Mount Elgon, we would like to be given trauma healing and counselling. Because for sure, you cannot be talked to today and you get healed same day it takes more time.*<sup>131</sup>

Women told us of struggling with unresolved grief for husbands, children, and other family members killed during the conflict – grief compounded by trauma from both physical and sexual violence, and by anxiety, depression, and hopelessness. One woman who was displaced from Tana Delta during the clashes in 2012, and whose child was killed, simply said, “*I am heartbroken.*” She further explained that she sometimes thinks about returning to her village, but that her grief prevents her:

*I personally long to go, but up to now in my heart I am sad because I had a child who was going to school in form two. ... They speared him with an arrow, he was taken to Coast General (hospital) and he died. That is why I have a divided feeling in my heart because, I want to go home and I am sad. ... It makes me very sad but what will I do? That's why I cannot go back.*<sup>132</sup>

The researchers were struck by the number of women who talked about suicide; some said that they often have suicidal thoughts, and some had attempted suicide. Concerningly, some women talked about killing themselves and their children, so that their children would not have to suffer as they had. A woman from Bungoma who was widowed, disinherited by her husband's family, and who had since been subjected to repeated intimidation, threats, and beatings, expressed her despair:

*I do not have anything and the children are suffering because he (deceased husband) left for us frustrations, he did not leave for us happiness in the world. Because even if I try to look I do not have anything. If I look at where I am, I am not able. If I look up for help it is far, if I look down it is not near. It is like we (her and the children) can think of killing ourselves because there is nothing, there is nothing you can do.*<sup>133</sup>

Some said the depression and fear women are suffering is impairing their ability to function and look after themselves and their children. These women desperately want help to recover. One woman said that counsellors are needed to help women “*know how to move on*”:

*Women get so many problems and sometimes, a mother is getting a problem and she is not strong enough to overcome this problem. There are some difficult situations that a woman will really need someone to talk to her. Let's say ... in this violence thing, they had problems, you will find someone, so long as she is trying to move on, she can't because every time she has these bad memories, she can be somewhere she wants to do something but this bad memory keeps hitting her. The only thing we can do to help some women, like such people who faced such problems, if we can find*

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<sup>131</sup> Interviewed in Bungoma, April 15, 2014.

<sup>132</sup> Interviewed in Malindi, June 12, 2015.

<sup>133</sup> Interviewed in Bungoma, April 15, 2014.



*some volunteers or counsellors who can go and help. You know counselling is very important. It will help someone to move on, it will help someone to know how to move on. And the time I get that difficult situation and I don't know the way to go and things keep on haunting me, the person will remain there and you will even find her dying for no reason. So if we can get counsellors, they go down there and help such women, I think it will help.*<sup>134</sup>

When the issue of counselling was raised during the Validation Workshop, it received widespread support. One woman explained that the insecurity in Mount Elgon had prevented people from being able to grieve and heal from the trauma. She saw that her whole community needs help to recover psychologically, and that she herself needs to cry:

*And then, concerning the post-election violence in Mount Elgon, many youth were involved in the issues of killing and up to now they are very much traumatised. And you know when a male child is traumatised, the mother cannot have peace. And so in that situation, we would request if we can get an NGO to support that. And up to now, Mount Elgon has not mourned for the injustices like when their people got lost. It happened like this, when your person was taken, there is no day you will open your mouth, you will keep quiet like that. When the Army came and killed people there is no way you would talk that your person is killed, you were to keep quiet just like that. And so as we speak now, everyone in Mount Elgon has a wound. As I speak now, eight of my people were killed and I was also violated, fingers were inserted in my private part and a knife on my neck. And so as I speak now, I have never cried and I have never spoken. And if I am just given the chance of one day to cry, I believe I will be relieved.*<sup>135</sup>

In one of the unfacilitated small groups during the Validation Workshop, women confirmed their desire for counselling:

Woman 1: *They would again take counselling services everywhere, you see. So like that of your place, they go there several times with counselling services. You know if you are many people and everyone talks, those issues come out little by little and you give your opinions, then you will see so people are many like this. Now you can be removing those things from the heart. But now, if you continue to say that it is your secret, it is your secret, you will just stay like that you see. So I would request those people to bring counselling services, they come and call the women whose husbands were killed, the women who were raped those days, they come and talk to you. When you are there with other women you are happy with each other and when you leave that place your memory will be relieved a little, you see. You are relieved from many issues in your heart.*

Woman 2: *Yes, that is what I was looking for in my mind. They should be many. Women should be called together for group counselling. There should be group counselling for women who have been violated like us like that. Because when we sit we just think that our body was spoilt.*<sup>136</sup>

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<sup>134</sup> Interviewed in Kisumu, November 7, 2013.

<sup>135</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>136</sup> Interviewed during Validation Workshop, June 22, 2015.

Very few women said that they had received any professional psychosocial care after violence, largely due to its unavailability. Those who had received counselling said it had come either from mutual support groups or from church volunteers. Volunteer counsellors, however, were largely not qualified to provide the sort of psychosocial support required after serious violence. One woman from Bungoma said that the church counselling amounted to *“telling us that just persevere in all that happened because God is with you. So they talked to us and told us to persevere and move on after the death. That we (should) just forget and get a way of healing from the pain”*<sup>137</sup> – advice which was largely ineffective, as she pointed out: *“Only we do not know the ways which can help us to heal the wound.”*<sup>138</sup>

This account was confirmed by a religious leader in Bungoma, who explained that *“at times we could meet a family who is traumatised. We could have time and sit with them, talk with them, encourage, give them comfort and all that.”*<sup>139</sup> He admitted, however, that the counselling his church was able to provide was inadequate, saying that

*once they were affected and traumatised and you know that thing does not just end on the spot, it takes time. It takes time to heal. For example what we did, it was not something continuous, we did it just for a while then we went away.*<sup>140</sup>

Most women outside Nairobi said that they had not received any counselling, and named this as a much needed service in their communities. Several women in Nairobi told us that they had received some counselling, particularly if they attended a hospital after sexual assault. Women described receiving initial counselling through the hospital, and then being encouraged (and sometimes assisted) to form mutual support groups. Most women said that they found both counselling and mutual support groups helpful:

*They were coming to Kenyatta and they were educating us and they also trained us and said that we should not be helped all the time, we should improve and that we should form groups. That is when we went and formed a group like that one so that someone can help herself. Not that we are being helped all the time but we also work hard to improve ourselves. So there is where we were we received care slowly by slowly as we were being counselled until I recovered. Those days I could not talk without crying the way I am talking now. So we proceeded and formed a group, we have a group there in Kibera. We always go to encourage others.*<sup>141</sup>

While short-term counselling and mutual support groups were effective for most women that spoke about them, they are unlikely to be sufficient for women with particularly acute trauma responses. A small number of women told us that they continue to experience symptoms consistent with post-traumatic stress disorder (such as hypervigilance and startle responses, discussed in section 3.2.3 above), in spite of receiving assistance through hospital-based counselling and support groups. One woman had accessed both public and private mental health services in Nairobi. She explained that the publicly available services, particularly mutual support groups, had been helpful to a point, but was also critical of the lack of continuity of care and confidentiality in the public system. She said that

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<sup>137</sup> Interviewed in Bungoma, April 15, 2014.

<sup>138</sup> Interviewed in Bungoma, April 15, 2014.

<sup>139</sup> KI, interviewed in Bungoma, April 16, 2014.

<sup>140</sup> KI, interviewed in Bungoma, April 16, 2014.

<sup>141</sup> Interviewed in Nairobi, September 30, 2014.

*in government hospital counselling, you go today and you get this one and tomorrow it is a different person. Then you keep starting your story everyday and I feel that is like traumatizing someone two times. And sometimes you talk to the counsellor and you are confiding in her. Like for me, they all know me in that centre and (then) you hear them talk about your issue outside and it was not something making me happy.*<sup>142</sup>

She attributed her recovery to the high quality counselling she received in the private system.

Mental health care in Kenya is significantly under-resourced and almost exclusively focused on acute psychosis, administered through in-patient hospital-based services. In 2012, the Kenyan government allocated less than 0.5 percent of its health budget to mental health services (Gibson 2013). Most mental health needs are untreated, referred to informal supports (such as self-help groups or church services), or attended to by traditional or religious healers (Gibson 2013). Professional mental health services outside of Nairobi are largely non-existent; in 2010, Kenya had just 23 psychiatrists in the public service, and only seven working outside Nairobi (Jenkins et al. 2010, 38). De Menil and Knapp (2015, 20) reported that there are 0.62 mental health nurses per 100,000 population in Kenya – well below the recommended 12 per 100,000. A recent survey of the mental health of 1,000 people living in Kisumu found a prevalence rate of 10.8 percent for common mental disorders, with depressive disorders the most common (Jenkins et al. 2012, 1813–14). A UNICEF study conducted in 2010 found that 32 percent of Kenyan girls experience sexual violence before reaching 18 years of age, and that only three percent of sexually abused girls received professional help of any kind (UNICEF 2010, 32, 61).

Key informants working with women and girls, whether in direct practice or through policy, confirmed that a lack of services constrains intervention possibilities, and impacts on the ability of women to engage in legal proceedings. A key informant from the judiciary agreed that counselling is necessary to enable women to participate effectively in court proceedings:

*So they need to be given free medical treatment, they need to have a police form three filed and they need counselling, because without counselling they will even not be able to testify in court.*<sup>143</sup>

A legal practitioner from Kisumu raised the lack of psychosocial support services as highly problematic and argued that women need a range of supports following violence:

*The challenges as an institution as I said before are lack of counsellor within the office. And lack of a safe home to put these women in. I believe a woman who has experienced violence be it physical like battering, domestic violence and even domestic violence like rape, need to be put in a safe place for some time. It helps not only physically, with the environment but helps psychologically and medically.*<sup>144</sup>

### **3.3 Barriers to accessing healthcare**

Women identified several barriers which either delayed or prevented them from accessing healthcare after violence. Delayed access to healthcare very often meant living with pain and

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<sup>142</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>143</sup> KI, interviewed in Bungoma, April 16, 2014.

<sup>144</sup> KI, interviewed in Kisumu, March 20, 2014.

discomfort for extended periods of time, and, in the case of sexual assault, sometimes resulted in preventable infections (including HIV) and unwanted pregnancies. Three major barriers to accessing healthcare were identified by women: security, cost, and shame and stigma.

### 3.3.1 Security

Several women told us that they were unable to access health care during periods of conflict (PEV, and the Bungoma and Tana River clashes) due to the ongoing violence. Several women from Bungoma reported that militia groups prevented women from attending hospitals, for fear that they would report the offences against them; it was only after the Kenyan government sent security forces that they were able to access healthcare:

*They did not want that you go to the hospital. I stayed for (eight months) until the Army came and that is when I went to the hospital.*<sup>145</sup>

Another woman described that her attackers continued to monitor her, to ensure she did not make any reports:

*In fact they warned me that if they only hear that I report, you will be no more. And imagine within that month, they were sending people to come and monitor me. Every time you could see three boys, four passing by and at night from six in the evening to seven you see people coming at home. They are coming to monitor if there are people I will talk to or are there people coming so that I can tell them about the incidence or whatever action I would take. I did not report anywhere and did not even go to the hospital.*<sup>146</sup>

A woman from Kisumu explained that, although she was thinking about how to get to the hospital during the rape, the violence made it impossible for her to go:

*They stayed with me like a husband and wife, they had sex with me that way then they went and I remained there thinking how I would go to the hospital. There was no way I would use going to the hospital because I would be beaten on the way. So I just stayed in the house with that of my problem, I did not go anywhere. I stayed until the police finished that problem is when I came out.*<sup>147</sup>

Once it was safe enough to come out, she began looking for her husband, became internally displaced, and then focused on working to support her children. She had been infected with HIV through the sexual assault, and had only accessed healthcare when she became unwell:

*For me to go to the hospital it took one year because I was continuing with work not knowing that I was infected.*<sup>148</sup>

A woman in Nairobi also became infected with HIV due to a lack of security preventing her from accessing medical help soon after the rape:

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<sup>145</sup> Interviewed in Bungoma, April 15, 2014.

<sup>146</sup> Interviewed in Bungoma, April 15, 2014.

<sup>147</sup> Interviewed in Kisumu, January 23, 2014.

<sup>148</sup> Interviewed in Kisumu, January 23, 2014.

*From here at Kibera, you couldn't go to any hospital, there was no possible way through which you could go. We were somehow imprisoned here. You couldn't get the required document within the required period of 72 hours and couldn't therefore be helped.*<sup>149</sup>

The provision of security is a critical prerequisite for many other rights, and protection is a core responsibility of the State. The Kenyan government has been criticised both for its slow response to violence in Mount Elgon, and for perpetrating extensive human rights violations in its response (HRW 2008, 5–7; KNCHR 2008; OMCT 2008b). During the PEV, police and state security forces were often the perpetrators of assaults. The Commission of Inquiry into Post Election Violence (CIPEV 2008, 246) heard evidence from Kenya's National Commission on Gender and Development, that 32 percent of victims from Nairobi, Nakuru, Burnt Forest, and Eldoret identified police as the perpetrators of sexual violence. The Commission noted that this report was in keeping with other evidence it had heard, and pointed to a profound failure on the part of state police and security agencies:

This finding mirrored other testimony given to the Commission concerning the response both by government and security personnel to other types of post- election violence. The very individuals who might have helped them were people to whom they could not go for help: perpetrators at the worse and otherwise often indifferent bystanders to the plight of ordinary citizens whom they should have assisted. (CIPEV 2008, 247)

While a lack of security was an acute barrier to accessing healthcare during episodes of violence, women in informal settlements in Nairobi reported that a lack of security routinely prevents them from being able to move freely. This is particularly so at night time, when women told us it is unsafe to go out at all, even if a child is in urgent need of medical care. The women listed safe access to healthcare at all times of the day as a core justice need.

### 3.3.2 Cost

Although health care in public facilities in Kenya is officially free, several women in this study identified fees and other costs as the principal barrier stopping them from accessing healthcare. Two women from Kisumu explained that a lack of money prevented them from going to hospital after sexual assaults:

*That happened because there was no money. It found when we were just from Nakuru where there was violence. We came here and took more than one week; there was no money still for me to go to the hospital.*<sup>150</sup>

*The reason why I did not go to the hospital, our hands were empty (had no money).*<sup>151</sup>

This was similarly the case for a woman based in Nairobi:

*And this guy just grabbed me and raped me in that office. I didn't know what to do, I thought of hospital but I didn't have money. And so I just went home and showered. Few days later I started feeling nausea, I knew I was pregnant.*<sup>152</sup>

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<sup>149</sup> Interviewed in Nairobi, September 30, 2014.

<sup>150</sup> Interviewed in Kisumu, January 20, 2014.

<sup>151</sup> Interviewed in Kisumu, January 20, 2014.

<sup>152</sup> Interviewed in Nairobi, September 30, 2014.

Another woman, internally displaced in Nairobi due to the PEV, explained that she continues to experience pain and infections due to the prohibitive costs of medical care:

*And we didn't know who they were and from that time most of the women in our area were raped and it is now.... And myself I got a fungal infection and pain in the lower abdomen which hasn't stopped until now and when I go to the hospital, I am not able to get treatment because it cost a lot and so the pain is still there.*<sup>153</sup>

From 1989 until 2007, Kenyan public health facilities operated as a user-pays system, with fee waivers for people living in poverty, children under five years old, and other groups identified as vulnerable or afflicted with particular illnesses (such as malaria or tuberculosis) (Chuma and Okungu 2011, 3). Although fee waivers were official policy, in practice, mechanisms for administering fee waivers were not in place, resulting in the under-utilisation of healthcare services among the poor and people in rural areas (Chuma and Okungu 2011, 2). In 2007, the Kenyan government abolished all fees for the use of public healthcare systems; however, many facilities continue to charge fees “due to cash shortages” (Chuma and Okungu 2011, 3). The informal nature of such fees makes finding reliable data difficult; however, a medical practitioner interviewed in this research confirmed that fees are charged by the institution, particularly for services beyond consultation and counselling, such as laboratory tests, medications, surgery, and other services:

*For example, one of the regulations is that no charge shall be levied for the services offered to the sexual violence survivors. But up to now, it is not, it was signed by the Minister and gazetted two years ago but up to now it is not implemented. The survivors are still not accessing the services because sometimes the costs are prohibitive. Sometimes surgeries are involved, very expensive investigations are involved. And when they cannot afford them then they can't get them, so access is still a problem and the government is also not... I think the government is not playing its rightful role. Even in this hospital, the survivors have to pay for their services except what we have locally as a department worked out to convince the top management that this we will not charge, for example, consultation and counselling. When they see a doctor or the counsellors we don't charge for that, but that is as much as we can do.*<sup>154</sup>

More concerningly, the key informant also reported that some of the payments requested of women are payments directly to individuals, rather than the cost of services provided:

*But in our country you can do anything, people do anything for money. We have even cases, I don't mean to tarnish the name of my good employer, but there are individuals in the hospital. There are individuals even in this hospital who would not take you to theatre when you are dying before you give them money. And they ask, even I myself I have had an experience where my relative could not be taken to theatre until I have given money. ... So, corruption is a problem.*<sup>155</sup>

A study on health spending among residents of Nairobi's informal settlements (slums) found that 56 percent of households surveyed were not able to afford sufficient food to provide

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<sup>153</sup> Interviewed in Nairobi, September 29, 2014.

<sup>154</sup> KI, interviewed in Nairobi, October 2, 2014.

<sup>155</sup> KI, interviewed in Nairobi, October 2, 2014.

“adequate calorie intake” (Buigut et al. 2015, 10). The study found a very low rate of spending on health among residents of informal settlements, and theorised that people were most likely not accessing the healthcare that they needed (Buigut et al. 2015, 11). A separate study based on 8,414 Kenyan households found that “the poor are more likely to ‘ignore’ illnesses because they cannot afford to seek treatment or to take time off work” (Chuma and Maina 2012, 419). Both studies reported that Kenya’s out-of-pocket health payments are very high. Buigut et al. (2015, 1) reported that, in 2010–2011, household out-of-pocket payments accounted for 37 percent of Kenya’s total health expenditure. The Kenyan Ministry of Health reported that women spent an average of KES 1,869 on health services in 2013, compared to men’s average expenditure of KES 1,329 (Ministry of Health 2014b, 44), thereby indicating that the costs of healthcare may fall disproportionately on women. The burden of healthcare costs may also be contributing to women’s further impoverishment; Chuma and Maina (2012, 419) identified the costs of health services as a causal factor in poverty creation, stating that “about 1.48 million Kenyans are pushed below the national poverty line due to out-of-pocket payments.”

Women interviewed in this study reported strong links between their poverty and their inability to access healthcare, both because the costs of healthcare are such that they do not access care when needed, and because consequent poor health pushes them further into poverty:

*When we go to the hospital, the doctor needs money and we don’t have money, when you go home you don’t have anything to eat.*<sup>156</sup>

### 3.3.3 Shame, cultural and emotional barriers

A significant number of women said that shame and fear of stigmatisation prevented them from accessing medical care after violence. Some women feared that the simple fact of attending a hospital or health facility would alert their husbands, children, or neighbours to their sexual assault. A woman from Kisumu explained that her fear that her children would learn of her rape prevented her from going to hospital:

*Even if he was telling me to go to the hospital, I did not want to go because it would make my children hear those bad issues, so it made me feel so bad.*<sup>157</sup>

A key informant based in Bungoma reported that women in her community will avoid reporting sexual assault to either health or police services, for fear of community stigmatisation:

*So if you are raped as a woman or if your girl is raped, you know you will keep it a secret because you know what the society will say about you.*<sup>158</sup>

Some women told us that they do not trust medical staff to maintain confidentiality:

*And then it is also embarrassing, you know issues of sexual violence. How would you go and how would you go and tell the doctor that you were violated sexually?*

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<sup>156</sup> Interviewed in Nairobi, September 29, 2014.

<sup>157</sup> Interviewed in Kisumu, January 20, 2014.

<sup>158</sup> KI, interviewed in Bungoma, April 17, 2014.

*Because they are issues that are shameful. And sometimes you know the village is a small place. Maybe the doctor is your neighbour, the nurse maybe treats you then you hear him tell others outside that that one was raped. And you know the stigma that surrounds the issue of rape.*<sup>159</sup>

The shame and stigma that women raised is complex and multi-faceted. Women told us that they feared abandonment by their husbands, stigmatisation from the community, a lack of confidentiality and understanding from service providers, and being diagnosed with HIV (or another serious illness). Several women in this study said that they had not told their husbands about being sexually assaulted, for fear of being abandoned:

*I would have liked to tell my person (husband) about it, but the problem is that if you reveal, you may be in trouble. They would say maybe you sought willingly what you got.*<sup>160</sup>

*And you see (if her finds out)... I'll be in a big trouble since he is the one who supports the children... And you know how men nowadays are... he may decide to leave me. He will maybe say: "Go to those men of yours."*<sup>161</sup>

A key informant explained that "many men value women for their purity," and that many women have regard to this in deciding whether to report a condition, especially sexual violence, to a health service:

*[F]or many men, that was too much to have to deal with. My observation is that for many women that (their male partner's response) was a major consideration on whether or not they would talk publically about their experiences or seek any help, even medical if they required it.*<sup>162</sup>

Several studies confirmed that women who have been sexually assaulted face significant stigmatisation, and risk being socially rejected by their families and communities (including being abandoned by their husbands) (ACORD 2010, 27; Fiske and Shackel 2015; Njuki et al. 2012, 6); this is even more so for women who are infected with HIV (Turan et al. 2011, 1112; Nyblade et al. 2011, 8926). Nyblade et al. identified the consequences of the community discovering someone has HIV as including "discord within marital or partner relationships, loss of economic support, the potential for physical violence and potential loss of relationships" (2011, 8926). A recent study evaluating the efficacy of a pilot voucher system to assist poor women in Kenya in accessing health services for physical and sexual violence found that, while removing cost barriers did increase women's service use, significant barriers remained, including transport costs, a "perceived lack of privacy and confidentiality," and poor service at first contact discouraging women from continuing with care (Njuki et al. 2012, 6). However, the study reported that "cultural factors and stigma ... [were] the single most important obstacle for low utilisation of health services" (Njuki et al. 2012, 6).

While the government of Kenya needs to urgently address the security and cost barriers to women accessing healthcare following violence, it additionally needs to lead a long-term

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<sup>159</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>160</sup> Interviewed in Nairobi September 30, 2014.

<sup>161</sup> Interviewed in Nairobi, September 30, 2014.

<sup>162</sup> KI, interviewed in Nairobi, October 1, 2014.



public awareness campaign to change popular attitudes which blame women for being raped, and which condone men's right to beat their wives. Public attitudes to violence against women both enable such violence to continue, and impair women's ability to access necessary services for their recovery.

### 3.4 Education

Almost every woman interviewed in this research cited education for their children as an essential justice need, and a significant number of women also wanted education for women. Women saw education as critical for long-term and sustainable improvement in their lives.

#### 3.4.1 Education for children

While many women interviewed are sending their children to school, a significant number were not due to the prohibitive costs. Women told us that “*school is all, there is nothing as important as that one.*”<sup>163</sup> They want their children to receive an education, both so that their children can have better lives for themselves, and so that their children are better able to help them when they are no longer able to work:

Woman 1: *Now when you start thinking this life has become difficult and children are not going to school, how will life be, it will be very bad because they have not gone to school.*

Woman 2: *They have not gone to school and these days someone must go to school for life to be good.*

All: *Yes.*

Woman 2: *Even us if we had gone to school we would have had a good life but our parents did not have that ability. Now, I always say God help me, I have two children who are boys. I always tell God that God, let my children go to school.*<sup>164</sup>

Improving education has been a key priority of successive Kenyan governments post-independence (1963). The Kenyan government is among the highest spending governments on education in sub-Saharan Africa, and globally; in 2014/2015, the government allocated approximately 17 percent of the national budget to education, a figure that has held steady over several years (CEI 2014, 1).<sup>165</sup> Kenya introduced the Free Primary Education programme in 2003, which led almost immediately to 1.3 million additional enrolments in primary school in 2003; 7.2 million students in total were enrolled, up from 5.9 million in 2002 (Ogola 2010, 1). In 2012, the gross enrolment<sup>166</sup> for primary schools in Kenya stood at 114 percent (World Bank n.d.), while net primary school enrolment<sup>167</sup> was reported by UNESCO as 83 percent (2012, 1) and 92 percent by the Centre for Education Initiative

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<sup>163</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>164</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>165</sup> By way of comparison, the Australian government allocated 7.1 percent of its Federal Budget to education in 2014/15 (Australian Government 2014).

<sup>166</sup> Gross enrolment refers to the number of actual enrolments in a particular level of education, in relation to the population of the age group that corresponds to that level of education. Kenya shows a gross enrolment significantly in excess of 100 percent, due to both the numbers of adults enrolling in primary school and the number of children and young people repeating educational levels (Index Mundi n.d.).

<sup>167</sup> The net enrolment rate refers to the number of students of the corresponding age group who are enrolled in each educational level.

(2014, 1). Gender parity has also been achieved in all but the north-west region. While the introduction of free primary education has increased enrolments in primary school, there remain more than one million school-aged children in Kenya not enrolled in school (UNESCO 2012, 1), and an average of nine percent of enrolled students not present on any given day (Uwezo 2014, 7). However, as of 2011, enrolment in secondary education was still low, with only 51 percent of boys and 48 percent of girls enrolling. Low school enrolment figures creates a ripple effect, with sixteen percent of women lacking basic literacy skills, compared to nine percent of men (UNESCO 2012).

Free primary education has not led to expected improvements in learning, as assessed through general knowledge and basic literacy and numeracy tests (Uwezo 2014). The Uwezo project conducted a series of annual education assessments throughout Kenya; in 2013, it assessed 135,109 school students in 155 districts across the country, and found generally very poor learning outcomes. In the Tana River region, less than 20 percent of Grade Three students were able to read a story at Grade Two level (Uwezo 2014, 57). The best performing region was Nairobi, where 50 percent of Grade Three students could read a Grade Two story (Uwezo 2014, 47). These results accord with other studies which have found very poor learning outcomes (CEI 2014; UNESCO 2012; Glennerster et al. 2011). In 2013, less than 50 percent of students who sat the test for the Kenya Certificate of Primary Education (KCPE) passed (CEI 2014, 2).

The Centre for Education Initiative (2014, 2) identifies several key challenges for Kenya's education system, including that the expanded enrolments following free primary education have not been matched by expanded infrastructure or resourcing (the student-teacher ratio is 47:1, and access to books, paper, and pens is limited). The report notes that access to education is uneven across the country, with children living in poverty and children from marginalised communities (those living in non-formal urban settlements [slums], and those from nomadic pastoralist communities) most disadvantaged (CEI 2014, 2–3). A 2011 MIT Poverty Action Lab study noted that, although primary education is notionally “free,” in reality there are several expenses that parents must meet. The first among them is the provision of uniforms for students. In 2003, the average cost of a school uniform was KES 480 (AUD 6.77), a cost which is beyond a great many families, particularly those living in poverty (Glennerster et al. 2011, 11). Parents must additionally meet a range of fees and levies, such as a one-time “signing on” payment of US\$35, and further fees for sitting exams, access to resources, and purchasing books (Economist 2014).

These fees are difficult for many Kenyan families, but particularly difficult for single mothers, widows, families with health and/or disability problems, and women who have been displaced. Indeed, displaced women and widows interviewed in this research were the least able to meet school fees, and reported that their children were either not attending school, or were only obtaining a disrupted education:

*What I can say is that if I was at home, and if not for the violence, I would have been doing so well. Because in 2012 when this violence started I had a child in class eight, but because of violence, that child did class eight but the violence affected him. He did not do so badly, he had 230 points. But because this place is new to us and I do not have a job, that child is not going to school. To date that child is at home. ... If I*

*was at home... then our children were able to go to school and because I am here, I am stranded.*<sup>168</sup>

Internal displacement invariably meant a loss of productive resources (such as land or business assets), and being thrust into a life of poverty. Additionally, many women lost important documents due to the sudden and chaotic nature of their forced departure. Many women's homes were burned and their documents have been destroyed. The absence of documents was raised by several women, particularly in Bungoma County, as an impediment to enrolling children in school and applying for bursaries to help with the cost of school fees. One woman described how, in her unsuccessful efforts to obtain a replacement birth certificate for her son to enable her to apply for a bursary for him, she was sent to multiple different government offices, and to the Chief:

*It is just still the struggle on the identification card for the husband and the birth certificate for the child. I recently went and I was given a form and I filled, but they were telling me that if the child is not having birth certificate, he cannot be given the bursary. They denied me. ... I have my child, who is doing well in school, he has passed exams well, but it is difficult.*<sup>169</sup>

Women in all four research sites reported that, before displacement, they had been able to keep their children in school. Many now are struggling to pay fees and keep their children in school. As this woman from Marafa explained:

*We came to Marereni because of the violence. From that time we ran away, we have been staying here. We left all the property, livestock and all other things. When we left all our property was burnt if it was a house like this they burnt and if the roof was made of iron sheets they removed the iron sheets and went away with it leaving nothing behind. Children who were going to school are now not going to school and now my two children who are in form one, one of them is at home and one is trying his luck. I do not know if I will manage because I do not have any source of income. The girl remained at home and the boy continued with their education.*<sup>170</sup>

Widows, particularly those that had been disinherited or chased away by their in-laws, are another group that is particularly disadvantaged in accessing education for their children. One woman from Bungoma was despairing that a lack of education was condemning her children to a life of hardship:

*Now we will stay with children who are bright at home and those ones with husbands to educate theirs as we remain behind. Or life to go on like that as they suffer in their lives, like the life of prisoners, we will stay the life of prisoners to the end. It is like there is no way doors will be opened for us; we just stay with children in problems. Why should my child stay in problems like me again?*<sup>171</sup>

Some women were faced with the awful decision of whether to provide food or education for their children, with a significant number choosing to forgo several meals themselves to enable their children to go to school:

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<sup>168</sup> Interviewed in Malindi, June 12, 2015.

<sup>169</sup> Interviewed in Bungoma, April 15, 2014.

<sup>170</sup> Interviewed in Malindi, March 27, 2014.

<sup>171</sup> Interviewed in Bungoma, April 15, 2014.

*Children are waking up in the morning without even tea to drink. For one week they could not even taste tea. ... Even now if you come to my house, there is no maize. The maize I get, I take to school in January (as a way of paying school fees). ... It would be good if the government would have helped us in education of our children because we can hustle to get other needs but if children are educated they can rescue us some day. So for me I feel education is something very important. They should have helped us on the issue of our children.*<sup>172</sup>

Poverty, health, and education needs interact in mutually reinforcing ways, with disadvantage on one axis creating or compounding disadvantage on the other axes. This compounding negative effect was particularly notable in women with HIV. Several women with HIV explained to us that they needed to eat food immediately prior to taking their medication; if they did not, the medication made them extremely unwell. One woman from Kisumu who was widowed, gang raped and infected with HIV during the PEV, explained that she is now the sole income earner in her family, and that if she does not work, she will have no money for food, rent, or school fees. When she is unwell, she is unable to work; however, without work, she cannot buy food and the HIV medication makes her more unwell, trapping her in a cycle of poverty and ill-health. Her ill-health also results in disrupted education for her four children, ensuring trans-generational entrapment in poverty:

*In this issue is I need support because I do not have enough strength because I am sick, I am taking medicine and sometimes those drugs, I do not feel so well when I take them and I cannot do hard work. Like now, I am doing the work of weeding sugarcane. Sometimes I cannot work and children are sleeping hungry and sometimes my children are not able to go to school. And I am not able to weed sugarcane and get fees.*<sup>173</sup>

The cost obstacles to education include fees and direct costs, and also opportunity costs – some households are in such dire poverty that children are required to work to help ensure basic needs are met. This extreme poverty particularly affects displaced, women-headed households with health problems. A woman originally from Naivasha, but who was displaced to Nairobi, explained that her son dropped out of primary school to work and earn some money to help provide food for the family. The woman expressed shame and guilt at his loss of education and opportunities for a better life. She explained that he was so distraught at seeing her unwell from HIV (contracted through rape during the PEV) that he refused to go to school anymore, and insisted on providing food for her:

*My youngest son when he was twelve years old. He refused going to school and started looking for food in corridors the time we lacked food. And I am on medication but when I lack food, I cannot take that medicine, you see. And for two years I was in a very bad situation and it is only recently that I started gaining a little strength because of the Doctors counselling, you see. That boy left school and entered into the corridors because... he has never seen his mother in problems any other time. When we started having problems that child started going to Markiti market to wash potatoes, he kept some then he sells to help me who is sleeping, you see. To date he refuses school. I have tried and he said that he cannot go to school without [us]*

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<sup>172</sup> Interviewed in Bungoma, April 14, 2014.

<sup>173</sup> Interviewed in Kisumu, January 23, 2014

*eating anything because sometimes we lack and like now I am sick. And if we lack something to eat, it will force me, by four, to go to the shop... I if I don't get I go to someone like her (points to another woman in the focus group) and tell her to help me with one cup of flour to cook for those children. And it made that child to have the feeling of problems and he refused to go to school at all. And so I am saying if the Government give us something small to lift us or support us, we can prevent some issues like children refusing to go to school because of seeing their parents suffering. The children would have been going to school well.*<sup>174</sup>

She told us her younger son is also at risk of leaving school due to poverty. She explained that *"he got the marks to go to Form One (high school) but he has not gone because I lack money."*<sup>175</sup>

Although not a quantitative study, our findings indicate higher than national and regional averages for children being out of school. This could be due to the population we interviewed – women affected by violence, most of whom were living in poverty, and many of whom had been displaced. The MIT Poverty Action Lab study identified people displaced by the PEV as a group potentially at high risk of educational disadvantage, and about whom more needs to be known:

The 2007/8 post-election crisis resulted in major internal displacement, with loss of income, community ties, and property, including documents. There is very little known about the plight of the internally displaced with regards to education. (Glennerster 2011, 13)

The interviews with displaced women, and particularly widowed and/or HIV positive displaced women, suggest that one under-recognised effect of the PEV is the creation of a group of severely disadvantaged children, who will be further disadvantaged in all areas of civic and economic participation later in life due to disruption to and/or exclusion from education, as a result of violence against their mothers. More study needs to be conducted to establish the precise demographics and locations of this group, with a view to their recognition as a vulnerable group, and subsequent targeting in policy and programming.

### *3.4.2 Education for women*

While women recognise the importance of education for their children, and said very clearly that seeing their children complete their education would help them feel a sense of justice had been achieved after violence and displacement, a significant number of women also said that education should be made available for adult women as a key strategy in women's empowerment and access to justice. One woman in Nairobi eloquently explained the link she sees between women's education and women's empowerment:

*Only education, education. Because it is only education which always helps women. If you have education in your brain, you cannot fail to get support. Those who are helping themselves are those who are educated. And it is because you are low there is no place you have reached in education.*<sup>176</sup>

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<sup>174</sup> Interviewed in Nairobi, September 29, 2014.

<sup>175</sup> Interviewed in Nairobi, September 29, 2014.

<sup>176</sup> Interviewed in Nairobi, September 30, 2014.

She believed that her lack of education and subsequent limited options had forced her to enter into a series of abusive relationships. She explained that, if a woman is educated, “*men should not cheat her.*”<sup>177</sup> Her friend agreed and said that if she had completed school she would have “*lived a good life.*”<sup>178</sup> She expanded by saying that her lack of education continues to limit her options today:

*Then something again which makes someone feel like going back to school, is like now even if I go looking for a job somewhere. You find that I am asked where the certificates are. You know now in Kenya, a certificate is required to be house help.*<sup>179</sup>

This desire was repeated in all four research sites, as women recognised that their safety, income earning capacity, and ability to participate in local governance, would all be greatly enhanced through better education. One woman from Kisumu saw that, if she could get an education, she would be better able to ensure her children also received an education:

*I feel that it would be good if I can get a job to support my family with that level I have reached or if I can be supported in my education or taken to a school where I can continue learning as I move on then I feel that can help me to support the children.*<sup>180</sup>

Another woman, based in Marafa, believed that better education for women was necessary for women to be able to participate in local governance structures, such as committees:

*They are getting involved but now most of the schools or most jobs requires education. And those who have education are few and now even if there is an opportunity and you have not gone to school, you cannot get. Like the ones for the committee, not like a leader itself but being in a committee.*<sup>181</sup>

She further added that women are hungry for learning opportunities, and will attend because “*they are interested in knowing*” and want the opportunity to “*open your mind.*”<sup>182</sup>

A woman in Bungoma argued persuasively that education for everyone in the community, including but not limited to women, offers the best way forward to peaceful co-existence. She reflected on the centrality of land in conflicts in Mount Elgon, and explained that education would decrease people’s dependence on land and thereby decrease land conflicts. She proposed that her community would benefit from a rehabilitation, counselling, and education centre:

*Many did not go to school, they can go there (the rehabilitation centre) and get different courses. And they should be educated that it is not only land that you can get money from. ... Everyone has their talent and with your talent, when you go to school you add the knowledge. ... Everyone to shine up their talent and they go and be self-reliant. Because if someone has a project to take up they can move on because by the end of the day even after ten years, these lands will not be there. And what will we be sub dividing? It will now be the knowledge which*

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<sup>177</sup> Interviewed in Nairobi, September 30, 2014.

<sup>178</sup> Interviewed in Nairobi, September 30, 2014.

<sup>179</sup> Interviewed in Nairobi, September 30, 2014.

<sup>180</sup> Interviewed in Kisumu, January 23, 2014.

<sup>181</sup> Interviewed in Malindi, June 12, 2015.

<sup>182</sup> Interviewed in Malindi, June 12, 2015.

someone has. Because if we go to other areas, people are very rich and the land is very small because they concentrate in educating their children.<sup>183</sup>

### 3.5 Economic justice

Women in Kenya have suffered significant and material economic harm from violence. Many of the women we interviewed were small-scale farmers or small entrepreneurs; only one stated she was employed for a wage in the formal economy. Several women lost their capacity to generate income as a result of the violence, either through being widowed or displaced and losing access to land, or having the capital of her small business destroyed or stolen during the conflict. Women from all research sites told us of devastating economic losses due to violence:

*Our lands were taken and I had my five acres of land and now I am just living in a secondary school project. I am staying there as a displaced person. We lost all our things – houses, food...*<sup>184</sup>

*And because the violence was getting intense, I had to leave with the children and so the food which was remaining there was finished. And the house I was living in was burnt. Everything which remained inside was all burnt. I have started all again, I started looking for clothes, cups, plates, pans all again.*<sup>185</sup>

*I had a four roomed house, they came back and destroyed the whole house and carried all the materials and all my things. That is how we came out of that place and went to the camp.*<sup>186</sup>

*It is because in the beginning you were staying well and you were able to take care of your children well. You had your house somewhere which you were depending on every month, like me I was having four rooms. I was staying in one and I rented out three. It was not much but when I collected the rent for the three houses, it was enough for us for the whole month. And I still had my business. Like us, all our things went. Like me, my things went worth three rooms, you see. My business was carried away, my houses were demolished and they carried the materials. So I cannot revive those houses. Where we are now is not a village, we are visitors. So we have started another life which is a life of problems, a life of suffering. Like for me now, I said I am doing daily jobs. I can get or sometimes fail to get. My dear, I am washing someone's clothes for two hundred shillings. This two hundred, in that house there is nothing and it is not automatic that I get. Even that child does lack food and we sleep and we wake up for a second day, you see. So we are living a life of suffering, from that time of violence. Nairobi is a garden of stones without going into your pocket you cannot eat and you cannot do anything. Everything in Nairobi is money, when you fail to go into your pocket you sleep without food. So we have suffered from that time of violence.*<sup>187</sup>

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<sup>183</sup> Interviewed in Bungoma, April 15, 2014.

<sup>184</sup> Interviewed in Malindi, June 12, 2015.

<sup>185</sup> Interviewed in Malindi, June 12, 2015.

<sup>186</sup> Interviewed in Nairobi, September 29, 2014.

<sup>187</sup> Interviewed in Nairobi September 29, 2015.

The loss of the ability to generate an income has, for many women, meant resorting to highly precarious labour, doing physically demanding, insecure, and low-paid work such as washing other people's clothes, looking through rubbish for items to recycle and sell, or making food items to sell by the roadside. With the loss of a secure economic base, women are less able to pay their children's school fees, household health expenses, and other essential goods and services. Several women told us that they frequently have periods of homelessness, and that when they do have housing, it is often in deplorable conditions. A woman in Nairobi said, "*If you come to Mathare and you start walking in our houses, you will shed tears.*"<sup>188</sup> A woman in Bungoma described the house to which she had to move, after being widowed:

*Even the house I am staying in is very bad, I place papers as walls. Even if you see you cannot believe that someone is staying there.*<sup>189</sup>

A woman from Kisumu said that a lack of money was forcing her to remain in a violent relationship, and that if she was compensated for crimes committed against her, she would be able to leave:

*I do not have peace where I stay. The house where I am is bad. In case I am given some money I can go and make my house, that can be good.*<sup>190</sup>

Given the many ways in which poverty impacts on women's ability to access food, safe housing, and healthcare, and their ability to ensure their children receive an education, it is unsurprising that many women expressed their need for justice in economic terms. Every woman interviewed for this research identified that being compensated for their losses and restored to a position in which they could meet their basic needs, while feeling secure that this capacity is sustainable, is core to them feeling a sense of justice. Women told us that they needed land, housing, livestock, capital for re-starting small business, and other agricultural inputs to be replaced:

*I hear that there is money for the widows, I just hear but I have not witnessed. I am requesting the government that if there is that money, these women of Mount Elgon are very hard working. If that money was available, they would have helped us with that money so that we can develop in business and farming. Because if you do farming even a half an acre then you divide this half is for school and this other half is for food. You see life will not be very difficult.*<sup>191</sup>

*I am requesting the government that if there was a place. I say a place, land. They would have looked for the widows who have suffered very much so that even if they get quarter of a hectare, a place to stay, so that they may not be chased every day from one place to another.*<sup>192</sup>

*Justice for me is when I get a place to stay.*<sup>193</sup>

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<sup>188</sup> Interviewed in Nairobi, September 29, 2014.

<sup>189</sup> Interviewed in Bungoma April 15, 2014.

<sup>190</sup> Interviewed in Kisumu, March 20, 2014.

<sup>191</sup> Interviewed in Bungoma, April 14, 2014.

<sup>192</sup> Interviewed in Bungoma, April 14, 2014.

<sup>193</sup> Interviewed in Kisumu, March 20, 2014.



*If the government was good, we have lost our property like cows, houses all have been grabbed and gone. They would have come so that all that lost their property to be compensated to improve their lives.*<sup>194</sup>

*Before I was doing business, I was going to Tanzania, buying materials there and selling to the women in Kibera. All that my business stopped, all the materials were stolen during the violence and I remained like that without anything. So now I have always been washing for other women their clothes. ... Us women, we can be given something small instead, in order to start up a business so that our minds can open up, instead of looking for jobs every day. Like me I do go in other's houses (washing clothes) and I used to have my own money and I was working on my own.*<sup>195</sup>

Whatever the form of compensation preferred by individual women, the ultimate aim was the same, as expressed by a woman from Tana Delta:

*Getting justice is eliminating this poverty. It is necessary that we are supported in that.*<sup>196</sup>

### *3.5.1 Reparations and compensation*

Reparations are a critical element of post-conflict justice. The UN Secretary General's (UNSG) report on transitional justice noted that, after widespread human rights violations,

States have the obligation to act not only against perpetrators, but also on behalf of victims – including through the provision of reparations. (2004, [54])

Reparations serve multiple purposes in post-conflict situations. Reparations help people to rebuild economically after conflict; to access medical and psychological treatment for injuries, illness, and traumas sustained during the war (which often inhibit the most vulnerable individuals and groups in society from participating equally in post-conflict social, economic, and political life); and, importantly, can have a restorative effect, helping in “restoring victims’ confidence in the State” (UNSG 2004, [54]). The UNDP noted that

[r]eparations, if well designed, acknowledge the victims’ suffering, offer redress, some form of compensation and acknowledge the responsibility of the state to make amends for past wrongs. (2011, 20)

Kenya’s Truth, Justice and Reconciliation Commission (TJRC) recommended reparations as a key remedy in its Final Report, specifically identifying sexual violence committed during the PEV as a particular target for reparations (2013, 36). The report identifies individual and group monetary compensation as the priority mode of reparation (TJRC 2013d, 106). Compensation also received widespread popular support; the Commission reported that some 31,000 submissions by individuals nominated compensation as their preferred remedy for harms suffered during the conflicts covered by the Commission’s mandate – a figure denoting almost six times the support of any other single remedy (TJRC 2013d, 100).

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<sup>194</sup> Interviewed in Malindi June 12, 2015.

<sup>195</sup> Interviewed in Nairobi, September 30, 2014.

<sup>196</sup> Interviewed in Malindi, June 12, 2015.

The Government of Kenya has also recognised the need for restorative justice. This is most notable in President Uhuru Kenyatta’s apology, delivered as part of the March 26, 2015 State of the Nation address, to the Kenyan Parliament and the nation for historical wrongs (Hansard 2015, 13). In this speech, the President announced the establishment of a KES 10 billion “restorative justice fund,” to be expended over the next three years (Hansard 2015, 13).

While it is encouraging that the Government of Kenya has recognised the need for reparations, women participating in the Validation Workshop in June 2015 expressed significant scepticism about the fund; in particular, they expressed doubt about whether women survivors of sexual violence would be able to access any funds:

- Woman 1: *But the president has given ten point five billion to compensate those who were affected. Where will that come from? Those whose houses were burnt are the ones who are always paid.*
- Woman 2: *Good point.*
- Woman 1: *Those are the ones who are always getting good money but rape is not always regarded as something.*
- Woman 3: *I don’t think it is a lot of money.*
- Woman 4: *But they said that it is everyone. Those are the statements they were now taking from people.*
- Woman 2: *I don’t think we will ever get something, I think we will ever leave on the road like that.*
- Woman 1: *Rape is not always visible but it affects you from inside.*
- Woman 3: *Let me tell you, there is nothing as bad as rape.*<sup>197</sup>

The TJRC identified several categories of “extremely vulnerable individuals,” whose applications for reparations should be expedited. These categories include women who are in economic hardship caused by being widowed, where their spouse was killed by either state actors or non-state actors acting with state complicity or where the state demonstrably failed to protect; and women who have urgent health needs and who can show a causal relationship between their current health needs and the violation (TJRC 2013d, 105). The TJRC recommends that, in determining eligibility for reparations, the state should consider the “preponderance of evidence,” and that

[e]vidence might include birth and death certificates, medical records, recommendations from the Implementation Committee’s partners (NCIC, KNCHR, CBOs, CSOs, NGOs), or other evidence as specified by the Reparations Regulations. (TJRC 2013d, 107)

The Government of Kenya has not yet released information about any mechanisms for managing the announced restorative justice fund. However, women participating in this study are already concerned that the TJRC evidentiary recommendations may disadvantage women who were sexually assaulted during the PEV:

*They were saying something that if you don’t have something but you went through psychosocial support, then you could bring the medical documents. But how many women went? What percentage? Who even knows that that post rape care is free, very*

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<sup>197</sup> Interviewed during Validation Workshop, June 22, 2015.

*few. So very many women who went through that in the rural areas will miss out on this reparation because of that.*<sup>198</sup>

Furthermore, many women who were widowed and/or displaced during various conflicts raised with us the difficulty they have experienced in obtaining birth and death certificates. The absence of such documents is already disadvantaging them in accessing material benefits, such as bursaries to assist their children to attend school. This group of women are at risk of being further disadvantaged by not being able to meet the evidentiary burden recommended by the TJRC for accessing monetary compensation.

Women also expressed doubt about the likelihood of them receiving reparations or compensation arising out of earlier ad hoc compensation schemes. Internally displaced women (IDPs) in Nairobi told us that they believed they would never receive any compensation, as they are not “favourites” of any Member of Parliament. They believe that IDPs who have received assistance to return and reclaim lands, or who have been compensated for their losses, received assistance due to political favours, rather than an objective assessment of harm done:

*You see, former President Kibaki came with the party of People’s National Unity and Raila came with Orange Democratic Movement, [local community representative, name redacted] was for Orange Democratic Movement. Now we have not had someone to intervene for us. ... The names you are seeing here are camps (shows a list of names), the camps which are in Nairobi. And now there is none who has been supported in Nairobi, not even one. The people of Maiu Maiu have been given four hundred thousand. Four hundred thousand each and there is nothing we have received, not even a little. ... What happened with the people in Mathare, Maiu Maiu, and Rift Valley is that we were all affected by the post-election violence. And the effect was the same for everyone. But when the Government decided to help those people to return to their business, to lift themselves up and start a new life. And us to wash our hearts from that river crossing to another river, they should support us the way they have supported the people of Maiu Maiu so that we clean our hearts and forgive our enemies and being careful so that even if there will be another election it should not be an election like the one for two thousands and seven. ... I would like the government to listen to our grievances, to our problems, to help us because right now we have gone very much down. We went down, no one can support herself. And if they would have done to us like they did to the people of Rift Valley, right now someone would have lifted herself up in life.*<sup>199</sup>

While the Government of Kenya announced KES 1.2 billion for IDPs in June 2015, it is not clear if these funds are to come from the KES 10 billion allocated for restorative justice, or from additional funds. The Government of Kenya has not released any guidelines on how these funds will be distributed, or eligibility criteria for receiving assistance. Displaced women in Nairobi, however, may have reasonable grounds to assume that they will miss out. In 2012–2013, the Government of Kenya distributed KES 3 billion to assist IDPs from the 2007/2008 PEV. *The Hague Trials*, a Kenyan news service specialising in reporting on PEV justice matters, reported that the 2012–2013 allocation of monies for IDPs was spent in regions which supported Kenyatta and Ruto – the Rift Valley and Central Kenya – and that

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<sup>198</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>199</sup> Interviewed in Nairobi, September 29, 2014.

IDP organisations in Western Kenya (known or perceived to support the opposition leader, Odinga) claimed that they did not receive anything (Jandiko 2015). It further cited the then Cabinet Secretary for Devolution and Planning, Anne Waiguru, as saying that “integrated IDPs” would not be eligible for assistance: “We have limited time to reopen the IDP database, and the government does not have funds for the integrated IDPs” (Jandiko 2015).

While the President’s announcements of both the “restorative justice fund” and compensation for IDPs are encouraging, little, if any, progress has been made on establishing or dispensing either fund. The lack of progress some ten months after the announcement risks missing an opportunity for the Government of Kenya to rebuild the trust and confidence of its citizens. Evidence of people’s growing scepticism about government-funded reparations is beginning to emerge. In December 2015, a victims group presented a petition to the Kenyan Parliament, calling on it to take up the recommendations of the TJRC and, specifically, to approve budget allocations for the KES 10 billion fund announced by the president in March 2015; this includes enacting necessary legislative frameworks to administer the fund (Journalists for Justice 2015a).

The Government of Kenya has the opportunity to make significant gains in the restoration of Kenyan women’s trust in the State. While all aspects of transitional justice will have an effect on civic confidence, reparations are particularly important. As Laplante and Theidon (2007) noted, the justice needs of people living in poverty are often expressed primarily in economic terms. The Kenyan women participating in this study are living in serious poverty, which is in turn diminishing their and their children’s access to safety, health, education, and opportunities to participate in social and civic life as citizens. Many women are able to draw a direct causal link between their current poverty, and either (or both) the post-election violence, and land conflicts in the Tana Delta and Mount Elgon. In the words of the TJRC:

The State of Kenya is responsible for reparations for the violations covered under the mandate of the Commission, either because violations were perpetrated by State agents or the State failed to protect its citizens. (TJRC 2013d, 98)

The ability of reparations to contribute to restoring community trust in the government requires that any prospective reparations are timely; explicitly embedded within a justice framework; transparently attached to harms suffered; and sufficiently resourced to deliver on commitments made. While individual direct payments as compensation are important, they are unlikely in and of themselves to satisfy women’s justice needs for security, health, psychosocial care, and education. The Government of Kenya is urged to act on commitments made regarding reparations and compensation as a matter of urgency, and to extend reparations beyond monetary compensation to also include law, policy, and service provision.

## CHAPTER 4: JUSTICE RESPONSES

*We know where to start but there is no one listening to you from that beginning and when the beginning is destroyed, you will not get to the end. So we are saying, the beginning should be good so that the end can also be good.*<sup>200</sup>

Many of the justice needs identified by Kenyan women impacted by violence (discussed in Chapter 3) have not been realised due to a strongly patriarchal culture, and justice processes that are gender insensitive, politically biased, corrupt, under-resourced, and inefficient (Kameri-Mbote 2000, 22; ICTJ 2014; ACORD International 2010, 35).

Whilst attempts have been made to respond to the epidemic of violence against Kenyan women and its impacts, justice for women survivors is strongly lacking. This chapter provides an overview of the law and justice framework in Kenya, and examines the efficacy of transitional justice strategies and mechanisms for women impacted by the post-election violence (PEV) and its aftermath.

The chapter examines ongoing barriers to women's access to justice, considering both formal and informal justice processes. This analysis reveals that much of what Kenyan women are calling for from justice remains elusive to them. As the opening quote to this chapter highlights, access to justice for women is thwarted by systemic barriers that pervade every level of justice, from points of entry to back end processes (ACORD International 2010, 46–47). Women in Kenya are entitled to be compensated for the injustices they have suffered as survivors of SGBV, and to realise outcomes that empower them and hold transformative potential for greater gender equality:

*Women also want compensation. They are losing their highness, they are losing their independence and livelihood. They want to be again acknowledged and have freedom and there should be true compensation.*<sup>201</sup>

Kenyan women have the right to be heard within justice processes as actors that shape justice and its outcomes.

### 4.1 Overview of law and justice framework in Kenya

The Kenyan legal system is founded on English common law. The supreme source of law is the Constitution of Kenya 2010, which binds all persons and state organs (Article 2(1)). Article 2(4) states that any laws inconsistent with the Constitution are invalid to the extent of the inconsistency. On December 12, 1963, the Independence Constitution was enacted to make Kenya a Republic, and on August 27, 2010, following twenty years of failed attempts at constitutional reform, a successful referendum saw the implementation of the current Constitution in Kenya (Ojienda and Aloo, 2011). Other primary sources of law in Kenya include Acts of Parliament; international law (Article 2(5)), and international treaties or conventions ratified by Kenya (Article 2(6)); Islamic law (Kadhis' Courts Act 1967, Chapter 11); African customary law (Judicature Act 1967, Chapter 8, s 3(2)); certain Acts of

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<sup>200</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>201</sup> Interviewed during Validation Workshop, June 22, 2015.

Parliament of the United Kingdom (Judicature Act 1967, Chapter 8, s 3(1)(b)); and other English statutes in force on August 12, 1897 (Judicature Act 1967, Chapter 8, s 3(1)(c)).

The 2010 Constitution attempts to address some of the root causes of the 2007/2008 PEV – in particular, the concentration in the Executive of significant political powers; corruption; impunity; and inadequate protection of minority rights (Constitution of Kenya 2010). With the Kenyan legal system divided into three branches (the Executive, the Legislative, and the Judiciary), the separation of power secures a system of checks and balances, providing for more stability (Constitution of Kenya 2010). In addition to containing a bill of rights, the 2010 Constitution, through the two-thirds gender principle,<sup>202</sup> also seeks to enable greater representation of women in more leadership positions (Constitution of Kenya 2010). Article 27(8) of the Kenyan Constitution requires the State to take legislative and other measures to ensure that not more than two-thirds of the members of elected or appointed bodies are of the same gender. This principle is reiterated in Article 81 with respect to public bodies (Article 81(b)). Affirmative action was used during the 2013 elections, with a number of government roles created specifically for women (USAID 2015). Although the President met the gender requirement by naming six women (out of 18 members) in his Cabinet, Parliament itself still fell short of this requirement. The eleventh Parliament features a record 86 women representatives, compared to the 75 women totalled over the past ten Parliaments (Association of Media Women in Kenya 2015, 7); however, this current figure only brings the representation of women to approximately 19 percent, far below the stated minimum of 33 percent required under the Constitution. Men still dominate Parliament, with figures at 81 percent in the National Assembly, and 73 percent in the Senate (Association of Media Women in Kenya 2015, 7). In 2012, the Attorney-General of Kenya filed for an Advisory Opinion from the Supreme Court regarding whether the two-thirds gender principle had to be realised in the 2013 elections; by majority, the Supreme Court ruled that, whilst the principle is progressive, Parliament was obliged to implement legislation giving effect to the two-thirds principle (FIDA 2015) (see below at Section 4.3.2).

Turning to other domains of public office, specifically in the justice sector, women's representation is still lacking. In 2012, of the 73,000 members of the Kenyan police force, only 11 percent were women (UN Women 2012). The National Women's Police Association was established in 2012 to empower women in the security and legal system (UN Women 2012). The reforms to the pay structure in late 2015 saw nine women rise to the top echelons of the police service (Maina 2015); however, with the dismissal of Ms Grace Syombua Kaindi from the Deputy Inspector-General role, the Service took a misstep in appointing a male as her replacement, and thus failing to meet the two-thirds gender principle (Langat and Cheron 2015). Meanwhile, the courts have hired over 100 new judges since 2011, including many women. In a 2015 speech, the Deputy Chief Justice of Kenya stated that 215 of 458 magistrates were women, making up 47 percent of the total, or near gender balance (Rawal 2015a, 9). However, as one moves up the court hierarchy, there are fewer and fewer women; 29 out of 69 High Court judges, eight out of 26 Court of Appeal appellate judges, and only two of the seven members of the Supreme Court bench, are women (Rawal 2015a, 9). The overall gender ratio in the Kenyan judiciary now stands at 45 percent women to 55 percent men (Justice Leadership Group n.d.).

The two-thirds gender principle is clearly having some positive impact on the participation of women in Kenyan public life, and in leadership roles (Kaimenyi et al. 2013, 93). However,

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<sup>202</sup> See, generally, Arts. 27(6), (8), 81(b), 175(c), and 197(1).

broader employment data suggests that women generally continue to be underrepresented in the labour force, and grossly overrepresented in lower paid, unskilled, and lower status positions (UN Data 2013; Budlender 2011). In 2013, the labour force participation of adult females in Kenya was approximately 62 percent, compared to 72 percent for males (UN Data 2013, under “Economic indicators”). Employment statistics reveal a larger percentage of women are engaged in non-paid, informal, or part-time work, including homemaking; 34 percent of women are considered “not economically active” in Kenya, compared to 25 percent of men; and 39 percent of men are paid employees earning a wage or salary, compared to only 18 percent of women (Budlender 2011, 2). Furthermore, 82 percent of domestic workers in urban areas are women, and 63 percent of urban street traders are women (Budlender 2011, 3).<sup>203</sup> Overall statistics place men’s earnings at a level at least one and a half times the average for women (Budlender 2011, 3).

The Kenyan court system is divided into superior and subordinate courts (Chambers and Partners, 2016, citing Constitution of Kenya 2010, Arts. 163(3)(a)–(b)). The Supreme Court, the Court of Appeal, and the High Court, make up the superior courts (or courts of record) branch (Chambers and Partners, 2016). The Supreme Court sits at the top of the hierarchy and binds all other courts (Chambers and Partners, 2016). It has exclusive original jurisdiction, as well as appellate jurisdiction for decisions of the Court of Appeal and any other court or tribunal deemed by law (Constitution of Kenya 2010, Arts. 163(3)(a)–(b)). The Supreme Court may also provide advisory opinions should the national government, a state organ, or county government make such a request; such was the case in the above-mentioned instance of the Attorney-General filing for an Advisory Opinion regarding the two-thirds gender principle (FIDA Kenya 2015).

The subordinate courts, also known as trial courts, include the Magistrates’ Courts; Kadhis’ Courts, which exercise jurisdiction over Islamic law (Kadhis’ Courts Act 1967, Chapter 11, s 5); Courts Martial; and other courts or local tribunals created by Acts of Parliament (Chambers and Partners, 2016). These other tribunals may be established ad hoc to deal with certain disputes that arise (Chambers and Partners, 2016). The courts have a discretionary power to award costs in any action or cause, or other event (Civil Procedure Act 1967, Chapter 21, s 27).

#### *4.1.1 Criminal justice*

The main players in the criminal justice system in Kenya are the community, the police, the judiciary, the probation and aftercare service,<sup>204</sup> and the prison service (Onyango-Israel 2012b). However, there are obvious deficits with the effectiveness of the system in its protection of the Kenyan public, and in particular women. The judicial system has been plagued by inefficiency, corruption, and political bias (Gainer 2015), which has resulted in the public’s loss of trust in the system (Gainer 2015); this is highlighted in the following words of one of the key informants interviewed in this study:

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<sup>203</sup> “Domestic workers record extremely low wages, equivalent to only about a third of the average earnings of all informal urban non-agricultural workers. Street traders earn much more... but their earnings are still only just over three-quarters of the average for all urban non-agricultural workers” (Budlender 2011, 3).

<sup>204</sup> The probation and aftercare services in Kenya are mandated by key Government agencies, to rehabilitate offenders in the community by implementing supervised non-custodial correctional services. This contributes to crime reduction (UNAFEI 2014).

*Not a single person has been successfully tried for the crimes that were committed in 2007, 2008 and the atrocities were appalling. Now it just so happens that those who have been identified as bearing the highest responsibility also happened to be the people who hold very seriously high positions in this country.*<sup>205</sup>

Kenya's courts have suffered from enormous backlogs, estimated at one million cases (Gainer 2015); some cases have not been heard for over 30 years (Ndungu 2012). As of December 2009, 2372 cases were estimated to be pending before the Court of Appeal in Nairobi and its circuit stations; 115,344 in the High Court and its stations; and 792,297 in Magistrates' Courts. This totals 910,013 pending cases. Some of these have been pending for up to five years (Republic of Kenya 2010, cited in Kamari-Mbote and Akech 2011, n 250). Case backlog remains a major challenge for the judiciary in Kenya, including in sexual violence cases; as of February 2014, there was a backlog of 650,000 cases pending in the Kenyan Courts (McEvoy 2014, under "Prosecuting sexual violence: Police practice").

The 2010 Constitution requires justice to be served to all Kenyans indiscriminately and without delay (Gainer 2015, 3). However, the number of judges in Kenya serving the entire population is comparatively low, compared to the rest of the world (Ndungu 2012); in 2011, there were only 53 judges and 330 magistrates serving a population of 41.4 million (Gainer 2015, 2). By comparison, Argentina and Colombia, which are of similar size, had respectively 2019 and 4805 judicial officers serving the nations' populations (Gainer 2015, 2). The Kenyan system also lacks mechanisms to track the status of cases and hold judges accountable for delays (Gainer 2015, 2).

The appointment of a new Chief Justice of the Supreme Court of Kenya, Dr Willy Mutunga, saw reforms dealing with some of these inherent issues. The significant backlog of cases is now being aided by the computerisation of the Judiciary, record digitisation, and, where there are pending judgments, the responsible judge or magistrate is to make a declaration (Mutunga 2011). Also coinciding with the Chief Justice's appointment were the appointments of 28 new High Court judges by the Judicial Service Commission, of which thirteen were women (Mutunga 2011).

In 2012, the Deputy Director of Public Prosecutions publicly stated that many of the 4000 police investigations relating to post-election violence could not proceed to court, given the lack of sufficient evidence (Maliti 2012). In investigations relating to sexual violence, there was often no preservation of DNA or forensic evidence, and witness statements were vague and recorded a year after the event (Maliti 2012). The International Rescue Committee (IRC) assessed responses to GBV in nine Kenyan counties, finding that "GBV cases are on the rise across the country, both in nature and diversity" (2014, 11), and that "[t]here is a glaring absence of support to survivors of GBV, as the chain of support right from reporting to the police, through to healthcare and the judicial process is slow, ineffective or hardly in place. This emboldens the perpetrators and increases the vulnerability of the survivors" (2014, 11). The Kenyan Police Service was cited as the weakest link in the chain in most counties (12). Furthermore, the Kenya National Crime Research Centre (NCRC) found that, of those that did report, 13.9 percent of women said the perpetrator was "arrested, prosecuted and convicted" (compared to 29.4 percent of men who reported such outcomes); 29.1 percent of women said "no action" was taken; and 11.8 percent of women did not know what had happened in their case (2014, 64). Both the IRC and NCRC reports found very low levels of

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<sup>205</sup> Interviewed in Nairobi, 1 October 2015.



reporting to police, and very poor outcomes when matters were reported (NCRC 2014, 60; IRC 2014, 12). Many of the women participants in our research highlighted police corruption and ineffectiveness as a key barrier to women accessing justice (see further discussion below):

*What we really deserve is for these policemen to give us our rights. If someone goes and reports, they should stop considering it as a joke or they look at you and despise you. So the first thing is about those policemen. Let them stop despising us, you go there to seek help and they don't provide any.*<sup>206</sup>

*Police sometimes just compromise, and they don't record the evidence, they don't record the evidence well, they don't take the matters to their logical conclusions. So they appear in court without the evidence and definitely then one would be acquitted for lack of evidence.*<sup>207</sup>

A further indication of Kenya's troubled criminal justice system is reflected in the state of its prisons. Of the 89 prisons in Kenya today (Nyaura and Ngugi 2014, 8), most of the facilities remain in the same state as when they were first constructed in colonial, pre-independence times (Mnyamwezi et al. 2015). Prisons are classified into three categories based on the level of security, inmate ages, and length of sentences (Nyaura and Ngugi 2014, 8) – closed prisons are maximum security prisons for long-term offenders of more serious or violent crimes; semi-closed prisons house offenders of less serious or violent crimes; and borstal institutions, or youth corrective training centres, are for those aged between 15 and 18 (Nyaura and Ngugi 2014, 8). The prisons suffer from harsh conditions, including overcrowding and congestion, unhygienic conditions, lack of clean water, spread of infectious diseases, and a lack of basic resources such as food and clothing (Nyaura and Ngugi 2014, 9–11). It has been reported that many prisoners are left starving, as they cannot afford to bribe wardens for their rations (Nyaura and Ngugi 2014, 9–10). The prisons also face issues from wardens smuggling in mobile phones for prisoners, enabling them to continue carrying out criminal activities externally (Onyango 2013, 40). Dishonest prison wardens have also been contributing to the drug and substance abuse in Kenyan prisons (Nyaura and Ngugi 2014, 9). Prisoners' rights and freedoms are also often infringed, with the use of torture being widespread, and corporal punishment permitted (Nyaura and Ngugi 2014, 9).

In addition to these issues, women prisoners face a number of other problems. Until the age of four, children are allowed to stay with their mothers in Kenyan prisons; the children are kept in the nursery during the day, and watched over by other inmates and guards (Nordahl 2016). However, beyond the age of four, there is often no longer easy access to their children for women, and many mothers never see their children after this age (Njeru 2012). Seeing their mothers in a prison environment also traumatises the children, and some children whose mothers die in custody never get the chance to interact with their mothers in a non-prison context (Njeru 2012). It has also been reported that, whilst male and female prisoners are raped by fellow inmates, women are also commonly sexually assaulted by prison staff (UK 2013).

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<sup>206</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>207</sup> Winifred Lichuma, National Gender and Equality Commission, interviewed in Nairobi, October 2, 2014.

Kenyan women comprise 18 percent of the total prison population (Onyango-Israel 2012a, 146), and account for only 4 percent of all violent crimes committed in Kenya (Kenya Police Crime Statistics 2011, cited in Onyango-Israel 2012a, 146). The majority of offences perpetrated by females include assault, loitering, littering, hawking, and illicit brewing and sale (Onyango-Israel 2012a, 146); notably, these offences are largely poverty-related.

The evidence is therefore clear that Kenyan women are overwhelmingly the target of sexual, physical, and structural violence in every sphere of their lives.

#### *4.1.2 Land and property rights*

Women participants in this study identified lack of access to, and ownership of, land as a major justice issue for women in urgent need of redress:

*I noticed that women suffer unique violations. And for example, issues related ... to property violations... and you find that in most instances those issues are not brought up... most communities do not consider them as consequential.*<sup>208</sup>

The 2010 Constitution provides a progressive legal framework for the recognition and protection of women's land and property rights (Gaafar 2015), including:

- (i) A Bill of Rights recognising the right of women to equal treatment under the law, and prohibiting gender-based discrimination (Article 27);
- (ii) Devolution of services, including land-related services, to the county level (Article 7);
- (iii) Recognition of traditional dispute resolution mechanisms (Articles 67(2)(f) and 159 (2)(c));
- (iv) A prohibition on the use of traditional dispute resolution mechanisms in a way that contravenes the Bill of Rights (Article 159(3)(c)); and
- (v) Requiring the legislative implementation of the principle that women make up at least one-third of the members of elected or appointed political bodies (Article 27(8)).

Kenya's National Land Policy 2009 seeks to "guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity" (ix). Together with other recent reforms in policy and legislation (e.g. Land Act 2012 and Land Registration Act 2012), the framework on land rights seeks to resolve historical injustices around access to, and ownership of, land (s 178–79), and improve gender equality in land use, management, and ownership (s 223) (Gaafar 2015). The National Land Policy 2009 specifically recognises the need to protect women's rights to inherit land (s 223(c)), both in and outside of marriage (respectively, s 223(d) and s 225); however, the inheritance rights of married and unmarried women are distinguished (s 223(e)). As men are traditionally considered the owners of land – an attitude borne of their status as heads of the household – women are consequently disadvantaged in land dealings, and often excluded from decision-making pertaining to the use and management of family land (including income generated from land) (Gaafar 2015). Moreover, as nearly all communities in Kenya are patrilineal, women rarely inherit customary land rights from their fathers or husbands (Gaafar 2015).

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<sup>208</sup> KI, interviewed in Kisumu, January 21, 2014.

The need for the specific protection of widows' and divorcees' land rights is noted in the National Land Policy 2009 (s 225(c)), in its recognition that widows and divorced women in Kenya are two particularly vulnerable groups of women when it comes to land and property rights (Gaafar 2014; International Women's Human Rights Clinic 2009, 14). Women participants in this study confirmed such vulnerability:

*Most of the time, the property which you are left for by your husband in the community, you will hear someone saying, I am selling this, I am selling this. You do not have any voice whatsoever.*<sup>209</sup>

*Because we do not have a way for sure and people like me I am not able. The land was sold, the land I bought together with my husband was sold, and so now I live the life of poverty.*<sup>210</sup>

The extent of a widow's land rights is dependent on a number of factors, including her age, number and gender of children, and the widow's relationship with the deceased's family (Gaafar 2015). These rights are "often insecure under customary law due to her status as outsider to the family lineage" (Gaafar 2015):

- Woman 1: *They took him and killed him, they did not want him to be buried.*  
Woman 2: *They took the land after killing him or how did it go?*  
Woman 1: *His parents had given him land, and when he died, they sold that land.*  
Woman 1: *Ooooh!*  
Woman 1: *And now I remained with nothing but frustration.*  
Woman 2: *What will save many women? There are such people in families. When your husband dies, the family starts selling his things.*  
Woman 1: *They say I only had girls, five girls.*  
Woman 2: *They felt that you don't have a boy*  
Woman 1: *I don't have a boy*  
Woman 2: *That is very bad*  
Woman 3: *Even girls are children.*<sup>211</sup>

Younger widows may be particularly vulnerable to land tenure insecurity (Aliber et al. 2004, 143), and may be forced into unwanted sexual relationships in order to retain marital property: "Yes, wife inheritance and you find most of them if they refuse to be inherited, they are snatched their property."<sup>212</sup> Such a social expectation is the result of cultural practices, such as "widow cleansing"<sup>213</sup> and "wife inheritance."<sup>214</sup>

Furthermore, as one woman participant explained:

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<sup>209</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>210</sup> Interviewed in Bungoma, April 15, 2015.

<sup>211</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>212</sup> KI, interviewed in Kisumu, November 7, 2013.

<sup>213</sup> "Widow cleansing" is the cultural practice of "cleansing" the impurity of a widow – an impurity ascribed to her by her husband's death – by engaging in unprotected sexual intercourse with another male, called a "cleanser" (Perry et. al 2014, 1).

<sup>214</sup> After a widow has gone through the "cleansing process," she is then "inherited" by a man of her late husband's family. Wife inheritance is seen as being different to marriage, as a widow remains married to her husband even after death; inheritors simply fill the role of the husband, but this relationship is one not of commitment and permanent bond, but of prescribed roles (Perry et al. 2014, 1).

*Someone can be a widow at a young age but the community will not allow her to look for another man like the bible says someone will be left free when her husband dies. If they will sympathise with you they give you anybody, they push to you anyone, like, "Here is the old man stay with him." And sometimes you find that he will not come to help you but to take the little that you have and you remain in a more difficult situation than the way you were.<sup>215</sup>*

Some women may not even be aware of their rights to refuse such practices. A judicial officer interviewed in this study believed that:

*A lot of women in the community are simply unaware of their rights in the case of wife inheritance. They believe they must be inherited because they do not know otherwise. So a woman who loses her husband, a brother in law will just come and rape and they move on with life as if something has not happened. And they are so used to that and they are not even aware that that is not the way things should be. They are not even aware that it is illegal.<sup>216</sup>*

Despite a legal framework that supports greater gender equality, men continue to be favoured when it comes to access to, acquisition of, and inheritance of, land in Kenya. Over 80 percent of women in Kenya are involved in small holder farming; however, only one percent are the owners of land in their own right, and only approximately six percent of land is jointly titled by men and women (UNW 2016). Moreover, Kenyan women access less than ten percent of available credit, and less than one percent of credit for agriculture (UNW 2016).

Women's access to land in Kenya is impeded by poor implementation of existing laws and policies; biased and discriminatory customary law practices (FIDA Kenya 2009); and the gaps that exist between customary and formal law (Gaafar 2015):

Culture and traditions continue to support male inheritance of family land while there is a lack of gender sensitive family laws. There is a conflict between the constitutional provisions and international treaties on gender equality vis-à-vis customary practices that discriminate against women in relation to land ownership and inheritance.

Women are not sufficiently represented in institutions that deal with land. Their rights under communal ownership and group ranches are also not defined and this allows men to dispose of family land without consulting women.

Few women have land registered in their names and lack of financial resources restricts their entry into the land market (Ministry of Lands 2009, [220]–[22]).

The lack of women on the bench, and within other land institutions, has been identified as a critical issue requiring urgent attention in the task of addressing gender equity in land security in Kenya (Gaafar 2015). It is explicitly recognised as a priority in the National Land Policy 2009, which requires the Government to "[e]nsure proportionate representation of women in institutions dealing with land at all levels" (s 223(h)). In 2008, for example, the Meru County Council included only five women out of 43 council members; Laikipia County Council included five women out of 36 council members; and the Land and Control Board in Meru included two women out of nine members (FIDA Kenya 2009, 14).

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<sup>215</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>216</sup> KI, interviewed in Kisumu, January 20, 2014.

Women in Kenya face numerous barriers in accessing justice in relation to land disputes, as they also do in accessing justice more generally (see further discussion below). Women may find the costly, complex, lengthy, and time-consuming legal processes involved to be prohibitive, and a strong deterrent to them pursuing formal justice processes in pursuit of their land rights (Gaafar 2015). For example, filing a succession claim generally requires no less than 17 different steps, and the completion of at least 13 forms (including providing supporting documentation, such as affidavits) (Harrington and Chopra 2010, 16). The cost of a formal succession claim may cost in excess of KES 60,000; this can be substantially more if there is another claimant and the case is contested (Harrington and Chopra 2010, 16). To put this cost into perspective, the average monthly earnings of a Kenyan woman are KES 6,390 (Nyaga 2010, 10). Women engaged in the informal and agricultural sectors earn, respectively, KES 3,118 and KES 1,597 on average per month (Nyaga 2010, 10).

Moreover, women may be deterred from pursuing formal processes due to fear of potential stigma and backlash from their families and communities:

It is often seen as disruptive and disrespectful for a woman to initiate a court proceeding to enforce her rights, and in one report interviewers found many respondents who claimed that communities are often “infuriated” when someone goes to court, particularly when the petitioner is a woman... To avoid these challenges, and preserve household peace and harmony, most women avoid the courts, choosing instead to deal with violations of their property rights through informal channels. They may first approach family elders to resolve a dispute; a married woman will usually approach her in-laws while an unmarried woman will approach her natal family elders.... as women’s land disputes are often with other family members (e.g., with brothers who claim their sisters’ inheritance or in-laws who have evicted a widow) women are often unable to secure a resolution in their favour... In some communities, cultural practices that do not allow women to appear before the elders result in a woman’s case being discussed in her absence. They can also suffer harassment and violence for complaining about the violation at all, in addition to losing their family support network. As a result, many women do not bring their grievances to the formal or customary dispute resolution mechanisms, even though they may have a valid claim. (Gaafar 2015)

#### *4.1.3 International obligations*

Kenya is a party to various treaties that impose both international humanitarian and human rights obligations, including, inter alia: the Geneva Conventions; International Covenant on Civil and Political Rights (ICCPR); International Criminal Court Rome Statute; International Convention Eliminating Racial Discrimination (ICERD); and the Convention Eliminating Discrimination against Women (CEDAW). Kenya is also a party to various regional human rights instruments, including several of which specifically recognise and seek to protect the rights of women and survivors of sexual violence. These include the African (Banjul) Charter on Human and People’s Rights, and the Protocol to the African Charter on Human and People’s Rights for Women in Africa.<sup>217</sup>

Pursuant to the Kenyan Constitution, international treaties form part of the domestic law of Kenya (Articles 2(5)–(6)). However, the provisions of the Constitution fail to establish a hierarchy of prevailing law, so as to enable clear resolution of conflicts between local legislation and rules of international law. This has resulted in case-by-case interpretive

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<sup>217</sup> See Appendix D for a summary of key international and regional instruments and efforts relevant to women’s rights in Kenya.

confusion in Kenyan courts (Oduor 2014, 97). For example, in the case of *David Njoroge Macharia v. Republic*,<sup>218</sup> the Court of Appeal of Kenya directly incorporated international human rights law into the domestic legal system:

From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of Article 2(6) of the Constitution of Kenya.

These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination. (Orago 2013, 421)

On the other hand, in *Beatrice Wanjiku & Another v. Attorney-General & Another*,<sup>219</sup> the High Court, in dealing with conflict between Article 11 of the ICCPR (which disallows civil jails) and section 40 of the Kenyan Civil Procedure Act (which allows imprisonment for debtors), placed international human rights norms from ratified treaties beneath both the Constitution and domestic legislation (Orago 2013, 433). The judge's reasoning was that, since Article 1 of the Constitution emphasised the sovereignty of the Kenyan people through a democratically elected government, international treaties could not usurp national legislation. Orago is critical of this judgment, calling it *per incuriam*, and suggests that it has the potential to allow retrogressive national legislation that falls beneath international human rights legislation (2013, 433–34). Moreover, Orago indicates that the sovereignty argument fails in light of the subsequent Treaty-Making and Ratification Act 2012, which allows for public participation in the ratification process (2013, 433).

Another case, *Diamond Trust Kenya Ltd v. Daniel Mwema Mulwa*,<sup>220</sup> dealt with the same issue. Although the case did not reject international law, it indicated that, in the hierarchy of laws, it was at parity with national legislation (Orago 2013). By this view, it could not oust the application of domestic legislation, nor could it render it unconstitutional. The ruling in the case went on to say the following: “Until a decision is taken at a proper forum, section 40 of the Civil Procedure Act will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum” (4).

The absence of clear constitutional safeguards regarding the interpretation and operation of Article 2(6), and lack of constitutionally entrenched Parliament powers pertaining to international treaty adoption, raises concerns about the hierarchy of international human rights law and ratified treaties within the Kenyan domestic legal system (Orago 2013, 422). Greater clarity would facilitate adherence to international human rights standards in the protection of women's rights, and enable breaches to be pursued more readily through legal channels.

#### 4.1.4 Customary law and traditional justice mechanisms

As previously noted, customary and traditional dispute resolution mechanisms are recognised under Kenyan law and entrenched in the Kenyan Constitution (Article 159). Research participants in this project highlighted, however, that the importance of, and extent of

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<sup>218</sup> Court of Appeal of Kenya at Nairobi, Criminal Appeal No. 497 of 2007.

<sup>219</sup> High Court of Kenya at Nairobi, Petition 190 of 2011.

<sup>220</sup> High Court of Kenya at Nairobi Commercial & Tax Division, Civil Case No. 70 of 2002.

reliance on, customary and traditional justice mechanisms varies between different ethnic groups and communities in Kenya. As one key informant told us:

*In Kenya, I think it is a bit more complex because a lot of our ethnic communities do not have those traditional justice mechanisms in existence. So it would literally mean that you are literally reviving something that hasn't existed for perhaps decades, I don't know how viable that would be. Whether there is, and you would actually need a traditional leadership system that would be able to carry on with that so that it is embedded in that. And then, in contextualising it, you can contextualise it and make it more gender sensitive. And again, in a lot of the cultures you have a traditional leadership that doesn't really exist or [is] respected. I think it is in very few communities; the Meru where the elders system is still very strong and still respected and that could be a place where you could embed traditional justice mechanism[s]. Amongst the pastoral communities in Kenya, it is still very strong and then perhaps with the coast it would be more the religious leaders, the Imams.<sup>221</sup>*

At the time of Independence, a large number of African citizens, including in Kenya, still relied on traditional and informal justice mechanisms to resolve disputes (Kimathi 2005, 7). Although it was expected that these mechanisms would fade from use as countries modernised, the inaccessibility of formal justice systems has contributed to the continued relevance and existence of traditional justice (FIDA 2008, 3). This is borne out in Kenya, when looking at particular communities. For example, in the arid lands districts, the formal court systems can be difficult to access (Chopra 2008a, 11), and local populations often hold the view that the judiciary does not actually dispense justice; this is because the outcomes in the official system are, at times, inconsistent with local paradigms and concepts (2008a, 12). As such, traditional justice systems can act to overcome obstacles to accessing the formal justice system (ACORD International 2010, 36). Moreover, customary law plays an additional role in the lives of many Kenyans in that its norms and practices have shaped, and continue to shape, Kenyan society and culture (Kamau 2010, 1).

That said, Muigua (n.d., 5) writes that the application of human rights standards to customary laws has been used at times to undermine the effectiveness of those laws. He notes that the courts have traditionally been biased against customary laws – an opinion dating back to the colonial era, where informal justice was viewed as “inferior.”

Nevertheless, even in the face of possible waning of some customary and traditional justice practices, the majority of disputes in Kenya are resolved outside the courts, and traditional mechanisms are recognised as a central pathway for attaining justice:

*[R]esearch shows more than sixty seven percent (67 percent) of people who have disputes have them resolved outside the Courts. And now the Constitution tells us that as the Judiciary we have to promote those traditional ways of doing Justice [so] long as they are in keeping with Constitutional principles and ethos.<sup>222</sup>*

Traditional and other non-state justice systems (including the Kadhi courts, the involvement of local chiefs, and peace/reconciliation fora) are still used by many Kenyans (Kameri-Mbote and Akech 2011, 174). This is particularly true of certain parts of Kenya (such as rural areas,

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<sup>221</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>222</sup> KI, interviewed in Nairobi, April 29, 2014.

the arid lands districts, and coastal provinces), where complainants still seek justice through alternative justice systems (see, e.g., Chopra 2008a, 10-12; FIDA 2008).

Women in these areas may find the formal justice system particularly inaccessible, for reasons such as distance and cost (see discussion below); by contrast, such barriers are more easily avoided by recourse to community justice mechanisms (Chopra 2008a, 11–12). Moreover, traditional systems will use the local language, have less impenetrable procedures, and are “enforced by people who are socially important to litigants” (ACORD International 2010, 36). The cases most commonly brought through such channels include disputes over land or livestock, marital and domestic matters, and domestic violence matters, but crimes such as assault and sexual violence are also sometimes referred to elders in informal justice systems (Kameri-Mbote and Akech 2011, 174).

A study of various communities in selected districts within the Coast Province (Mombasa, Kilifi, Kwale, Kinangop, and Tana River) found that the traditional justice systems used varied from community to community (FIDA 2008, 8). Most communities in the study had a hierarchy of systems, ranging through the district, divisional, locational, and village levels (2008, 8). However, the members involved in making decisions within most of these systems were exclusively men, with a few communities where both men and women comprised the membership of the traditional justice system; even in the latter situation, men still formed the majority (8), although Mombasa in particular seemed to feature a larger degree of female involvement (10). In many of these systems, membership was not even open to women (10); at times, even if women were members, they did not attend sessions due to cultural mores restricting women’s interaction with men.

There were two cases in which the traditional justice system was made up entirely of women – the *Had Gasa* of the Orma community, and the *Kijo* of the Pokomo community. The former can deal with both men and women, and is a powerful community justice system able to impose severe punishments. They are feared, especially since they are known to impose spiritual sanctions, and their judgments are usually complied with (FIDA 2008, 10).

Generally, the procedure is as follows. A complaint is brought at a lower-level system, the defendant is summoned, and a hearing set; a payment, typically between KES 200–300, is usually made before the hearing (FIDA 2008, 9).<sup>223</sup> After the decision is made, it can be appealed to a higher-level traditional justice system, and, failing that, the Chief (2008, 9); if an Imam made the decision, appeal to the Kadhi courts may also be possible.

Access for participants is generally equal for both men and women, and women interviewed as part of the FIDA study highlighted the availability, affordability, timeliness, and proximity of traditional justice. As noted above (and as further discussed below), the formal justice system is not only seen as intimidating and difficult to access, but also costly and accompanied by long delays (FIDA 2008, 13). However, there are also cultural factors that may affect women’s access to traditional justice (FIDA 2008, 12), such as lack of self-confidence and fear. One woman participant provides the following poignant example:

*You know, here in Africa, being married is a big thing. So to lose that social status or maybe for the community to go see how you don’t satisfy your husband, that is why he*

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<sup>223</sup> Some traditional justice mechanisms do not require payment, while others yet impose non-monetary fees. Some systems also ask for a payment of about KES 200 before any decision is released.



*is going to your child. So they choose to defend the man at the cost of the child... And many women do that, many just defend the man... They will always defend the man and silence the child, they tell them never to talk about that again and all that. And it is sad, very, very sad.*<sup>224</sup>

Shame and fear of being stigmatised and abandoned by husbands, and ostracised by communities are powerful factors that often prevent women from seeking local justice:

*It has happened to many, many women and people just choose not to talk about it because either it is too shameful or I don't know, it is something that the society first judges you... You are cast, you know. And they just tell you in your face. And to avoid all that, I rather not talk about it.*<sup>225</sup>

*In an Africa set up, our society is mostly paternal you are a woman, you have been raped, you see what, the society starts looking at you like, you know they start blaming you.*<sup>226</sup>

*In the African traditional setting, rape has never been accepted up to date. Once you are raped, there is usually a lot of stigma that comes around you. So even for the women to come out to speak and say I was raped, it is very difficult, Some of them chose to suffer in silence because they don't want to say that I was raped then they end up stigmatised.*<sup>227</sup>

Moreover, women often perceive that traditional and informal justice can be biased against women due to prejudice on the part of male members, which may go unchecked (2008, 13). For example, a woman from Kibera in our study explained the following:

*No justice because... they didn't bother to deal with the perpetrators. You see, here at Kibera, once another child was raped. The rapist was caught, beaten and taken to the chief. The chief jailed this man for a very short time... while the victim was being treated. Then the chief freed the man and let him go. So up to now, here at Kibera, justice is never found.*<sup>228</sup>

Patriarchal beliefs can also affect women's ability to access justice through these systems. For example, as discussed above, women's claims to land are often denied on the basis of traditional beliefs (FIDA 2008, 14). Women are also often socioeconomically disadvantaged compared to men, which may exacerbate the possibility of receiving a negative outcome (14). The exclusion of women also causes many women to feel left out of the decision-making process (14).

Interviews conducted by ACORD International amongst the Mijikenda and Turkana communities provided some insight into how those communities address SGBV using traditional justice. For example, in the Mijikenda community, the process involves the complainant making a report and then paying the court KES 80 in administration fees. The Kaya elder then issues a notice requesting the accused to attend court. Those found guilty are

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<sup>224</sup> Interviewed in Nairobi, September 30, 2014.

<sup>225</sup> Interviewed in Nairobi, September 30, 2014.

<sup>226</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>227</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>228</sup> Interviewed in Nairobi, September 30, 2014.

fined by the elders, but such a fine does not exceed KES 4000; this often does not correspond with the harm suffered by the survivor (ACORD International 2010, 37); for example, victims infected with HIV will not receive adequate compensation under this system (37). Various alternative, non-monetary punishments can also be meted out under this traditional system of justice. These processes though are still marked by patriarchal structures, with the head of the Kaya court always being male as it is considered an omen for women to head the court (37). ACORD International suggests that this may fetter the reporting of SGBV, as survivors might have information they would only be comfortable sharing with other women (2010, 38); unfortunately, this is a fact for which little concern is accorded in traditional, and formal, processes of justice.

For the Turkana, formal courts are inaccessible or inadequate; thus, even if the Council of Elders believes a case warrants recourse to the formal system, there is limited power to make use of it (ACORD International 2010, 39). As such, it is usual to resort to traditional mechanisms. Such cases are adjudicated by the Chief, and assisted by a Council of Elders. If the case cannot be managed, it is referred to the Children's Office (2010, 38). Rape cases are divided into either rape or defilement of a girl, and rape of a married woman. In the case of the former, the girl's family is granted permission to beat the assailant, and he is to provide two oxen to her family. Raping a married woman is seen as a more serious crime than defilement, and, as retribution, her entire clan is allowed to kill the assailant. If the accused pleads guilty and the clan chooses to spare his life, his clan is asked to give cattle as compensation. In none of these cases does the survivor herself receive a financial benefit (2010, 38); however, if she is made pregnant out of wedlock, he is to give ten cattle and twenty goats/sheep to her family as compensation.

Poverty is a further complication, as it can result in options being chosen for their convenience instead of their potential to mete out justice for the survivor; for example, economic circumstances may dictate that defendants not be "jailed" for a lengthy period of time (ACORD International 2010, 39). It is also noticeable that different locations have different definitions of crime; for example, according to a respondent in the ACORD study, the community of Kaptirio does not consider rape a crime (2010, 38).

However, some efforts to include women have been made in certain communities. In Lakipia district, for example, the "peace elders initiative" is attempting to make informal justice more inclusive by installing youth and women as "elders" (Kameri-Mbote and Akech 2011, 174).

A 2003 joint ICJ-Kenya study (cited in FIDA 2008, 4) suggested that the use of community justice systems is not limited solely to rural areas, but is also present in informal urban settlements (especially Kibera and Mukuru slums). This study, like our research findings, suggested that local communities, regardless of location, commonly use alternative dispute resolution mechanisms, and highlighted the fact that poor women in urban locations are also apt to find formal justice mechanisms inaccessible (FIDA 2008, 4):

*The biggest problem we have generally with the legal processes, especially with the adversarial system, but specifically in a country like Kenya because of the way it is accentuated by the sort of foreign nature of exotic of the legal system compared to the everyday reality of people generally but of course especially for women, is that our courts tend to be very unfriendly places generally, but especially so for victims and*

*doubly so for victims of gender based violence. Because there is some unspoken stigma associated with it and generally there is a horror of a lot of intimidation.*<sup>229</sup>

*The justice system is completely blind to the lack of access, even when you talk about court fees, you know, and all that. Because is not even about getting a lawyer, because perhaps, maybe programmes can be put in place that can help people to, to actually be an advocate for themselves. But then the other deterrent is the court fees. They're so prohibitive, so people don't bother. You know, and then justice is really slow in Kenya. And we had a court case that drags on the 13 years. And in what is that? You know. I mean it's really, I mean it's really and so I think that there are several, uh, challenges with the system itself.*<sup>230</sup>

As one woman explained, these barriers to formal justice mean that

*because... we [women] grew up within the [traditional] system... it is actually a lot easier for them to just go. People don't think, when people are violated they don't think I am going to the police; I am going to seek a lawyer. They will go to the elders you know.*<sup>231</sup>

Kamau (2007) carried out an ethnographic study in Taraja, an informal urban settlement in Nairobi. As is generally the case in informal settlements, Taraja falls into a lower socio-economic bracket, although individual circumstances may vary (2007, 269–70). According to the respondents in her study, there is a hierarchy that applies to dispute resolution, with cases first being heard by the elders of the concerned village; afterwards, if necessary, the case can be appealed or remitted to the Assistant Chief, and then to the Chief. If it is still not resolved, it is forwarded on to the administrative officer of the location, who may either remit it to the District Commissioner or to a formal court (291). In practice, however, steps were often skipped; for example, cases may go straight to the Chief without first going to the elders. Moreover, the elders still play a role in hearings in front of the Chief or Assistant Chief (292). Recourse to the formal justice system “hardly seemed to be an option to parties” (292).

Social inequalities (if they existed in the case) also affected both the nature and the outcomes of disputes, with the results in such cases often reflecting unequal power relations. Women's experiences therefore mirrored the hegemonic structures of society, with patriarchal concepts such as “wifely obedience” affecting decisions (Kamau 2007, 317). Women were also left out of the consultation process in finalising decisions (317). This was confirmed by women in our study, “*because the men will sit, they will negotiate and you know the woman is not even part of the negotiation.*”<sup>232</sup>

Kamau also noted that the processes of traditional justice were in fact integrated into the “socioeconomic fabric of the society” (260), being concerned with health matters (such as HIV prevention) and civic education issues.

Participants in this research project most often spoke about traditional justice processes involving negotiation and mediation. In informal negotiation proceedings, parties will meet to identify and discuss the issues at dispute, until they arrive at a mutually acceptable solution.

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<sup>229</sup> Interviewed in Nairobi, April 29, 2014.

<sup>230</sup> Interviewed in Nairobi, October 1, 2014.

<sup>231</sup> Interviewed in Nairobi, October 1, 2014.

<sup>232</sup> Interviewed in Nairobi, April 29, 2014.

The goal is to avoid emphasis on how the dispute arose, but rather create options for solutions that satisfy both parties (Muigua n.d., 9). A common example of the use of negotiation in Kenya is present in the resolution of family and private law disputes (Muigua n.d. 9). In practice, because of the unequal power between women and men, negotiations more often favour the interests of men over women, and bias the outcomes against women (Wojkowska 2006, 20; ACORD International 2010, 39).

Mediation which typically involves a third party mediating between the parties to the dispute may also disadvantage women. With mediation, “[t]he goal often is not just to punish the perpetrator, but to compensate the victim for their loss” (Wojkowska 2006, 17); however, if compensation is not forthcoming to a victim (as is the case with many sexual violence cases), mediation may seem futile. A number of women participants in this project expressed frustration at seeing their perpetrator walk free and without being punished, following mediation, in which they ultimately received no tangible form of recompense. Other women, particularly widows, reported that, without a male relative to speak on their behalf, there was no chance of being heard in any community-based mediation process:

*Like us widows there is none who will listen to you even if you disagree with someone in the village, because you do not have a husband. An example is our government elder, they will listen to someone who has a husband but they will not listen to you because their men will stand up for them but you do not have yours. And you as a woman if you are faced with a problem who will stand up with you? They see you as if you are not a person in front of other people.<sup>233</sup>*

Traditional local elders are commonly invoked as a first point of call in the resolution of disputes within communities. The decisions of elders have traditionally been highly regarded, due to their influential status, knowledge, and respect (Muigua n.d., 12). Elders play a strong role, in particular, in resolving inter-familial disputes, and those related to natural resources (Muigua n.d., 11). Elders are also often the first point of contact for domestic violence matters (Kameri-Mbote 2000, 24). However, such cases cannot be effectively or fairly dealt with, unless elders are sensitive to the needs of women, and ensure women protection. The fact that the majority of elders are males makes this a less effective mechanism, either for protecting women’s rights, or as a catalyst for changing social and gender norms:

The casting of both the elders and chiefs in a patriarchal mould could and does reinforce cultural perceptions of women as subservient and in need of chastisement to ensure conformance to their roles. The effect of this is the disempowerment of women, making them more vulnerable to acts of violence. (Kameri-Mbote 2000, 24)

Customary and traditional law and justice mechanisms in Kenya thus play a key role in the preservation of cultural norms, particularly with regards to the place and status of women in families, and society more generally (Kamau 2010, 1–2). As evinced by the women participants in this research, customary and traditional laws and practices often undermine the rights and interests of women, and act to reinforce existing power hierarchies and social structures (Wojkowska 2006, 17); these render women more powerless, disadvantaged, and with little voice in their communities (Kamau 2010, 1–2). A key informant from Kisumu explained that

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<sup>233</sup> Interviewed in Bungoma, April 15, 2014.

*[in] this particular region we work with the Luo council of elders, the Kisii council of elders, the Bukusu and Nyakah, which is still part of the Luo council of Elders. So we have worked with them because we noticed that in most instances when there is such violations women rush to them. But we also noted that they are not aware on gender specific issues. They do not really understand how to handle women's issues because you see most of them use customs to hear and determine matters and some of these matters and some of these customs actually are retrogressive. So we work with them and train them on how to handle women's issues... also how they can bring women on board to be part of the counsels.*<sup>234</sup>

Another key informant with whom we spoke explained the following:

*They're really encouraging the elders to be part of this transition system. You know the alternative justice systems. But those elders are really the ones that continue, they're the custodians of culture that actually discriminate against women. So when you say that those guys are then going to be... the arbitrators or the alternative dispute resolution mechanisms, those are the guys who when a woman has been raped, they say to you give a chicken, you give a goat, you know. And they fall back on the ancestral way of doing things. We don't have any women who sit in these councils of elders, yet this is the model that they are looking at. The other challenge is that they carry a lot of weight in the community. And respect. And so, how then do we get women into the systems, or even get those councils to actually understand the gender issues so that they begin to dispense with justice for women. Because you'll find that, because women, we grew up within the system, so for them it is actually a lot easier to just go. People don't think, when people are violated they don't think I am going to go to the police; I am going to go to seek a lawyer. They will go to the elders you know. And so it is, how do we get these systems to also respond.*<sup>235</sup>

Women may be disadvantaged and excluded in traditional justice mechanisms in various ways, because of the higher status of men within their social context. For example, some women described being powerless in how perpetrators were dealt with by the elders:

*So [the elders] say, so you raped our daughter or our wife, then they say then you will pay this number of cows or camels and the perpetrator is forgiven. So you see the victim will still live in the same community with the perpetrator, the husband who was paid cows and camels will not want to touch that woman because she was raped. So you see the woman just stays with all her problems.*<sup>236</sup>

Traditional justice mechanisms may also limit the justice outcomes that women can obtain. For example, some women told us about how decision-making in a case, once referred to the elders, was simply taken away from them:

*I agreed that my case can move on but the elders sat down with him as he was now looking miserable (all laugh) and the man apologised then I withdrew the case... No, it was with the village elders and the case ended there.*<sup>237</sup>

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<sup>234</sup> KI, interviewed in Kisumu, January 21, 2014.

<sup>235</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>236</sup> Interviewed in Nairobi, April 29, 2014.

<sup>237</sup> Interviewed in Kisumu, November 7, 2013.

Despite these weaknesses and dangers, customary law and traditional dispute resolution mechanisms have been shown to be effective in managing conflicts, since the link with communities is often a strong one. Such mechanisms, as noted above, may also be more accessible, flexible, adaptable, quick, and affordable, which may be of greater benefit to women compared to the difficulties in resorting to formal justice processes. Customary law recognises the cultural roots of its laws, and the traditional values embedded within them; the dispute (and resolution) is thus more easily viewed as being relevant to the whole community, and so collective interests may be considered in decision-making (Wojkoska 2006, 17). As disputes can be dealt with in a discrete manner, perhaps possible detriment to the status of women in the eyes of the community may also be minimised. Women may additionally feel less intimidated in such processes, as the participants are known to her, and the processes are simpler and more personal than formal justice processes (which, as discussed above, often serve to alienate women) (Wojkoska 2006, 17). These potential benefits of traditional justice for women need to be recognised and leveraged in favour of women's interests. Women can use their particular role or authority to "influence the development of customary law in a way that is more responsive to women" (Kamau 2010, 32). One example that emerged from our research was the role that women can play in ensuring that the use of traditional justice mechanisms is properly circumscribed only to appropriate cases bearing women's needs in mind, and are not, for example, utilised in cases of defilement, rape, or sexual violence; these types of cases are marked by inherent power imbalances and gender biases and inequalities that characterise the crime itself, which would inevitably come to bear on the resolution of such cases in a way that further victimises and disadvantages women and girls:

*So in Isiolo for example there are five counsels of elders, they have one for each of the major ethnic groups in Isiolo and then they have one which is for... everyone else. So these ones are actually facilitated by the Provincial Administration in the sense that the Provincial Administration knows that they exist and they even facilitate them... Two of the five are headed by women and they have made rules for themselves, for example, the one which is the most interesting one is the Turkana one which is headed by a woman. And one of the rules is that any matter which has to deal with a criminal act committed on a child does not belong there, it has to go to Court.<sup>238</sup>*

*[T]here is no reconciliation in cases of sexual violence. No reconciliation at all at all. So even when they go to the Police station that they want to withdraw the case, the Police tell them no, no, no, this one you can't. They go to the village elder, even the village elder has been sensitised. The village elder will tell them that this case must go through the Court. So you find that such a collaboration sends a very strong message to the community that such cases if you commit such an offence, then there is no reconciliation, there is no compromise. You will have to go through the whole process.<sup>239</sup>*

## **4.2 Access to formal and legal justice**

Women participants identified multiple deeply entrenched barriers to women's access to justice in Kenya. One key barrier repeatedly identified by women, as well as by key informants, was the pervasive culture of corruption and "lawlessness" that prevailed in both

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<sup>238</sup> KI, interviewed in Kisumu, January 21, 2014.

<sup>239</sup> KI, interviewed in Nairobi, April 29, 2014.

formal and informal justice processes. Women explained that formal and informal justice in Kenya sometimes run in tandem, intersect, or converge. Women may move between formal and traditional or informal justice processes as their circumstances warrant or dictate. Therefore, formal and traditional systems of justice in Kenya are not closed systems, but rather are cross-permeating, both in culture and form. Indeed, a number of participants recognised the importance of trying to harmonise the culture, language, and values of both systems of justice:

*Policemen should be brought on board when sensitisation and mobilisation is being done... The community and the policemen should be brought together and the police should be told about it... Dialogue with the community and the police so that they can talk and agree.*<sup>240</sup>

*The way we are approaching alternative justice systems is really to have multiple dialogues. Having multiple dialogues with practitioners, with academics... with the Law Society.*<sup>241</sup>

The interactive and open nature of formal and informal systems of justice in Kenya is important to note when it comes to thinking about the sensitisation of justice actors and reform strategies and options.

Participants in this study consistently described processes of justice of all kinds, and at all levels, that are plagued by corrupt officials, inefficiencies in practice and procedure, and an overwhelming patriarchal, discriminatory, and gender insensitive culture. As one key informant in Nairobi explained:

*Yes there is stigma but poor people in Kenya just have poor access to justice whether they are women or men...So I think that the legal system and mechanisms are just not accessible to people who cannot afford to pay a bribe, who cannot afford to get a lawyer to push their things through. So I guess corruption also comes into that as well and there is just a culture that is permissively very patriarchal and does not take women's need seriously.*<sup>242</sup>

In this section of the report, we examine the barriers in accessing justice for women impacted by violence, as identified by our research participants. It will focus on formal and legal justice, and the implications for justice, law, and institutional reform in Kenya.

#### *4.2.1 Corruption, bribery, and the cost of justice*

Corruption, bribery, and inefficiencies at all levels in justice processes were identified by women in this research as posing key barriers to accessing justice for women impacted by violence.

According to the 2014 Transparency International Index, Kenya is considered one of the most corrupt countries in the world, ranking 145th from 175 countries (Transparency International 2014a). Across the national government in 2013/14, the Auditor-General

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<sup>240</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>241</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>242</sup> KI, interviewed in Nairobi, April 30, 2014.

reported that only 26 percent of the KES 1.3 billion of spending had a clean audit opinion (Office of the Auditor-General 2014, 3, 12). Although poor, this was an improvement from 2012/13, in which only twelve percent attained the clean opinion (Office of the Auditor-General 2014, 12). In a 2014 survey conducted by Transparency International, respondents' most frequently cited reason for bribing was that it was the "only way to access the service" (Transparency International 2014b, 21). The survey revealed that 70 percent of respondents had paid a bribe to a public sector official in the preceding year; most commonly, bribes were paid to the police, judiciary, and those working in registry and permit granting capacities (Transparency International 2014a, 3).

The deep culture of corruption in Kenya also permeates the justice system, implicating many justice actors – village Chiefs, doctors, police, judges, and other government officials. The Norwegian Institute of International Affairs (NUPI) reported bribery as rampant throughout the police, as well as in public hospitals. In 2002, for example, 96.9 percent of Transparency International respondents stated that they had paid a bribe to police while interacting with them, and 86.8 percent had paid a bribe to public hospital officials during contact with the public hospital system (Andvig and Barasa 2011, 40). Corruption in justice processes was a recurring theme, often mentioned by our research participants:

*The chiefs just wanted bribes and you could see them giving things to the people who were not affected by violence. Some people in the village were giving them bribes, but for me I did not have any money to give... So some people in the village were giving them bribes then they were being given those things.*<sup>243</sup>

*And so there is nothing the government in the community does to support, like the Chief, village elders and the police. If you report and the accused has money and bribes, everything goes silent like that. And when you report that the child is raped and they should arrest the person who did it, they tell you fuel their car. So if you don't have money to fuel their car... your case goes like that.*<sup>244</sup>

*And that is what is making us not to benefit because you report someone and that person has more strength than you are when they reach there they give bribes. Now you see the lower people like us who are down we will remain to be frustrated, you see. Our voices are not being heard (all group members support her statement). Someone who has money does something wrong to you. You as a woman, you do not have money and this person who has money, will give that money and that of your issue will go off there and there and no one will intervene for you.*<sup>245</sup>

*And if you lack money you again don't succeed. You will report and they write and it will be the issue of go, come back, and the person who did that to you goes there with a lot of money and bribes the doctor and the issue ends there. It ends without having a lawyer.*<sup>246</sup>

Women participants clearly stated that the levels of corruption throughout the justice system in Kenya thwarted women's access to justice at every turn, sometimes even where success in

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<sup>243</sup> Interviewed in Kisumu, March 20, 2014.

<sup>244</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>245</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>246</sup> Interviewed during Validation Workshop, June 22, 2015.



a case had seemed inevitable. This is testament to the depth of corruption, and the culture of impunity that exists:

*Corruption cannot be ruled out. We still have corruption practiced in the courts where you are very sure you have... incriminating evidence. But at the ruling or the judgment level, somebody gets acquitted.*<sup>247</sup>

One of the primary sites of corruption identified by research participants was the police:

*We thought that even if we went to the Police, they would demand some money... Now there is nowhere I could get that money.*<sup>248</sup>

*If you want to be a Police Officer, you simply bribe.*<sup>249</sup>

*They take advantage when you run to the police camps or the police station, some of the police or security men take advantage of these women or in the process of running you are also sexually violated by either men because you have sometimes to give sexual favours in exchange of security.*<sup>250</sup>

Transparency International determined that the National Police Service Commission was the most corrupt Kenyan institution (Transparency International 2014b, 17), with a significant amount of its spending queried; this included KES 31,117,504 allegedly spent on an office space that had not been occupied for sixteen months, KES 139,958,799 paid to a contractor who abandoned work on a site when it was only 34 percent complete, and KES 59,846,608 for an unsigned lease agreement between a landlord and the police commission (Office of the Auditor-General 2014, 41). There was also KES 1,178,052 spending by the National Police Service that was not approved by Parliament (2014, 19).

A 2013 survey conducted by Transparency International found that 95 percent of Kenyan respondents perceived the police as corrupt or extremely corrupt; a staggering 77 percent of respondents indicated that they had paid a bribe to police (Transparency International 2013). On average, the size of a bribe to police was KES 4821, an increase of KES 410 from 2013 (Transparency International 2014b, 19).

Executive Director of Transparency International, Samuel Kimeu, has described the corruption in Kenya as attaining “a sense of normalcy” (Wanjala 2013), so widespread as to no longer be treated as illegal or unusual (Wanjala 2013). For example, public minibus drivers are pulled over by traffic police on a daily basis; the standard process is to pay off these officials manning the roadblocks with petty bribes, rather than face the intimidation and false accusations that these officials might conjure up (Wanjala 2013). Other road users, such as drunk drivers, drivers under the influence of drugs, or drivers of unroadworthy vehicles, are also able to bribe these officials, thus jeopardising the safety of all road users (Standard Digital 2014). Traditionally, various methods of trickery have been used to conceal the actual action of the bribe. For example, money will be tucked away in the pages of an identification document (Wanjala 2013), or dropped on the ground scrunched into a ball and picked up once the vehicle has driven away (Mwanza 2013). More recently, to avoid detection, these

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<sup>247</sup> Winifred Lichuma, National Gender and Equality Commission, interviewed in Nairobi, October 2, 2014.

<sup>248</sup> Interviewed in Kisumu, March 20, 2014.

<sup>249</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>250</sup> KI, interviewed in Nairobi, April 29, 2014.

officials have turned to mobile transferring systems, and middlemen who collect money on their behalf (Mwanza 2013). The Ethics and Anti-Corruption Commission estimated that approximately KES 300,000 was collected daily and shared between the officials (EACC 2013). Additionally, in August 2015, Chief Justice Willy Mutunga discovered a “parallel court” for traffic offences, operated by corrupt judges and police officers (Winsor 2015). Traffic offenders who wished to avoid court would pay fines and cash bails into the pockets of these officials, robbing Kenya of KES billions in revenue (Maina 2015). These officials have also issued falsified receipts to offenders who have paid bribes (Maina 2015).

It has been suggested that a key contributing factor in police corruption is the low salaries that police officers are paid; junior officers were previously paid around KES 20,000 a month (Wanjala 2013). In 2015, this increased to KES 32,880 for constables, the lowest pay grade (Maina 2015). Corporals, the next rank up, now earn KES 42,660 a month (Maina 2014); by way of comparison, the average monthly income in Kenya in 2015 was just under KES 31,000 (KNBS 2015, 79). For paid employees with an undergraduate level education, average monthly earnings are around KES 32,000 and KES 30,000 for private and public sector employees respectively (Nyaga 2010, 10). For those with postgraduate qualifications, monthly earnings increase to almost KES 65,000 and KES 35,000 for private and public sector employees respectively. Turning to public servants,<sup>251</sup> although judicial officers earn significantly more than police officers,<sup>252</sup> the pay level of prosecutors and police are comparable.<sup>253</sup> Therefore, police are actually relatively well paid in Kenya (Nyaga 2010, 10). Police corruption, then, is likely to also be partly attributable to broader cultural influences and inadequate training of police (ICTJ 2014, 3–5). These factors are being targeted by recent reforms to the police in Kenya, but still have some way to go (see further discussion below).

Like police corruption, widespread judicial corruption, coupled with judicial inefficiencies, are well recognised as inhibiting women’s access to justice (Republic of Kenya 2010, 35). In 2014, the Kenyan Judiciary was ranked as the third most corrupt institution in the country; Transparency International recorded that 11.6 percent of the bribes in Kenya were paid to the Judiciary, only preceded in ranking by the police and land services (Transparency

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<sup>251</sup> The Salaries and Remuneration Commission (SRC), in their 2012-2013 Annual Report, set out a salary structure for public servants. Minimum and maximum amounts for monthly remuneration are set out; 60 percent of this remuneration is the basic salary, and 40 percent is allotted for allowances (SRC 2013, 21).

<sup>252</sup> A judge of the High Court may receive monthly remuneration of between a minimum gross amount of KES 532,500 (KES 319,500 basic salary and KES 213,000 of allowances) and a maximum of KES 907,279 (KES 544,367 basic salary and KES 362,912 of allowances). The pay scale for magistrates varies depending on position. For the lowest pay grade, Resident Magistrates, the total monthly minimum of gross remuneration is KES 123,750 (KES 74,250 basic salary and KES 49,500 of allowances) and the maximum is KES 190,000 (KES 114,000 basic salary and KES 76,000 of allowances). Senior Resident Magistrates have a total gross monthly minimum remuneration of KES 180,000 and a maximum of KES 300,000, while Principal Magistrates fall between KES 225,000 and KES 360,000. The highest pay grade for Magistrates, a Chief Magistrate, starts at KES 445,500 and tops out at KES 701,441 (SRC 2013, 53).

<sup>253</sup> A 2015 advertisement for vacancies suggested that a similar level of variance in the pay of prosecutors exists (Migori News 2015). However, the salary scale is more equivalent to that of police officers. The advertised salary for entry level prosecutors (Prosecution Counsel I) ranges from KES 30,472 to KES 40,835 per month. The next step up (Prosecution Counsel II) receives KES 35,275 to KES 45,021 per month (Migori News 2015). These lower-range salaries are relatively comparable to those of the respective levels for police officers (see Maina 2015), though it is unclear if any of these figures include allowances; however, benefits such as housing allowances are available for these positions. A Senior Principal Prosecution Counsel (the highest pay grade before the Assistant and Deputy DPP positions) takes home from between KSH 77,527 and KSH 103,894, while the highest advertised position, Deputy DPP, receives between KES 120,270 and KES 180,660 (Migori News 2015). Given that Maina (2015) observed that the top two pay grades for the police (excluding the Inspector-General and his deputies) ranged between KES 187,890 and KES 274,890, the salaries are comparable.

International 2014b, 20). Comparatively, it was found that the Judiciary recorded the largest average size of a bribe, at KES 7885 (2014b, 19). The Auditor-General's 2013/14 audit revealed that KES 463,366,769 of the Judiciary's spending was without supporting documentation (Office of the Auditor-General 2013/14, 18); unsupported payments included KES 84,267,245 paid from the deposits account, KES 377,382,724 spent on domestic travel and subsistence, and KES 1,716,800 used for rent. Additionally, there was KES 2,318,540 worth of revenue that was not accounted for (Office of the Auditor-General 2013/14, 40), and KES 5,677,844 in unsurrendered imprest balances (2013/14, 44).

Confidence in the judiciary remains a problem in Kenya. In a 2013 Gallup poll, 61 percent of Kenyans expressed confidence in the judiciary (compared to 27 percent in 2009) (Gainer 2015, 17). However, more recent controversies over corruption and the 2013 election ruling may have eroded this improved confidence (Gainer 2015, 17), with Ipsos polls suggesting a decline in confidence between 2013 and 2015. For example, in November 2013, only 21 percent of those surveyed had "a lot" of confidence in "Other Courts" (comprised of courts other than the Supreme Court). By February 2014, this had fallen to a mere 12 percent, dropping even further to 9 percent in May. It has climbed up a little since, but, as of April 2015, remains at around 12 percent (Ipsos 2015, 22). The number of respondents expressing a "lot of" confidence in Chief Justice Willy Mutunga witnessed a similar drop, falling from 27 percent as of November 2013 to 16 percent in February 2014, before settling at 22 percent as of May 2015 (Ipsos 2015, 22).

Lack of judicial accountability, poor judicial training, and the under-resourcing of courts, are likely contributing factors to judicial corruption and underperformance. These factors are being targeted by recent judicial sector reforms (see discussion below), and it is hoped that persistent attention will translate into greater access to justice for women in Kenya.

Such rampant corruption at all levels of the justice system creates a general sense of impunity and undermines confidence in the justice system (Wanjala 2013). Recent UNDP data found that 49 percent of people did not feel confident in the justice system, and 48 percent did not feel safe (UNDP 2015, 268). Moreover, a situation which demands that people must pay bribes at every turn inevitably impacts most those that are economically disadvantaged (which are more often women), and renders them unable to access any form of justice. We heard this time and time again from the women participants in this research project:

*[Y]ou know a poor person has "got no right." Our Kenya has become "a Kenya of something small" (bribes). It has become a Kenya of something small. I can be violated but when I report that; maybe that person has done that to me because he has money. But because I am a poor person, when I take my complaints there, I will not be heard. But with him, once he goes and gives money, even if you arrest that person and put him in prison, that person will take two days and you see him outside (one of the other participants agrees with her) because he has money.<sup>254</sup>*

Women participants told us that corruption rendered them unable to access most forms of justice:

*The reason why I did not go to the hospital, our hands were empty (had no money) and we thought that even if we went to the Police, they would demand some money... I*

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<sup>254</sup> Interviewed in Nairobi, September 29, 2014.

*was feeling ashamed because I am with big people and this issue is not making me feel good. I was disturbed in my heart and I did not even eat for one week because this issue was so painful to me.*<sup>255</sup>

*For me, for the case when I saw that justice wasn't served... there was a young man who had been sodomised, there at Kibera. He had been sodomised by a man. They went to the police... the young man was attended to, and the perpetrator was caught. When they went to court, the man's parents brought a title deed and bailed him out. In this case, I saw that justice wasn't served at all because the victim's mother couldn't come and oppose the release of his son's aggressor.*<sup>256</sup>

*Even if you go to our place in Emia (village where some live), the Church of ICM (International Church Ministry) gave some money that the widows should be built houses and those who were not lucky to get land. May be your husband died and you were not lucky to get that land. There was no widow who received anything, you just get the Chief has built the houses of widows in his home. Even his daughter has such a house, we are speaking the truth.*<sup>257</sup>

Moreover, such widespread corruption was seen to exacerbate a pervasive culture of impunity more generally, which some women described as a state of lawlessness:

*[T]he reason why we have laws, and penalties for breaking the law, is that it is supposed to serve as a deterrent to breaking the law. But if the law is not enforced, and I know that they are not going to enforce the law, then I am not deterred. If I want to beat you up, and I know that I will get away with it, that's fine. And it is driven primarily by our leadership, because even when you talk about the culture of lawlessness that you see in Kenya, you wouldn't believe it, if you drive on our roads that we actually have any laws and the people in the forefront of breaking the laws are the leaders.*<sup>258</sup>

*[W]here there is lawlessness, there will be people taking advantage. So the number of gang rapes, general rape and defilement cases during that period reached a precedent high.*<sup>259</sup>

*Right now, we're staring down a case of anarchy, because lawlessness is being strengthened... at the highest level.*<sup>260</sup>

The impact of such a culture on women is clear, rendering women more vulnerable to victimisation within their communities, with little protection available to them (UNSG 2006, 30).

Women also described this prevailing culture of corruption as an impediment to truth telling:

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<sup>255</sup> Interviewed in Kisumu, March 20, 2014.

<sup>256</sup> Interviewed in Nairobi, September 30, 2014.

<sup>257</sup> Interviewed in Bungoma, April 14, 2014.

<sup>258</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>259</sup> KI, interviewed in Kisumu, January 20, 2014.

<sup>260</sup> KI, interviewed in Nairobi, October 1, 2014.

*[T]here was a time I heard a witness giving testimony on the side of Ruto... please forgive me, I heard him say that he was forced to go and give false statements so that he can be taken outside the country where he will be given a good life together with his children. So you see that he was given money. You see that is not right, he did not use truth, the truth is in the community, now it is people like us who can tell the truth.*<sup>261</sup>

### Cost of justice, inefficiencies, and resource allocation

Corruption not only acts as a direct impediment to access to justice for women, but widespread systemic corruption in the justice system inevitably inflates the cost of justice, thereby adding to systemic inefficiencies.

Women participants in this research project repeatedly identified the cost of justice as a key barrier to accessing justice for women:

*Many cases regarding women just get stuck in the air because they are weak people who do not have money.*<sup>262</sup>

*Most of the women in this country we, we're very, we're not well off to afford lawyers compared to our male, I can't afford a lawyer... So we couldn't have [an] equal stepping stone.*<sup>263</sup>

*The amount of money she has to pay to access Justice is just too much. The government claims that yes they are able to pay that, but the follow up to get yourself to be given free services, I am yet to see even a woman who has been provided free services free legal service by the government. So affordability becomes another issue.*<sup>264</sup>

*It is just the fact that women are always the poorer people. So more often than not it is women who are unrepresented.*<sup>265</sup>

A woman who has experienced sexual assault in Kenya, and seeks access to criminal justice, is not only confronted by having to pay bribes in order to have her case investigated, but also by overly complicated and expensive administrative structures and costs. In all rape cases in Kenya, the attack must be recorded on a P3 form,<sup>266</sup> which is obtained from the police; the form is to be filled out by the examining doctor. In most cases, P3 forms are inaccessible and doctors charge KES 1500 to complete them, which the complainant is expected to pay (Wanjala 2013). Complainants are also responsible for requesting that the doctor present evidence in court. The P3 forms are often provided too late, and frequently there is a lack of coordination between the investigating police and the hospital due to the examination being carried out at a local hospital (Wanjala 2013). The typical expenses a woman complainant will need to meet, just in court-related costs, include (Hlimi 2013):

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<sup>261</sup> Interviewed in Nairobi, September 30, 2014.

<sup>262</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>263</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>264</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>265</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>266</sup> A P3 form is a medical examination report, obtained from the police station and to be completed by a police officer and a medical professional. It is a legal document used as evidence in cases involving bodily harm.

- Hearing fee in the High Court: KES 2000 per day
- Origination summons: minimum KES 1500
- Issue of witness summons: KES 50
- Issue of execution (e.g. warrant of attachment or a sale of property): KES 50
- Affidavit/declaration: KES 50
- For each exhibit: KES 10
- Communication with a court or tribunal outside of Kenya: KES 250
- Particulars: KES 100
- Judicial review: KES 6000
- Order of mandamus: KES 6000
- Prohibition certiorari: KES 6000
- Decree or order: KES 150

It is readily apparent that these expenses are prohibitive, having a deterrent impact for a woman likely living in extreme poverty.

Moreover, the formal justice system in Kenya is inefficient and under-resourced:

*The justice system is completely blind to the, the lack of access even when you talk about court fees, you know, and all that. Because it is not even about getting a lawyer, because perhaps, maybe programmes can be put in place that can help people to, to actually be an advocate for themselves. But then the other deterrent is the court fees. They're so prohibitive, so people don't bother. You know, and then justice is really slow in Kenya. And we had a court case that drags on the 13 years. And in what is that? You know. I mean it's really, I mean it's really and so I think that there are several uh, challenges with the system itself.<sup>267</sup>*

As previously discussed, the judiciary, in particular, is suffering from severe backlogs and delays (see also further discussion below). This inevitably impacts on women's access to justice, and the quality of the justice that is administered:

Interviewer: *If you go to the Police or if you go to a Court? Can they give you justice?*

Respondent: *I don't think so because the process, even if you have a case it will take so long that you can give up.<sup>268</sup>*

*One of the biggest challenges we have now is the delays. Delays in the execution of justice. It makes many women give up and lack confidence in the system.<sup>269</sup>*

Some key informants, as actors within the justice system, expressed frustration at the inadequate allocation of resources to justice processes, which often crippled their capacity to do their job:

*We do not have funding for productions and photocopies for witness statements. To the victims and the accused persons, the accused persons will come to court, they*

<sup>267</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>268</sup> Interviewed in Nairobi, September 30, 2014.

<sup>269</sup> KI, interviewed in Nairobi, April 29, 2014.

*have not read the statements. The complainants have not also read the statements of her fellow witnesses, the case just goes haywire, and there is nothing the judiciary can do because if I produce money to produce one witness copy, then one witness will accuse me of bias. So we need a government vote to cover evidence as well as statements in courts.<sup>270</sup>*

*Yes the doctor is there and we know it's free. Yes we know it is free but we don't have a vehicle and our doctor cannot walk to the Court or use a motorcycle to the Court. So we need a certain amount of money for the doctor to come and testify in Court. You know such kinds of costs which are costs that you don't anticipate. Transport for coming to Court every time and the case gets adjourned is another issue you know, it is another cost on accessibility or affordability.<sup>271</sup>*

*Even to visit the scene sometimes because we have only one stationed mobile vehicle, which has been assigned all duties at the station. If I receive, a report of a woman being battered somewhere and if you ask for a vehicle you are told that there is no vehicle, it has gone somewhere. So you cannot even rush to that place as quickly as possible so if there can be a vehicle in that office to deal with those cases specifically then we will be in a position to work well.<sup>272</sup>*

It is very clear that more resources must be allocated to the justice sector in Kenya, if it is to both be more accessible to women and deliver quality outputs to them. Recent justice sector reforms are directed towards trying to do just this (see discussion below); however, while approximately KES 154 billion was allocated to the Governance, Justice, and Law and Order Sectors in the 2015/16 budget (Dache 2015), the Judiciary's budget was cut, ostensibly for political reasons (Shiundu and Obala 2015). In comparison, the 2015 South African budget estimated expenditure of R 82,724 million (approximately KES 515.8 billion) for police services, and R 39,063 million (approximately KES 243.64 million) for law courts and prisons (National Treasury, Republic of South Africa 2015, 58).

One key area that requires greater resource allocation is legal aid for women impacted by violence (Kameri-Mbote 2000, 28):

*Justice is for the rich not for those who can't afford like me. Now, currently I don't know what is happening to the Non-Governmental Organisations. They don't have money, when you go to try to get a lawyer they tell you there is no funding. There are no pro bono lawyers, there is nothing and even the long legal process is something... I try to be strong but I am not. I try to pull through the day and I feel life is so unfair.<sup>273</sup>*

*Almost all victims in this part of the country do not go for representation. We have NGOs that are trying their best to represent such victims. We have FIDA for instance. But the legal officers in FIDA are too going through all the courts in the region. So you end up with a situation of nine out of ten victims of gender violence come to court without representation. There is no one to watch the brief for them; they do not know how to cross-examine. They are completely lost and in our position, we are not*

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<sup>270</sup> KI, interviewed in Kisumu, January 20, 2014.

<sup>271</sup> KI, interviewed in Nairobi, April 29, 2014

<sup>272</sup> KI, interviewed in Kisumu, November 7, 2013.

<sup>273</sup> Interviewed in Nairobi, September 30, 2014.

*allowed to assist them. So it is painful you watch a case being lost because you cannot intervene. So the government needs to come up with a legal aid program and it is already in the constitution but the treasury in liaison with the judiciary has not released funds for legal aid, because the constitution is very clear that the person who cannot afford legal aid should be provided by the counsel at the government expense.*<sup>274</sup>

Government-funded legal aid in Kenya is limited. Legal aid is only available for those charged with murder in the High Court, and for child offenders with no other options for legal assistance (Kameri-Mbote and Akech 2011, 15). There is the option of submitting a “pauper brief,” where those lacking means can apply for permission to sue as paupers; however, this is dependent on whether a lawyer is willing to accept the brief (Kameri-Mbote and Akech 2011, 15). Recently The Legal Aid Act 2016 was enacted in Kenya which could widen the number of people with access to state-funded legal aid. Its application to women in need is yet to be seen.

Non-government organisations thus play a key role in the provision of legal aid and pro bono assistance, particularly to women impacted by violence (Kameri-Mbote and Akech 2011, 15). FIDA Kenya is one of the key organisations that provides legal aid support to women through their “Access to Justice Programme”; between July 2014 and July 2015, FIDA Kenya provided legal advice to 8504 women. Of 105 cases filed in court, the success rate was 90 percent (FIDA n.d.). In response to the high demand for legal assistance from women, FIDA Kenya started a self-representation programme in 2002, to improve access to justice for disadvantaged women. The programme provides women with training on court processes, how to give evidence in court, how to cross-examine a witness, and how to produce documentary evidence. Since it has been established, the programme has trained in excess of 7000 women throughout Kenya. Between July 2014 and July 2015, the programme trained 677 women, filed 421 cases, and completed 104 cases, with a success rate of 87 percent (FIDA 2016). The impact of such programmes for women’s access to justice is very clear, evinced by statistics that reveal that, whilst conviction rates for sexual assault or defilement of child cases sit at between 15 to 20 percent (McEvoy, 2014), the success rate increases to between 80 and 90 percent where legal aid assistance is provided in prosecution (McEvoy 2014).

Numerous other NGO organisations also work to support women’s access to justice in a range of important ways. One recent initiative that has been attracting attention worldwide due to its transformative potential is the 2013 filing of a public interest litigation case, spearheaded by the Coalition on Violence Against Women (COVAW) (see further discussion below). The case involves eight petitioners – six women and two men, all survivors of SGBV experienced during the 2007/08 PEV – together with four Civil Society Organizations (COVAW, ICJ-Kenya, Physicians for Human Rights, and the Independent Medico-Legal Unit), who are suing the Government of Kenya. The respondents in the case include the Attorney General, the Director of Public Prosecutions, the Inspector General of the National Police Service, the Independent Police Oversight Authority (IPOA), the Ministry of Medical Service, and the Ministry of Public Health and Sanitation (COVAW 2016).

The petitioners, a representative constituent of the larger SGBV victim community from the 2007/2008 PEV, allege that the government failed to anticipate and adequately prepare police

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<sup>274</sup> KI, interviewed in Kisumu, January 20, 2014.



to prevent violence and protect civilians from sexual violence while it was occurring (COVAW 2016). Moreover, they claim that, in its aftermath, the police refused and/or neglected to document and investigate claims of SGBV, leading to obstruction and miscarriage of justice; the government denied emergency medical services to victims at the time; and that the government failed to provide necessary care and compensation to address their suffering and harm (COVAW 2016).

COVAW (2016) have stated that “[u]ltimately, the petitioners want the government to:

- Publicly acknowledge and apologise to the victims for their failure to protect the rights of Kenyans;
- Provide appropriate compensation, including psycho-social, medical, and legal assistance to the victims; to investigate the sexual violence and prosecute those who are responsible; and,
- Establish a special team within the Department of Public Prosecutions to ensure that such investigations and prosecutions are credible and independent.”

The petitioners are also seeking to establish a database for victims of SGBV committed during the PEV, and to have an independent body set up to monitor the provision of reparations to victims (Nudd 2014).

The respondents have denied the petitioners’ arguments, instead claiming that many victims of the PEV sought and obtained protection within police stations throughout Kenya, and that victims were also able to access necessary medical services. The government has further argued that, whilst police took steps to prevent the violence, the magnitude of the violence and the speed at which it escalated across Kenya prevented the police from providing every Kenyan with protection (Nudd 2014). The case is currently continuing and its outcome is eagerly awaited.

#### 4.2.2 *Lack of knowledge and culture*

Many women participants in this research also identified lack of knowledge of women’s rights as a key impediment to accessing justice:

*And then the literacy level, most people don’t even know that they have rights. Even if they know those rights they say there’s no problem. You go to the communities where a 60 year old man is married to a 13 year old, and they’re having... a baby, and the society feels like it’s okay. So culture... ignorance of their existing rights. So I think that those are some of the things that remain for accessing justice.<sup>275</sup>*

There seems to be a general lack of access to justice information in Kenya, to enable people to pursue their rights. In a 2014 study conducted by the Ethics and Corruption Commission (EACC), 52 percent of court users did not agree that the public had reliable access to information about the law and court systems (EACC 2014, 32).

Many women lack knowledge regarding both their legal rights, and relevant legal frameworks to access justice (COVAW, 2016). According to USAID’s assessment of land tenure in rural areas, 90 percent of poor civilians were not aware of formal laws (IWHRC 2009, 69). This

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<sup>275</sup> Interviewed in Nairobi, October 1, 2014.

lack of legal knowledge amongst the community extends, inter alia, to issues of land, sexual violence, and female genital mutilation.

Following the enactment of the Sexual Offences Act 2006, the government omitted to make a public announcement of the passing of the new law, and also failed to implement training of law enforcement officials about the implications of this statute (Aura 2014, 16). As a result, the majority of women are still not aware this Act exists (Aura 2014, 16), and, therefore, are not aware that they have legal rights which can be enforced if they have been victims of sexual violence. As women are unaware of their rights, enforcing such rights becomes a great challenge. This low level of awareness of the law is considered a major contributor to the perpetuating of sexual violence in Kenya (KNCHR 2012, 79).

Cultural norms and practices have been seen to foster sexual violence within most Kenyan communities (KNCHR 2012, 80). The harmful cultural practice of female genital mutilation (FGM) through circumcision, for example, is a customary rite of passage in Kenya. Despite FGM becoming recently outlawed by the Prohibition of FGM Act 2011, many communities still practise FGM without legal implication, as this law is not regulated, nor education provided about its existence. Some communities fail to observe the law completely: “Cutting girls is something our people have done for hundreds of years. No one can convince us that it is wrong” (Chatterjee 2014).

As women are generally less educated than men, they are less likely to understand the complex laws surrounding land (IWHRC 2009, 69). Local officials and elders who often adjudicate land disputes are mostly unaware that formal land statutes exist. Additionally, the inaccessibility of land laws often leads to reliance on customary laws, as an alternative (IWHRC 2009, 69). As statute generally provides greater protection of women’s rights than customary law, women’s lack of legal knowledge deprives women of the opportunity to assert their rights (IWHRC 2009, 69). Customary law denies women equal land rights, which is a serious violation of formal law. Training local leaders on existing land statutes could mitigate this infringement on women’s rights.

The low status of women in local communities, as well as lack of awareness regarding legal rights, poses a great challenge for women utilising and engaging with legal systems (KNCHR 2012, 80). Additionally, the lack of legal knowledge on the part of law enforcement officials further marginalises women, as women who make it to the reporting stage often cannot progress their matter further (IWHRC 2009, 69).

#### *4.2.3 Physical access, distance, and time*

The physical distances that many women (particularly women living in rural and remote areas in Kenya) must travel in order to access justice was identified as a significant barrier to accessing justice by women participants in this study:

*I’ve asked why they say when you arrest them it takes a long process to take them to court, and most of the time they don’t even have transport to take them on transport to the court. So accessibility to these courts is so frustrating for justice.<sup>276</sup>*

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<sup>276</sup> KI, interviewed in Nairobi, October 1, 2014.

*And we are hearing that, and particularly around the issue of poverty, that in some sites it goes beyond the notion of whether you can afford a lawyer or not, there are women who can't afford a bus fare to get to the lawyer.<sup>277</sup>*

*In those six months, you might even have used ten thousands, because from home to the Court is two hundred and fifty going and two hundred and fifty coming back all the time like that. And sometimes it forces you to go with the witness. If you go with the witness you have to pay for her.<sup>278</sup>*

*Other than awareness, the accessibility. For example, when the Truth, Justice and Reconciliation Commission was sitting in Kisumu, for the whole Kisumu County, then a woman in the most remote part of Kisumu might not be really be able to access. So how then will the information reach that woman in the grass roots to be able to understand that there exists a particular Commission, and what that Commission is doing, and how and way span to reach that Commission or any other body?<sup>279</sup>*

Other research confirms that unequal distribution of courts throughout Kenya hinders access to justice. The 2014 EACC study reported that 38 percent of users identified distance as a constraint to accessing justice (EACC 2014, 17). Moreover, 62 percent of judicial officers surveyed in the study thought that courts were too far away (2014, 16).

Most High Courts in Kenya are not located in the arid lands (Chopra 2008b, 11). The Report of the Task Force into Judicial Reforms (Republic of Kenya 2010, 86) found that, in Northern Kenya, courts can be as far as 500 km away from those who need to use them, and rural/marginal areas have these problems magnified by a lack of advocates and other legal service providers. Magistrate Courts operate in district capitals, which can be inaccessible to women who live in remote areas, both because they will often not have access to a vehicle, and because some roads are only passable by trucks or four wheel drives (Chopra 2008b, 11). Thus, there are numerous disincentives for women to make the journey, especially factoring in the cost of transport, accommodation, and food, once in the capital (and which will multiply if a hearing is adjourned). Women often experience long delays and adjournments in proceedings, which of itself is a disincentive for women

*because the process, even if you have a case it do take so long that you can give up.<sup>280</sup>*

*One may have to go to court many times for... and then there are postponements and there are... there are so many things. So the justice system itself is not user friendly to the survivors of sexual or gender based violence.<sup>281</sup>*

According to staff surveyed in the EACC study (2014, 20), 23 percent of court delays are attributable to adjournments. A study conducted by the Kenyan Judiciary found that, for criminal cases, the average time from case filing to conclusion is 498 days (1 year and 4 months), with a median of 362 days (The Judiciary, Republic of Kenya 2014, 12) (henceforth 'Judiciary'). Almost half the criminal cases took over a year to be resolved (Judiciary 2014, 12), with the case hearing taking up 67 percent of the total time between filing and

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<sup>277</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>278</sup> Interviewed in Malindi, June 12, 2015.

<sup>279</sup> KI, interviewed in Kisumu, January 21, 2014.

<sup>280</sup> Interviewed in Nairobi, September 29, 2014.

<sup>281</sup> Dr Ian Kanyanya, Kenyatta Hospital, interviewed in Nairobi, October 2, 2014.

determination (Judiciary 2014, 14). An analysis of the reasons for delays in determination found that 22.4 percent were due to the court not being in session, 19.1 percent due to the unpreparedness of parties, and 18.3 percent due to the unpreparedness of police and probation officers (Judiciary 2014, 22).

Processes that have been put in place to expedite cases are also, because of broader systemic problems and inefficiencies (discussed above), often ignored. For example, in 2008, the then-Chief Justice issued Practice Directions as guidelines for case management, in order to facilitate faster dispensation of justice (Republic of Kenya 2010, 45); this included both guidelines for the court (for example, that courts should only list for hearing those cases that they could reasonably handle), for the parties (such as exchanging summaries of their respective cases prior to the trial), and general suggestions (for example, fast-tracking old cases, cases involving children, and all criminal cases) (Republic of Kenya 2010, 45–46). However, the Task Force on Judicial Reforms, in its 2010 report, stated that “many judicial officers and advocates are unaware of, or do not pay keen attention” to these directions, and so, at the time the report was issued, they were yet to make much impact (Republic of Kenya 2010, 46). A key informant provided another example:

*The Pretrial Directions are essentially meant to facilitate quick dispensation and resolutions of these cases. But in most instances most advocates reluctantly ignore those provisions. So that those provisions are not really helping us, and I think it would be more prudent, once we have those provisions, let us have some clauses that will propel the litigants to ensure that they are within those timelines.*<sup>282</sup>

Additionally, women are not guaranteed a successful outcome (or compensation) in their case, so they have much to lose in pursuing formal justice (see further discussion below).

The use of mobile courts seeks to attempt to overcome these problems (Chopra 2008b, 12), although the use of such courts in Kenya remains uncommon, and “the distribution of the courts in marginalised and rural areas remains highly sparse” (Republic of Kenya 2010, 86). In December 2015, the Judiciary established its 51st mobile court in Wumunyu – one of 33 introduced in that financial year, bringing the total number of mobile courts in the country to over 50 (Judiciary 2015). However, according to Chopra (2008b, 40), “mobile courts are implemented sporadically. [They] are either held in areas with a high population and which do not have a court building, or in areas where magistrates insist that the types of cases occurring should not be left to the informal systems”. Mobile courts are also being used in some refugee camps in Kenya (HRW 2010; KANERE 2009), although their efficacy remains in question as “legal redress is time consuming and requires a high level of evidence... [and] the complex setting... at times prevents the naming and shaming of the perpetrators due to intimidation that can further jeopardise the rape survivors’ lives” (Mwangi 2012, 21). Such concerns point to the importance of implementing more holistic justice strategies that meet the multiple needs of women survivors, and their lived experience.

Mobile courts are not only important in terms of facilitating women’s “physical” access to formal justice, but can also serve as a means through which women can be redirected from traditional justice systems to formal justice ones (Chopra 2008b, 13). Importantly, mobile courts may also act as a check on the decision making of Chiefs, as the availability of a mobile court provides an alternative avenue for dispute resolution (Chopra 2008b, 13).

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<sup>282</sup> KI, interviewed in Nairobi, October 1, 2014.

While the Kenyan Judiciary “do[es] not intend to be lulled into believing that mobile courts are a permanent solution,” being rather “a temporary answer to an urgent need for physical infrastructure, a platform on which the Judiciary is quite thin” (Mutunga 2012), these courts have experienced some preliminary success. The mobile court programmes in Kakuma and Dadaab camps in particular have been described as “very successful” (Beck 2013); this success, particularly in effecting reductions in crime within the camp and surrounding areas, has been cited by the UNHCR in support of establishing similar mobile court schemes in Uganda in April 2013 (Edwards 2013). However, while reported cases have been dealt with swiftly and effectively, they do not appear to have had much effect on encouraging the initial reporting of those crimes (US Department of State 2013, 32).

Given Kenyans’ lack of confidence in the judiciary (as discussed above), mobile courts may also serve as an important mechanism for public outreach by the judiciary, to “help increase public understanding [and thereby trust] of the law” (Chopra 2008b, 12).

#### *4.2.4 Stigmatisation, fear, and lack of protection*

Many women participants in this research identified stigma and fear as key barriers in access to formal justice. In court, for example,

*the person giving the evidence would not be a hundred percent confident. Say a lady has been gang raped, she is standing in court facing a crowd of hundreds of people including her five rapists, her parents, relatives, the village elders and people from where she is married, they will be heavily intimidated.*<sup>283</sup>

Cultural factors were frequently identified by women as inhibiting their disclosure, and as a deterrent to pursuing justice. The Commission of Inquiry into Post-Election Violence (CIPEV) noted a prominent trend in the testimony of non-reporting sexual violence victims of the 2007/2008 post-election violence. Victims feared the rejection and ostracism that would attend their reporting to such an extent, that it stopped many of them seeking out medical treatment or counselling (CIPEV 2008, 267). Additionally, married women particularly feared, and often subsequently experienced, abandonment by their husbands (267). As one woman participant explained:

*let us say for instance that you are the woman and you become a victim of incest. Your husband rapes your child and makes your child pregnant, you know accessing justice is just hard because you find from the time you go to the Police station, you know you are already stigmatised.*<sup>284</sup>

This is particularly problematic for formal justice processes, which requires reporting to authorities as a prerequisite to commencing investigations and prosecutions.

Even if women choose to report sexual violence, formal court processes can re-expose the victim to the same fear and stigma that attended the initial disclosure. During a parliamentary debate on the Domestic Violence Bill in July 2002,<sup>285</sup> Professor Anyang’-Nyong’o

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<sup>283</sup> KI, interviewed in Kisumu, January 20, 2014.

<sup>284</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>285</sup> This Bill has since been passed into law, as The Protection Against Domestic Violence Act (2015).

commented on stigma as a barrier to women pursuing formal justice for domestic violence disputes – comments that are applicable to all forms of SGBV:

[W]e must recognise that some of these issues should not be heard in an open court. This is because of the kind of cultural and social stigma that is associated with forms of domestic violence. Sometimes, the victims are stigmatised after such things are made public. One of the things that happen when a woman goes to court and has to give evidence regarding the violence metted [sic] out to her by a man is that, society expects women to be less open about sex and sexual practices. When a woman speaks openly about sexual practices, there is a stigma attached to her to the effect that she either invited what happened to her or that she is loose. You might also find that there is a tag on her that since she was sexually violated, she is no longer worthy of heterosexual relationships in society. (Hansard 2002, 1770)

Women participants in this research voiced similar hesitations about pursuing justice through formal legal mechanisms:

*In the African traditional setting, rape has never been accepted up to date. Once you are raped, there is usually a lot of stigma that comes around you. So even for the women to come out to speak and say I was raped, it is very difficult. Some of them chose to suffer in silence because they don't want to say that I was raped then they end up stigmatised. Those who came out it is because may be it is known, may be when they were being raped, other people saw and so it is known that they were raped. But even then it doesn't mean that they become accepted by their communities and the community takes care of them and say that you know, we understand that you were raped and it is not your fault, we are going to take you back and your kids and everything.<sup>286</sup>*

*It has happened to many, many women and people just choose not to talk about it because either it is too shameful or I don't know, it is something that the society first judges you. They will ask you, "Why didn't you scream? What were you wearing? Where were you?" And now like me it has happened to me three times and they are like eeh! You are cast, you know. And they just tell you in your face. And to avoid all that, I rather not talk about it.<sup>287</sup>*

*When you go to court, how well are you protected? Because you go to court, it is an open court. It is not in camera, it is where any other person can hear your matter. You are narrating your incidence, you feel guilty. Sometimes people chuckle and cough, they start laughing, you know. Those systems have not been put in place and I believe when it comes to issues of violence or gender based violence against women, we should have a specific court that deals with that and it should not be in open like that. It should be in camera, the victim and the aggressor who committed the crime against the victim. Not where everybody is listening, a public audience is not for such cases.<sup>288</sup>*

The lack of protection afforded to women who wish to disclose sexual violence and pursue justice was a further factor that often prevents women from reporting and seeking formal

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<sup>286</sup> Interviewed in Nairobi, April 29, 2014.

<sup>287</sup> KI, interviewed in Nairobi, September 30, 2014.

<sup>288</sup> Dorothy Muoma, Office of Attorney-General, interviewed in Kisumu, March 20, 2014.

legal redress; “*And that is what pains most, if he is arrested he comes back. And the bad thing is that when he is arrested and he is released, your life is in danger.*”<sup>289</sup>

Witness intimidation is a particularly problematic issue in those cases where the perpetrator is socially, financially, or physically empowered relative to the victim, and thus there is greater likelihood of retaliation or other harm should the victim report (Seelinger and Freccero 2015, 60). In its comprehensive report of Kenya’s 2007/2008 post-election violence (PEV) (see also below), the CIPEV found that, among women who did not report PEV-related SGBV, 32 percent cited fear of being attacked by police (who were “effectively untouchable”), and 24 percent cited fear of retributive attacks (2008, 246–47). Furthermore, the National Crime Research Centre (NCRC), based in Nairobi, found that, despite the almost twofold lifetime prevalence rate of SGBV among women compared to men, more male victims reported to police than female victims in 2013–2014; this was taken as indication that women were often intimidated by police officials when reporting SGBV (NCRC 2014, 74–75).

While there is “a certain safety in the courtroom,” there are few measures to protect victim-witnesses from being harassed to and from the court (Seelinger and Freccero 2015, 60).

*Actually most of gender violence cases within Kisumu come from the slums, practically all of them and the rest from poor rural areas surrounding Kisumu. So you find that these women are unaware of their rights and even as they go through the process, most of them succumb to intimidations. Sometimes we try to follow up in court users committee and we realise that some of them withdraw and disappear from court because they are intimidated in their villages that if you continue giving evidence, your brother in law will deal with you and if you do that they will deal with you. And so most of them come from court very fearful because of the consequences they face at home and this really hinders their enthusiasm with cases.*<sup>290</sup>

This is especially so since many victims of sexual abuse are forced to return to the site of their abuse (and possibly their abuser), due to a shortage of safe houses and shelters (OMCT 2008, 24). Kenya does have a programme established by the Witness Protection Act (2010) and run by Kenya’s National Witness Protection Agency; however, while this programme can offer safe shelter and even witness relocation, only those with active criminal cases are eligible (Seelinger and Freccero 2015, 60). Additionally, when shelters are overcrowded, women sometimes find that they cannot accommodate their children, and choose instead to return to unsafe premises (OMCT 2008, 24).

#### *4.2.5 Gender-insensitive and hostile culture of justice*

Gender insensitive, intimidating, and alienating formal justice processes also often discourage women from pursuing justice. Professor Anyang’-Nyong’o, in the aforementioned parliamentary debate, implicitly criticised the evidentiary requirement of testifying, in open court, about stigma-attached sexual incidents as gender insensitive; this translated into an explicit statement that such processes were too “intimidating” for many women victims (2002, 1770). Another form of intimidation and alienation experienced by women (especially rural women), when confronted with formal justice processes, is attributable to their legal illiteracy; the court atmosphere, difficult language, complex procedures, and technicalities all

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<sup>289</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>290</sup> KI, interviewed in Kisumu, January 20, 2014.

combine to render complainants spectators to a process run by judges and lawyers (FIDA Kenya 2008, 3–4; Seelinger and Freccero 2015, 61). Some women also fear the examination process (Seelinger and Freccero 2015, 60).

Similar concerns were evident among the respondents in this research. For example one participant talked about how women feel judged in court for being emotional, and pressured to behave in a way that is “pleasing” to men’s expectations of how women should behave:

*You are judged by the way you dress, by the way you talk in Court...you know when you cry it portrays a weakness. Yet crying is not necessarily a weakness. It could be because of the problems that I have gone through and when I am in Court sometimes emotions, that is a gender issue, it is not our fault that all women are all emotional. In fact in our self-representation you should see us almost wanting to part women and say, you cannot afford to cry and you cannot afford to show your vulnerability. Try and dress your best, you find yourself trying to make them appease the male.<sup>291</sup>*

Furthermore, as another woman explained:

*The needs of women who have suffered violence is exactly to design court processes, court procedures that make it safe for them to be able to tell their stories. But also that make justice functionally accessible to them. The biggest problem we have generally with the legal processes especially with the adversarial system, but specifically in a country like Kenya because of the way it is accentuated by the sort of foreign nature of exotic of the legal system compared to the everyday reality of people generally but of course especially for women, is that our courts tend to be very unfriendly places generally but especially so for victims and doubly so for victims of gender based violence. Because there are some unspoken stigma associated with it and generally there is a horror of a lot of intimidation.<sup>292</sup>*

This sense of intimidation and alienation has an additional financial dimension, by making it necessary for complainants to obtain legal representation – which many often cannot afford – before attempting to seek formal justice (Kalla and Cohen 2007, 8). This serves as a further disincentive to pursuing action in formal legal settings. Attempts have been made to make court processes more user friendly and less intimidating,

*So some of the things we have done is, we have changed the way we dress for example and one of the reasons why we did away with the gown, the very colonial, intimidating, red gowns with wigs, quite complicated the white wigs and so forth. It is part of our efforts to make the courts more friendly. We got rid of again very intimidating masculinist titles like “my Lord” in our Courts. We don’t use those titles anymore; the only title we use now is “Your Honour” of course for males and females. So now we say My Honour we don’t say Your Lordship and so forth. So we believe that all those go a long way in terms of meeting, the unique needs of court users and for women who have suffered violence in particular.<sup>293</sup>*

As discussed further below, these reforms, whilst welcome, need to be coupled with more extensive judicial reforms. For example, as one key informant emphasised:

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<sup>291</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>292</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>293</sup> KI, interviewed in Nairobi, April 29, 2014.



*But training I believe will be the key ultimately, it will be important to make especially judicial officers acutely aware in terms of judicial education, discourses that come out of fear, and that it is carried out in the different courts, in the different places, to really meet the needs of women who have suffered gender based violence.*<sup>294</sup>

By contrast, as discussed earlier, women complainants may find a relative degree of familiarity and control in informal justice mechanisms. This is particularly so in domestic violence disputes; as Muli (2004) explained, prosecution and incarceration of the husband or partner can certainly end the abuse for at least the period of the incarceration, but it may not necessarily help the victim obtain a sense of security and control over her familial situation. Rather, many women prefer the opportunity to tell “their side of the story,” and the chance to preserve their family relationships in a way that is likely to be missed in an adversarial criminal trial (2004, 125).

Nonetheless, some women participants felt that women could be empowered to pursue formal justice and have their voices strengthened in such processes through a greater participation by women lawyers and advocates in formal justice processes. In 2009, the Kenyan Ministry of Gender, Children and Social Development identified that women made up 34.6 percent of all lawyers in Kenya (2011, 27), while the Law Society of Kenya currently identifies on its roll of advocates a (albeit improved) gender imbalance of 5053 women and 6829 men (LSK Online n.d.). As recognised by both former FIDA Kenya Executive Director Grace Maingi and Kenya Institute for Public Policy Research and Analysis Programmes Coordinator Eric Aligula, an increase in the number of women lawyers (and jurists) would be particularly relevant to both pushing for gender sensitive policies engineered to enable women faster access to justice, as well as mainstreaming the role of women in national justice policy-making (Voice of America 2011).

*As women we have realised that we do not get our rights. They should listen to us and give us our rights. They should give us a female lawyer so that when we are violated and we report, our lawyer must listen and follow up for us to get our rights (the rest of the group support). So that she can intervene for us as a lawyer but without that we cannot succeed as women.*<sup>295</sup>

*Our database of pro-bono lawyers should get very wide so we can say that [you have] access to pro-bono lawyers and the discomfort of actually telling a male lawyer about your experiences as a woman [is removed]. Because when you go to a male lawyer they perceive, look at them again as an aggressor. They are not very comfortable. So we have to identify a female lawyer to access them or a male lawyer who is sensitive to women issues and are able to take them through the steps and before that you have to tell them that this lawyer is a qualified lawyer and that he is [aware] of gender based issues with them and that he is qualified.*<sup>296</sup>

Ultimately, judicial reforms should recognise that

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<sup>294</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>295</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>296</sup> Interviewed in Kisumu, March 20, 2014.

*the Court process is in itself the process of Justice. It is in itself important, perhaps as important, sometimes more important than the outcomes. And so it is extremely important that it happens in a particular way...Because [women] tell us that they are quite more interested on how they are treated in the Court even more than for example the speed with which the Court, the cases are heard.*<sup>297</sup>

The need to have more gender sensitive, women focused criminal justice processes has led some justice actors and women's advocates to start thinking about, and dialoguing on, the possibility of a specialised women's court.

There are special courts for children but I believe we desperately need specialised courts for sexual offence cases. At the moment they are treated just like any other case, and when you have children coming to court, sitting from morning until evening, they get hungry and their education is interrupted. Plus, as complainants, they have to give evidence in view of the accused. I heard of one woman Magistrate at Kibera Law Courts in Nairobi – I do not know if she is still there – who improvised and put up a bed sheet in the court to prevent the complainant from looking directly at the accused person. It is high time we pushed for structures to put these things in place, to modernise the court, because we are supposed to be protecting the complainant, and the minute she sees the accused man or woman she cannot speak freely. The laws will not work properly until these things change. (Anne Ireri, quoted in GVRC 2015, 53–54)

Several women and key informants with whom we spoke in this study similarly suggested that this was a necessary development in Kenya to ensure justice was served to women impacted by violence:

*Because you go to court, it is an open court. It is not in camera, it is where any other person can hear your matter. You are narrating your incidence, you feel guilty. Sometimes people chuckle and cough, they start laughing, you know. Those systems have not been put in place and I believe when it comes to issues of violence or gender based violence against women, we should have a specific court that deals with that and it should not be in open like that. It should be in camera, the victim and the aggressor who committed the crime against the victim. Not where everybody is listening, a public audience is not for such cases.*<sup>298</sup>

*Time has come for us to specifically have courts dealing with gender issues and judges so it is very difficult to balance you know on which kind of case to finish first. You want to deal with a robbery with violence case, you want to deal with succession case you know, it is totally overwhelming but if we had special courts of gender violence, it would be very, very easy.*<sup>299</sup>

Examples from other jurisdictions, most notably South Africa, offer insights into the issues that would need to be considered in the development of such an initiative in Kenya. The courts in South Africa have Thuthuzela centres attached to them, which provide police services, healthcare, legal support, and counselling services (Quast 2008, 11). In South Africa, the use of specialised sexual offences courts has increased the conviction rate and decreased finalisation times in such cases. For example, from 1995 to 2000, the average annual conviction rate in the Wynberg Court was 68.5 percent (Sadan et al. 2001, 37). A later

<sup>297</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>298</sup> Dorothy Muoma, Office of Attorney-General, interviewed in Kisumu, March 20, 2014.

<sup>299</sup> KI, interviewed in Kisumu, January 20, 2014.

2008 report indicated that, after the introduction of these courts and attached Thuthuzela centres, conviction rates increased to between 75 percent and 95 percent, and that a typical case took six months from the first report to be finalised. This demonstrates a marked improvement; prior to the implementation of the centres, case resolution took, on average, between 18 months and 2 years to finalise (Quast 2008, 11).

Intensive research conducted by South Africa's Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (Mattso), commissioned to investigate the viability of re-establishing sexual offences courts, concluded in June 2012 the utility of such courts in:

- Reinforcing a victim-centred court system that is prompt, responsive and effective;
- Reduction of secondary victimisation;
- Improvement of skills of court personnel;
- Reduction of the cycle time in the finalisation of sexual offences cases; and
- Contribution to the efficient prosecution and adjudication of these cases (Manyathi-Jele 2013, 2).

There are thus strong indicators that investment in the development of a gender court in Kenya could strongly improve women's access to justice.

#### 4.2.6 Lack of outcomes for women

Women participants frequently mentioned that the lack of tangible outcomes delivered by formal justice is a strong deterrent to pursuing justice. Even where a case reaches court and a "favourable" judgment delivered, an outcome that reflects this "success" is not guaranteed, and, as many participants in this research testified, is usually absent (ACORD International 2009):

*And when it comes to cases of gender violence, especially rape then usually from my experience even after the end of the case even if you jail the accused person, [women] still don't feel like justice has been done because in other jurisdictions like the US, Germany and other countries we have what we call restitutions. At the end of a criminal case, there are some sort of compensation for the person who has suffered an injustice. But in Kenya, we don't have that. In Kenya, a case will come to an end, we say yes accused go to jail for thirty years, you, you have been raped go back to your house and that is the end of the story. So in that sense they feel so empty in fact some of them will ask you, you mean the case is over?<sup>300</sup>*

Amnesty International (2014a, 34) has reported that women in particular continue to feel the effects of the PEV, and that they have failed to receive effective reparation and compensation (3). As discussed further below, "[d]espite the vast documentation of SGBV, to date, no individual has been convicted of a sex crime related to the PEV, nor have victims been repaired for the harms they suffered" (ICTJ 2014, 1).

As earlier discussion has highlighted, a woman's decision and capacity to pursue justice as a survivor of sexual violence is marked by a myriad of difficulties and challenges, many of which pose great personal risks and costs to women:

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<sup>300</sup> Interviewed in Kisumu, January 20, 2014.

*So taking a case forward is very difficult for lots of women from disclosing within her community to actually being abandoned by the husband to being stigmatised to having to never get the Police and the Court system and everything that comes with the cost and everything that they can find, then finally if they can finally get to having their case heard. And even if they get a positive outcome, many women have talked to us, what I really need is I need some form of reparation.<sup>301</sup>*

As this quote highlights women need, and seek compensation and reparations in pursuit of justice. In an ICTJ study when respondents were asked what they wanted from authorities, 56 percent stated compensation or economic support (Robins 2011, 21). Numerous women participants in this study similarly articulated this as a priority for justice, very clearly (see discussion in Chapter 3):

*And even if they get a positive outcome... what I really need is I need some form of reparation.<sup>302</sup>*

*You know if justice is done to you, you will remove that wound from your heart but when you stay like this and nothing is being done, there is no way you will remove that wound from your heart.<sup>303</sup>*

Without tangible outcomes for women in the form of compensation and reparations, women will continue to question the value of seeking justice; for those that try, they will likely be left feeling that justice has but added to their pain, suffering, and victimisation. Women will be left impotent to rebuild their lives, and the power structures complicit in women's victimisation will thereby remain intact and undisturbed. In the ICTJ study mentioned earlier, many women who had suffered SGBV indicated that restitution was not enough in isolation; they did not want to return to a status quo of marginalisation (Robins 2011, 22). Women, as made clear by the participants in this study, are seeking transformative processes towards greater empowerment and equality – towards a better life.

### **4.3 Transitional justice strategies and mechanisms**

Kenya has sought to implement a number of transitional justice strategies in response to the serious crimes and human rights violations perpetrated in the aftermath of the PEV. This section of the report examines the efficacy of some of these key strategies for women impacted by violence, particularly those directed towards criminal prosecution, truth-seeking, reparations, and institutional reform.

As this report has already documented, women in Kenya need greater access to effective remedies and redress for the violations experienced during, and following, the PEV. In particular, women impacted by SGBV need justice responses that recognise the multiple needs and priorities of women survivors, given their lived experience.

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<sup>301</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>302</sup> Interviewed in Nairobi, October 1, 2014.

<sup>303</sup> Interviewed during Validation Workshop, June 22, 2015.

### 4.3.1 Criminal prosecutions

The investigation and prosecution of mass atrocities and breaches of human rights is well recognised as a core component of transitional justice in the aftermath of conflict (UNSG 2004, 13–14). Sensitive and successful prosecutions play an important role in restoring dignity to victims and delivering them justice (UNSG 2004, 13). However, as already discussed in this report, the criminal prosecution of violence perpetrated against women in Kenya, particularly sexual violence, is marred by omnipotent barriers which impede women's access to justice at every turn and often serve to only further victimise and marginalise women survivors. A key informant described the following obstacles that women often must navigate in the prosecution of sexual assault:

*The investigation officers have never taken it upon themselves that it is their responsibility to ensure the witnesses come to court. Because... as a survivor [you] must go and convince your witnesses to come to court. And it becomes a cost on the part of the survivor... and most of these sexual crimes... the survivors are moderately they are quite poor people within society so finding your way to go and report, to go several times to court for the hearings that will be adjourned for one reason or the other, sometimes the accused persons are not produced in court and therefore you can't proceed so the lengthy judicial process works against the survivors. And most of the times we have had cases around the P3 forms, that must be filled in by a medical practitioner, not all areas have the medical practitioners – some of them use clinical officers. But the clinical officers or medical doctors will not... by themselves make appearance in court. The survivors must foot their bills to enable them to come to court, it becomes an expense to the survivors that most of them decide then [they] would just rather leave the matter and cannot pursue it anymore so that lengthy processes of our judicial system is compromising the processing.*<sup>304</sup>

Another key informant explained that

*[s]ometimes certain courts have been very... have tried to be as friendly as possible by trying to prioritise the cases that are heard before them when they involve a doctor, so that when you go there they try to attend to that case quickly. But not all the courts do that. So, that is... that feeling that you would waste a lot of time to go to court. [It] makes doctors to be hesitant to get involved. Actually we have had cases where the doctor has declined to fill the necessary forms like the PRC forms because they do not want to go to court. And when the court summons have come, sometimes they have tried to dodge because they do not want to go to court. It's because it consumes their time and the other thing is because we are least prepared, many of us we are least prepared to appear before court. We fear being crossed-examined by very unfriendly lawyers. With the learned friends, they can put you on the carpet and make you feel like you are in the wrong profession and you don't know what you are talking about.*<sup>305</sup>

These examples serve to highlight the alienating culture of courts generally, which ultimately impacts on women's capacity to access and be delivered justice; not only are women

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<sup>304</sup> Winifred Lichuma, National Gender and Equality Commission, interviewed in Nairobi, October 2, 2014.

<sup>305</sup> Dr Ian Kanyanya, Kenyatta Hospital, interviewed in Nairobi, October 2, 2014.

themselves alienated by hostile processes, but the processes are stacked against the court openly receiving quality evidence upon which to adjudge a case.

In the case of Kenya, the ICC has achieved little to advance the prosecution of SGBV, or the protection of the rights of women who have been violated during conflict. A number of women participants were sceptical about the value of the ICC and its processes:

*I cannot go. The first thing I am a parent but if it is here in Kenya I can testify the truth. But I cannot go there, you know you can be given money and money is like a devil. You can be given money then you give false information and you know it is not good to speak the truth. For sure is that not bad and you are also a parent? That is also someone's child that you are going to testify about. Give a true testimony, even if it they think it is not right you say it is true.<sup>306</sup>*

*Now that someone goes to testify falsely, even the witness himself said that he was given money. I do not trust it myself.<sup>307</sup>*

*From my opinion, I think the voice that is missing from this conversation, is the victims, the real victims. We have not given them publicity. In fact when you talk about the ICC you're not thinking about the victims, [you're] thinking about perpetrators. ... Because nobody thinks through about what those people went through. If you could actually highlight, bring the voice of the people who are... on the table. So that it moves from being political, it moves from being... because it happened. And we can all say we still don't know who did it, but that's why we are going through all this process so that we can actually prove, if all victims were alive they would have proved. So the whole idea that the case is collapsing. We're setting a precedent.<sup>308</sup>*

Investigation by the ICC into the PEV of 2007/2008 was opened in 2010 (01/09-19-Corr, 83). The Waki Commission in 2009 (discussed below) provided the Court with the names and justification for investigation of certain individuals. The investigation focused on alleged crimes committed in Kenya between 2005 and 2009, and related to the PEV.

In January 2012, Pre-Trial Chamber II confirmed charges against four of the six individuals in two separate cases,<sup>309</sup> to later face trial in April 2013<sup>310</sup> – Francis Kirimi Muthaura; Deputy President William Samoei Ruto; Joshua Arap Sang; and President Ihuti Muigai Kenyatta. Confirmation of the charges against the four accused was a significant step for the

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<sup>306</sup> Interviewed in Nairobi, September 30, 2014.

<sup>307</sup> Interviewed in Nairobi, September 30, 2014.

<sup>308</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>309</sup> Charges were not confirmed against Kosgey and Ali: ICC-01/09-01/11-373, 138; ICC-01/09-02/11-382-Red, [427].

<sup>310</sup> With respect to Case ICC-01/09-01/11, The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, charges of crimes against humanity (including murder, deportation or forcible transfer of population, and persecution) were confirmed against Ruto and Sang, but not confirmed against their initial co-accused, Henry Kiprono Kosgey. With respect to Case ICC-01/09-02/11, The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, charges of crimes against humanity (including murder, deportation or forcible transfer, rape, persecution, and other inhumane acts) were confirmed against Muthaura and Kenyatta, but not confirmed against their initial co-accused, Mohammed Hussein Ali. Ruto, Muthaura, and Kenyatta were accused of being criminally responsible, as indirect co-perpetrators, for the crimes outlined in their respective cases. Sang was accused of having otherwise contributed to the crimes outlined in his case.

ICC, as the first cases to proceed to trial in the exercise of the Office of the Prosecutor's (OTP) own mandate,<sup>311</sup> rather than referral from a State or UN Security Council<sup>312</sup> (Wanyeki 2012, 1).

Although charges were later withdrawn against Muthaura,<sup>313</sup> the other three accused continued to face charges related to the PEV, tried in two cases: Ruto and Sang, who were aligned with the Orange Democratic Movement (ODM) during the PEV, were jointly tried, and Kenyatta, aligned with the Party of National Unity (PNU), was tried separately. While significant reports of sexual violence were made during the PEV, the Prosecution only brought charges for SGBV crimes against President Kenyatta, which were confirmed concerning the commission of rape "in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008" (Women's Initiatives for Gender Justice 2014, 90). Although no charges of SGBV were laid in the Ruto and Sang case, court documents suggest that there was evidence of such crimes having taken place; for example, evidence was led by the prosecution at pre-trial, of witnesses who testified to seeing incidences of such violence.

Kenyatta had been charged as an indirect co-perpetrator of crimes against humanity (murder, rape, forcible transfer, persecution, and other inhumane acts) against supporters of the ODM (Bowcott 2014). However, as mentioned in Chapter 1, the charges against President Kenyatta were withdrawn on the basis of insufficient evidence (ICC 2014), including the SGBV charge. The prosecutors had originally requested an adjournment, but this was rejected by the ICC, as was their request for a finding of non-cooperation against the Kenyan Government (Bowcott 2014). Karen Naimer, Director of the Program on Sexual Violence in Conflict Zones run by Physicians for Human Rights, was quoted in the Guardian as saying, "The decision to drop charges against President Kenyatta is devastating to the thousands of survivors who saw the court as their last hope for holding one of Africa's most powerful leaders accountable" (Bowcott 2014).

As noted above, the key challenges in the prosecution of SGBV include "under- or non-reporting owing to societal, cultural or religious factors; stigma for victims; limited domestic investigations and the associated lack of readily available evidence, lack of forensic or other documentary evidence, owing to the passage of time" (ICC OP 2014b, 24–25). While Kenya is obligated to support ICC processes, pursuant to the Rome Statute, the importance of developing domestic systems and an institutional framework for effective national

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<sup>311</sup> As permitted by Article 15(1) of the Rome Statute, "The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court."

<sup>312</sup> The situations in the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), and Uganda, were, for example, state referrals. The situations in Libya and Darfur were, on the other hand, referrals by UN Security Council resolutions.

<sup>313</sup> "Prosecutor Fatou Bensouda notified Trial Chamber V of her decision to withdraw all charges against Muthaura during a status conference on 11 March 2013. The Prosecutor stated that her Office had proceeded with the case against Muthaura in "good faith, believing that there was a case against him," but had come to the conclusion that there is no longer "a reasonable prospect of conviction at trial" and that there is no prospect that further investigations will remedy this... The Prosecution explained the reasons for withdrawing charges, emphasising that "the Muthaura case has presented serious investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007-2008 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution" ... the Government of Kenya has "in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful" in the case against Muthaura (Women's Initiatives for Gender Justice 2013).

prosecutions of serious crimes – one which addresses these challenges – is considered essential (ICTJ 2013, 6; Inder 2015, 4).

In addition to criminal prosecutions, justice for women demands multiple other pathways for achieving justice. Other key transitional justice strategies that have been sought to be implemented in Kenya are discussed next.

#### *4.3.2 Truth-telling, reparations, and institutional reform*

As earlier discussion in this report has highlighted, considerable effort is still required to guarantee the effective dispensation of justice for women survivors of the PEV. Despite attempts at institutional reform in Kenya, more is needed by way of a sustained and coordinated programme to realise significant and sustainable systemic and cultural changes.

At the forefront of transitional justice in Kenya was the Commission of Inquiry on Post-election Violence (CIPEV, or “Waki Commission”), and the Independent Review of the Elections Commission (IREC, or “Kriegler Commission”), established to investigate the crisis. These commissions were followed by the Truth, Justice and Reconciliation Commission (TJRC). Whilst the importance of these commissions in Kenya’s transitional history was recognised by several research participants, frustration at the lack of implementation of many of their recommendations was also noted:

*I think around the institutional reforms, the biggest thing because the need everywhere is dealing with the issue of corruption, because it affects every area, you know. Every aspect, every area and it will affect the service delivery from government to everyone. The other thing I would say needs huge priority is that we have many commissions that have sat over years in our history as a country. They have come up with very valid recommendations that have never been implemented. And this has created a huge impunity gap that then eluded the rule of law in this country. And so for me in establishing the rule of Law, because when you have the rule of law established, it will also curb or mitigate or reduce sexual violence against women. It will you know, that will be one of the dominant facts so in terms of establishing the rule of law, is actually implementing the recommendations whether it is the Truth Justice and Reconciliation Report, whether it is the Waki Commission Report, there has been a Land Commission Report, there has been so many Commissions. And doing it from the highest level so that it is seen that it is not a Justice that is skewed but it is Justice that is fair. And it is starting with those who have the most influence who always get away.<sup>314</sup>*

#### Waki Commission

The Waki Commission was established under Agenda Item 4 of the Kenya National Dialogue and Reconciliation Accord (KNDR), mediated by Kofi Annan as Chair of the Panel of Eminent African Personalities and concluded on February 28, 2008 (ICTJ 2008, 1).<sup>315</sup> It comprised the following members: Chairman Justice Philip Waki, of Kenya’s Court of Appeal; Commissioners Gavin McFadyen (from New Zealand) and Pascal Kambale (from

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<sup>314</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>315</sup> While the KNDR was concluded on February 28, 2008, Agenda Item 4 was not agreed to until March 4.



the DRC); Commission Secretary George Kegoro (from Kenya); and Counsel Assisting the Commission, David Majanja (from Kenya) (CIPEV 2008, 1).

The CIPEV's mandate was "to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters" (CIPEV 2008, vii); more specifically, it outlined the following terms of reference (CIPEV 2008, 21–22):

- To investigate "the facts and circumstances related to the acts of violence following the 2007 presidential elections";
- To investigate "the actions or omissions of State security agencies during the course of the violence";
- To draft "sets of recommendations concerning measures to be taken to prevent, control, and eradicate similar violence in the future; bring to justice those responsible for criminal acts; eradicate impunity and promote national reconciliation; improve the functioning of security agencies; [and] deal with any other legal, political and administrative matters deemed necessary"; and
- To "make such suggestions to the Truth, Justice, and Reconciliation Commission as the [CIPEV] deems necessary."

To these ends, the CIPEV issued a 529-page Final Report, released on October 15, 2008. Its core recommendation, relevant to present discussion, was the establishment of a Special Tribunal for Kenya, to seek accountability for crimes (particularly crimes against humanity) perpetrated in relation to the PEV; this tribunal was to be comprised of a Trial Chamber and Appeals Chamber (each containing two foreign and one domestic judge) (2008, 472–74). A number of other recommendations specifically addressed SGBV, including:

- That citizens be informed about the existence of Gender Violence Recovery Centres (CVRCs), which offer free medical services within government hospitals to victims of SGBV, and the expansion of these CVRCs into independent departments (with their own funding, staff, and facilities) within all public hospitals (268);
- Police training on communicating with SGBV victims and the creation of gender units within every police station, where victims of SGBV can be treated with sensitivity and have their cases properly recorded and investigated (269);
- Police acknowledgement that sexual violence is a serious crime, and the treatment of reports of this kind of offending as such (e.g. the recording of all reports, examination of crime scenes, analysis and evaluation of evidence, and investigations to be conducted by officers competent at investigating serious crime) (425–426);
- That NGOs working in the health sector partner with medical institutions, to ensure improved responses to SGBV (269); and
- That an office of rapporteur on sexual violence be established, to work with existing government institutions that address SGBV (e.g. courts, the police, and the National Commission on Gender), and to present an annual report to the National Assembly on the handling of SGBV cases and policy-making in that year (269).

The formation of the CIPEV itself constituted an important preliminary step in the development of transitional justice in Kenya. Both it and the Truth, Justice and

Reconciliation Commission it recommended (discussed further below) were important truth-seeking mechanisms designed to promote the sharing of stories of injustices suffered during the PEV; this, in turn, was intended to help promote healing and reconciliation within the country (Amnesty International 2014b; Murphy et al. 2015, 42–43). This crucial link between truth-telling, healing and reconciliation was confirmed by many women participants in this research:

*Let me contribute in that, you know if you speak the truth is when you get healed. You have asked a good question, for sure if you have never gotten hold of a gun, how can you kill someone?*<sup>316</sup>

*Yes, in the heart you say, “if I was able, even this one also...” And we say that, “One day, even after ten years we will also do the same to them.” We will also do to them something because what they did to us is painful and again we were suppressed in that pain. We were not given space to breath (they never got a chance to speak out).*<sup>317</sup>

*In relation to this violence I feel you have really supported us because even me since then I have not talked in front of people like you. It is my first time since the violence and I feel my heart has started opening.*<sup>318</sup>

*For sure not many because the first thing you feel ashamed, you feel ashamed to tell someone such an issue but I always thank that lady from Christ the King. The lady called Mercy because when she came and organised such a group and we started talking about that issue when I am free and I am not ashamed to talk about it. Because it is something true and something I have experienced.*<sup>319</sup>

*First I have pain, there are people who died when I was seeing, secondly I am now using medicine which I was not using, was doing business and now I have gone backwards... So I have pain in my heart and such issues are the ones which can drive me to go, stand and speak the truth.*<sup>320</sup>

FIDA noted specifically that the CIPEV process “had notable milestones as far as gender issues are concerned,” including in listening to survivors’ testimony in private; receiving testimony and records of interviews from specialist SGBV organisations; and collecting evidence from women, men, girls, and boys who had experienced rape, sodomy, and genital mutilation (2009, 23). However, it also observed weaknesses in the Final Report’s investigation of sexual violence; its focus on the most horrifying cases of sexual violence was to the detriment of investigations into physical assault and grievous bodily harm, attacks on pregnant women, the killing of family members in front of women and children, abductions, and forced pregnancies (2009, 15).

On institutional reform and the conduct of prosecutions in relation to the PEV, many of the Final Report’s recommendations remain outstanding. These include the CIPEV’s core recommendation, the establishment of the Special Tribunal (ICC OP 2013, [6]–[7]; ICTJ

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<sup>316</sup> Interviewed in Bungoma, April 14, 2014.

<sup>317</sup> Interviewed in Bungoma, April 14, 2014.

<sup>318</sup> Interviewed in Bungoma, April 14, 2014.

<sup>319</sup> Interviewed in Nairobi, September 30, 2014.

<sup>320</sup> Interviewed in Nairobi, September 30, 2014.

2015);<sup>321</sup> reforms to the Kenyan police force, such as the training of officers on how to handle SGBV cases (ICTJ 2015); and the establishment of an office of rapporteur on sexual violence (ICTJ 2014, 6; ICTJ 2015). Furthermore, to date, no SGBV victims have received reparations from the state (ICTJ 2014, 1; Amnesty International 2014b, 43); however, as noted above in Chapter 3, President Kenyatta, in his 2015 State of the Nation Address, declared that he had instructed the Treasury to establish a fund of KES 10 billion (US\$110 million) over the next three years “to be used for restorative justice” (Kenyatta 2015; ICTJ 2015). Amnesty International has acknowledged that limited state reparations have been paid to some IDPs, including women and children, to assist them in resettling (2014, 39–40), while government initiatives (e.g. Operation Rudi Nyumbani<sup>322</sup>) have encouraged people residing in camps to return to their original homes through the provision of transport costs, building and farming materials, and small compensation packages (2014, 38).

A lack of accountability, however, remains perhaps the greatest barrier to transitional justice in the aftermath of the 2007/2008 PEV. Two days after the publication of the Waki Commission’s Final Report, Kenyan police announced that it was forming a task force (which was to include female police officers and lawyers from FIDA Kenya) to investigate sexual offences related to the PEV (HRW 2011, 20); however, FIDA withdrew in November 2008, as a result of being excluded from the task force’s work (HRW 2011, 20). The task force’s activities also lacked credibility, with minimal follow-up after requesting information from hospitals and organisations (HRW 2011, 20–21). The investigation ultimately produced a list of 66 complaints, most of which were allegedly committed by security force members; this list was submitted to the Office of the Director of Public Prosecutions (DPP), which, after considering the complaints in accordance with the Sexual Offences Act 2006, sent the complaints back to the police for further investigation (ICTJ 2014, 9). To date, a final report has not been delivered by the task force (2014, 9), and no proceedings have been initiated against any police officers known to have committed acts of SGBV (2014, 11).

Prosecutors have had great difficulty holding individuals to account for individual acts of SGBV. While a 2011 report to the Attorney General lists 47 convictions for gender-based PEV cases (Team on Update of Post-Election Violence Related Cases 2011, 15–23), the list has been described as haphazardly compiled and “almost wholly inaccurate” (HRW 2011, 21, 25–27); other independent organisations have found that, to date, no individuals have been convicted of sex crimes in relation to the PEV (ICTJ 2014, 1). Several acquittals for rape, such as in the cases of *Republic v. Erick Kibet Towett and Simion Kipyegon Chepkwony*<sup>323</sup> and *Republic v. Julius Cheruiyot Kogo*,<sup>324</sup> hinged on issues in the identification of the defendants (HRW 2011, 38). Another high-profile acquittal, the case of *Republic v. James Mbungua Ndungu and Raymond Munene Kamau*,<sup>325</sup> managed to produce convictions for robbery with violence, but saw acquittals for attempted rape after the men were charged with

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<sup>321</sup> Numerous bills to establish the Special Tribunal were either voted down by the National Assembly of Kenya, or were not debated in Parliament due to a failure to meet the requisite parliamentary quorum (ICC OP 2013, [7]–[11]). Following this, in accordance with the “sealed envelope” agreement between the CIPEV and the African Union Panel of Eminent African Personalities, Mr Kofi Annan passed a list of persons believed to have been most responsible for instigating the PEV to the Office of the Prosecutor at the ICC (ICC OP 2013, [12]–[13]). While the Office of the Prosecutor initiated various criminal proceedings in the ICC all have now been terminated.

<sup>322</sup> Translated into English as “Operation Return Home.” This initiative was launched in May 2008 (Amnesty International 2014b, 38).

<sup>323</sup> Kericho Magistrate’s Court, CR 66/08.

<sup>324</sup> Eldoret Magistrate’s Court, CR 597 6/08.

<sup>325</sup> Naivasha Magistrate’s Court, Police File 764/44/08.

removing a woman's trousers and touching her genitals; the defendants were believed to be associated with the Mungiki, whose ideology includes a prohibition on women wearing trousers (HRW 2011, 41–42).

In the absence of a Special Tribunal and a coordinated effort by the DPP to prosecute SGBV, civil society groups have taken to initiating public interest litigation in Kenyan courts to help women survivors seek justice (Nyanyuki 2014a; Seelinger and Freccero 2015, 53). Arguably of greatest interest recently has been Constitutional Petition No. 122/2013 (discussed earlier above), initiated in the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi. The Petition is a complaint under constitutional law, and applies to provisions of both Kenya's former constitution (in force during the PEV) and the new constitution (in place since 2010) (Seelinger and Freccero 2015, 54). Rather than attempting to prove specific criminal incidents committed by defendants, it is aiming to establish a significant precedent, by forcing the state to recognise its failed obligation to protect Kenyan citizens (including its failure "to properly investigate and prosecute crimes"); its complicity in permitting, acquiescing to, or even in directly perpetrating, SGBV; and its discrimination against SGBV victims in providing state support and assistance (Seelinger and Freccero 2015, 53–54). It also is pushing for an expanded understanding of, and commitment to, "comprehensive justice" for SGBV survivors, including psychosocial support, physical security, a base rate for reparations, and an apology from the state (Seelinger and Freccero 2015, 54). At the time of writing, this case is still pending; however, questions have been asked about the respondents' seriousness in responding to the Petition (Nyanyuki 2014b).<sup>326</sup>

### Independent Review Commission

The Independent Review Commission on the 2007 General Elections held in Kenya (IREC), commonly referred to as the "Kriegler Commission," was established by the same agreement as the Waki Commission brokered by incumbent President Mwai Kibaki's Party of National Unity and Raila Odinga's Orange Democratic Movement (ODM). It comprised the following members: Chairperson Johann Kriegler (former South African judge, and former Chairperson of the South African Independent Electoral Commission); Vice-Chairperson Imani Daudi Aboud (Tanzania); Horacio Boneo (Argentina); Marangu M'Marete (Kenya); Francis Ang'ila Away (Kenya); and Catherine Muyeka Mumma (Kenya) (IREC 2008, iii–iv).

The IREC's purpose was to investigate the conduct of the 2007 Kenyan elections. Of specific relevance to the present discussion are the following terms of reference, which are largely reproduced from the IREC's Final Report (IREC 2008, 3):

- To examine the constitutional and legal framework, to identify any weaknesses or inconsistencies;
- To examine the electoral environment and the role of the political parties, civil society, the media and observers;
- To examine the organisation and conduct of the 2007 elections, extending from civic and voter education and registration through polling, logistics, security, vote-counting and tabulation, to results-processing and dispute resolution;

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<sup>326</sup> Dr Joan Nyanyuki, the Executive Director of COVAW, recorded that, following the third resumption of the case in April 2014, the Attorney General and DPP requested another adjournment to be allowed to read the CIPEV Final Report, which was released into the public domain in October 2008.

- To assess the functional efficiency of the Electoral Commission of Kenya (ECK), and its capacity to discharge its mandate;
- To recommend electoral and other reforms to improve future electoral processes.

In fulfilling its mandate, the IREC noted and criticised the manner in which women’s civic rights as Kenyan citizens were abused during the 2007 elections. The integrity of the final result was challenged by the exclusion of almost one-third of all eligible voters, with a bias against women and young people (2008, x). Women, in particular, were “significantly under-represented” (8), constituting 51.4 percent of the population at the time and only 47.1 percent of the voter register (79). The IREC found that “unacceptable practices,” including “using sexist tactics and violence to keep women out of the race” (24), was widespread; this included the use of violence during party nominations, to dissuade women from running (58).

A series of recommendations were put forward to address the many failings observed in the conduct of the 2007 elections. In specifically addressing the advancement of women’s rights, the IREC focused on improving women’s representation within Parliament. It recommended that the “nominated seats,” whose holders are nominated by parties according to the proportion of every party in the National Assembly, be devoted to women (151). However, it rejected submissions that reserved seats for marginalised groups should also be allocated to women, on the basis that, while women are under-represented, they “cannot be considered marginalised” to such an extent that the likelihood of one woman being elected is “infinitesimal” (147).

The results of the 2013 election provide interesting insight into any progress that has been made in the arena of women’s representation. Despite the IREC’s recommendations, women were allocated 47 reserved seats (one from each individual county) in the National Assembly, to be filled separately from the 290 directly elected seats from the 290 constituencies (FIDA Kenya 2013, 48). Notably, in 2013, the proportion of total seats held by women in the Parliament doubled, from the previous ten percent (UN Women 2013; Commonwealth Observer Group 2013, 15); 87 of the 416 seats in the National Assembly and Senate chambers were won by women (UN Women 2013). However, as a proportion of directly elected Members, women suffered an overall decrease, from eight percent in 2007 to only 6 percent (16 of 290) in 2013 (FIDA Kenya 2013, 48); furthermore, only one out of eight presidential candidates, seven out of 237 candidates for Governor (or 2.95 percent), and 697 of 9603 candidates for the County Assemblies (or 7.26 percent), were women (Commonwealth Observer Group 2013, 15). A FIDA Kenya gender audit of the 2013 electoral process found that the allocation of reserved seats had a curious negative impact on women’s electability in the directly elected seats, with political parties pressuring women to only contest those seats, and women candidates campaigning for the directly elected seats being represented as “greedy” (2013, 66).

Women’s representation, therefore, remains a pertinent issue in Kenyan political governance. While the 2010 Constitution introduced Article 27, incorporating both an affirmative action provision and the gender two-thirds rule to apply to representative bodies,<sup>327</sup> the results of the

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<sup>327</sup> The referenced provisions are Art. 27(6) – “To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination” – and Art. 27(8) – “In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

2013 election clearly failed to meet these constitutional requirements; a constitutional crisis was only avoided by a Supreme Court Advisory Opinion (No. 2 of 2012) ruling that the quota in Article 27(8) did not apply to the 2013 election results, but rather should be implemented “progressively” by August 27, 2015 (Judiciary 2012a, [79]). Eventually, this deadline also lapsed, but not before the National Assembly requested a one-year extension to determine a formula through which the two-thirds gender rule could still be implemented (Godia 2015). With this extension, Aden Duale, the Leader of the Majority in the National Assembly, put forward the *Constitution of Kenya (Amendment) (No. 4) Bill 2015* (“Duale Bill”); the Bill, which seeks to have seats for women increased for a period of 20 years, proposes amending Articles 81, 97, 98, and 177 of the Constitution “so as to provide that the two-thirds gender rule for elective positions shall lapse twenty years from the next general election” (Republic of Kenya 2015, 2256). At the time of writing, this Bill is yet to be passed (Kenya Law 2016).

### TJRC and reparations

As noted above, the TJRC, on the recommendation of the CIPEV, was established in 2009. Its mandate, as spelt out in the Truth, Justice and Reconciliation Commission Act No. 6 of 2008, included:

the investigation of all of the violations on the gross human rights violations and other historical injustices in Kenya between 12 December 1963 and 28 February 2008; identification of the individuals, public institutions, bodies, organizations, public office holders, the State, state actors, or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses; identification and specification of the victims of the violations and abuses and making of appropriate recommendations for redress, including reparations; creation of a historical record of violations of human rights abuses; identification and recommendation of the prosecution of any person responsible or involved in serious violations of human rights, including socio-economic rights and to make recommendations for systemic and institutional reform to ensure that such violations do not occur in the future. (ICJ Kenya 2013)

The TJRC divided its operations into four stages – 1) statement taking, 2) research and investigation, 3) hearings, and 4) the writing of its report (TJRC 2013a, 80). The Commission also conducted civic education and outreach activities, such as training stakeholders, holding workshops, and participating in *barazas*, in order to try to reach a diverse range of people (82). The recruitment of statement takers was formulated as an inclusive process, and they were trained on how to assist victims in dealing with trauma (83). 191 of the 304 statement takers were female (85).

42,465 statements in total were collected, with 16,503 of them coming from women (TJRC 2013a, 83). Both individuals and representatives from affected communities and groups were also given the opportunity to submit memoranda, with 1,828 memoranda collected in total (TJRC 2013a, 89).

A total of 1,104 statements from adults regarding sexual violations were received, of which 103 were from men (TJRC 2013b, 712). The statements and memoranda relating to sexual violence had a victim count of 2,646 women and 346 men (TJRC 2013b, 712). All victims who gave statements identified their assailants as men (TJRC 2013b, 712).

Testimonies were also given in public hearings, closed hearings, and women’s hearings (TJRC 2013b, 712). Of the 778 cases heard in public hearings, 26 were in relation to sexual

violence, and 21 were from women (TJRC 2013b, 713). Nineteen of the 100 *in camera* cases related to sexual violence; of these, 17 were women (713). The women's hearings, which were public hearings organised for women only, had over 1200 participants (713).

The TJRC released its report in mid-2013, with a suite of recommendations. Of particular note to present discussions is the comprehensive framework recommended for a reparations programme, including for victims and survivors of sexual violence (TJRC 2013d).

Recommendations are a combination of measures falling within five forms of reparation (as per the Basic Principles) (TJRC 2013d, 99):

- Restitution: restoration to original situation before the violation;
- Rehabilitation, including medical/psychological care;
- Compensation: money for damage suffered;
- Satisfaction: including “official declarations restoring dignity and reputation, public apology, commemoration and tributes”; and
- Guarantees of non-repetition: includes structural measures aimed at this.

Eligibility for reparations is limited to “gross violations of human rights,” as defined by the TJRC’s mandate (TJRC 2013d, 102), occurring between December 12, 1963, and February 18, 2008 (103). Gross violations of human rights are categorised into five categories (103–104), with rape and other types of SGBV falling into category 2:

- Category 1: violations of the right to life
- Category 2: violations of the right to personal integrity
- Category 3: forcible transfer of populations
- Category 4: historical and contemporary land injustices
- Category 5: systematic marginalisation

The scheme makes provision for particularly vulnerable victims to have claims expedited, including victims “demonstrating urgent health concerns with a causal relation” to category 1 or 2 violations, and “single heads of household demonstrating significant economic hardship with a causal relationship” to category 1 or 2 violations (105).

The recommendations include collective and individual reparation measures, and distinguish between material and non-material measures. The framework deliberately encourages collective reparation (107), including “to address structural inequalities such as identity and gender-based dimensions of individual violations” (108). Collective reparations are variously characterised, and may take the form of socio-economic measures (109), government policy (112), and non-material reparations (114).

The report proposes a Committee for the Implementation of the Recommendations of the TJRC (Implementation Committee) to oversee reparations. The National Assembly amended the Truth, Justice and Reconciliation Act to require that Parliament consider the report, and that any implementation was to take place in accordance with the National Assembly’s recommendations (Amnesty International 2014c, 5). Further amendment was made, however, enabling the Minister to establish an implementation mechanism based on the National Assembly’s recommendations. This watered down the previous iteration, which required the

recommendations to be implemented within six months of publication (Amnesty International 2014b, 69).

As of 2015, no steps had been taken to consider the report (ICTJ 2015). Indeed, the Kenyan National Assembly “has yet to reintroduce the report to the floor for debate or adoption” (ICTJ 2015). Moreover, while President Kenyatta announced a three-year KES 10 billion restorative justice fund for victims of post-election violence (ICTJ 2015), there was no policy to implement the fund (Wangui 2015), and the government has also undermined its own promise by appealing court awards of compensation to victims by claiming it has no money to fund them (Journalists for Justice 2015b).

Therefore, reparations for survivors of sexual violence in Kenya remain illusory and inaccessible.

### *4.3.3 Institutional reform*

A key step in institutional reform in Kenya has been the adoption of the 2010 Constitution (discussed earlier), which provides a progressive framework for inclusivity and preventing the reoccurrence of past human rights violations (Akech 2010, 11). As previously noted, however, the Constitution, although progressive, is challenged in its implementation; this is particularly so when it comes to recognising and protecting the rights of women.

The police and judiciary are the two institutions most urgently in need of reform in Kenya. Women participants were resoundingly clear about this priority:

- Interviewer: *Do you think the Police can give Justice, Courts can give justice to the women?*
- Respondent: *You cannot be helped.*
- Interviewer: *Why not?*
- Respondent: *Because even if you take a case...you cannot be supported...*
- Interviewer: *Do you know of any woman who has gone to the police and has been helped by the Police?*
- Respondent: *No.*
- Interviewer: *Do you know of any women who have gone to court and has been helped by the Court?*
- Respondent: *No.*<sup>328</sup>

As discussed above, a range of steps are being taken to address the widespread corruption and inefficiencies that plague both these institutions. There is little doubt that these reforms are essential to improving access to justice for women impacted by violence.

#### Police reform

In relation to the police, the recommendations of the National Task Force on Police Reforms were adopted in the formulation of the 2010 Constitution, bringing significant changes in policy, legislation, and institutional structures towards police reform and accountability (Mageka 2014). In particular, three important bills have been passed to ratify the Constitution’s provisions in furtherance of police reform: the National Police Service Act

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<sup>328</sup> Interviewed in Nairobi, September 29, 2014.



2011, the National Police Service Commission Act 2011, and the Independent Police Oversight Authority Act 2011. As a result of these laws, Kenya's two police forces, the Kenya Police and the Administration Police, were merged under one Inspector General of Police, thus providing better insulation from political interference, and more accountability. The National Police Service Act governs the administration, functions, and powers of the police, including its authority figures (Amnesty International 2013, 9). The latter two bills established two civilian oversight institutions, the National Police Service Commission (NPSC) and the Independent Police Oversight Authority (IPOA); all police officers are to be vetted by the NPSC, under section 7 of the National Police Service Act 2011 (ICTJ 2014, 9). The IPOA will monitor the police service; its mandate includes the receipt of complaints about police misconduct, and investigating these complaints.

The process of vetting police, however, has been a very slow one. The National Police Services Commission completed a recruitment exercise of more than 10,000 new officers in 2014, but, following reports of corruption (including bribery, nepotism, and tribalism), the High Court declared the process void and ordered a new recruitment round (Transparency International 2014b, 15). In October 2015, following the first phase of vetting, 63 police officers, including three in senior positions (Nyamori 2015), were sacked due to corruption (Odula 2015). One of these three senior police officers was found to have taken a year's salary without having attended work (Ndanyi 2016). In the second phase of vetting, 12,000 police officers are to be evaluated (Nyamori 2015).

A key aim of the police reform package is to restore public confidence in the police (ICTJ 2014, 9), which, as previously noted, is very low and acts as an ongoing barrier to women accessing justice. The rapid passage of legislation towards policy reform has disappointingly been overshadowed by the delayed establishment of corresponding institutions (Amnesty International 2013, 12). Additionally, 2014 amendments to the Security Laws Act, such as re-introducing executive control over the Inspector General and expanding powers of the police, have significantly regressed some of the improvements made (Njuguna et al. 2015, 2).

Furthermore, a major impediment to effective police reform has been the lack of awareness of the new laws by police officers. Despite the introduction of gender desks several years prior, a 2009 report indicated that many officers at those desks had received no training on gender-responsive crime management (ACORD International 2009, 20).<sup>329</sup> It is self-evident that police efficiency, competency, and capacity to facilitate access to justice for women survivors of sexual violence hinges on the training that is provided to officers (ICTJ 2014).

A new police training curriculum was implemented in 2011 as part of police reform initiatives (Momanyi 2011), and which has seen the inclusion of human rights issues touching on GBV (Daily Nation 2013). UN agencies that specialise in gender issues, as well as international policing experts and various public institutions, were consulted in the development of the curriculum (Momanyi 2011). 18,000 officers who were already on the force were also enrolled in attitude change courses (Momanyi 2011). The Kenya Police Service Women's Association was launched in 2012 (Obala 2012), with a view to promoting women in law enforcement and security reform (UN Women 2012).

### Judicial reform

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<sup>329</sup> Gender and children's desks were introduced in some of the Kenyan government's earlier attempts at police reform; however, many of the desks in Nairobi were no longer operating by 2010 (Capital FM News 2010).

The 2010 Constitution has also seen extensive judicial reforms being introduced (Bosire 2012). As noted above, a new Chief Justice, Dr Willy Mutunga, was elected under a more rigorous process, soon after the new Constitution came into force. His appointment brought new hope for a more honest and accountable judiciary. Legislation was passed to facilitate the vetting of judges and magistrates (Vetting of Judges and Magistrates Act 2011).

Promisingly, an extensive strategy has been developed for judicial reform in Kenya (Judicial Transformation Framework 2012–2016). This strategy is built on four key pillars: (i) People-focused delivery of justice; (ii) transformative leadership, organisational culture, and professional and motivated staff; (iii) adequate financial resources and physical infrastructure; and (iv) harnessing technology as an enabler of justice (Judiciary 2012b, 3). The first pillar is directed towards “creating a legal system which ensures equality of all before the law and an equitable legal process.” This includes strategies towards access to, and expeditious delivery, of justice, such as extending court services and streamlining court processes and costs. To support implementation of this reform strategy, the Judiciary Transformation Secretariat was created (Gainer 2015, 6). The judiciary has also been afforded some budget increases (Gainer 2015, 6), and the World Bank has provided funding for these reforms under the Judicial Performance Improvement Project (World Bank 2012).

Some outcomes in judicial reform have been produced, including the establishment of a national case-tracking tool in 2015, and finalisation of court manuals for different level courts (although implementation of these varies between courts) (Gainer 2015, 16). Each court has been required to establish an Office of Court Counsel to assist litigants with self-representation, as well as setting up customer care desks (although, again, the quality of care provided varies between courts) (Gainer 2015, 17). Extensive backlogs in court cases have been tackled, with gains being made (Gainer 2015, 17). Furthermore, there has been recruitment and vetting in the judiciary, and training for judges has also been implemented. In the area of SGBV, the Judicial Training Institute is in the process of developing a curriculum and training manual on SGBV for judicial officers (Rawal 2015b, 10). A sexual harassment policy has also been put in place by the judiciary; the Sexual Offences Rules of Court were recently published by the judiciary in 2014, under the auspices of the Sexual Offences Act, and make provisions for the protection of victims and witnesses in sexual offence cases.

All of these reforms are immensely welcome, and, if sustained, will undoubtedly improve access to justice for women impacted by violence in Kenya. However, political will in driving change must not waver, and rigorous mechanisms must be maintained for ongoing scrutiny and accountability in the judiciary. An informed, open, transparent, and independent judiciary is paramount if justice is to begin to serve the needs of women survivors of sexual violence.

### Other institutional reforms

Broader institutional reforms in Kenya are also needed to facilitate justice for women impacted by violence. As discussed in Chapter 3 of this report, SGBV impacts women in multiple, complex, and intersecting ways; therefore, women survivors need to be supported by strategies that are holistic, multi-dimensional, and coordinated, including addressing women’s needs and priorities in education, health, housing, and poverty alleviation (Republic of Kenya 2014, 13–16).

## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

Kenya has enjoyed relative stability since achieving independence in 1963. That stability, however, was abruptly ruptured when violence erupted following the announcement of election results in December 2007. The violence continued for three months, during which time over 1,500 people were killed, 350,000 people displaced from their homes, and between 3,500 and 40,000 rapes were committed. While the PEV may have attracted international media attention, Kenya has been wrestling with several other localised conflicts. Of particular relevance to this report are the Mount Elgon clashes, which peaked between 2006 and 2008, and the 2012 clashes in Tana Delta. Large scale episodes of violence are not uncommon throughout Kenya's history, and women suffer enormously as both targets of direct violence (particularly sexual violence), by being forced from their homes and properties, and by becoming widowed or otherwise bereaved. Such episodic violence, however, masks an unacceptably high level of violence against women, perpetrated with impunity on a daily basis around the country in all spheres of women's lives.

This research project spoke to 63 women affected by violence, from four distinct regions of Kenya: Nairobi, Kisumu, Bungoma, and those displaced from Tana Delta. The women ranged in age from 18 to 66 years, and each had survived violent conflict in Kenya. This report presents their views and experiences regarding women's justice needs and their experiences of seeking justice, as well as highlighting some key harms that require a justice response.

A key message arising from this research is that gender-sensitive justice cannot be approached in an atomistic manner. For justice to be effective for women, it needs to be holistic and take account of the complex social, economic, cultural, and political context through which women are exposed to an intersecting web of harms. Justice, accordingly, needs to be designed to incorporate legal, psychological, economic, and politico-cultural remedies; together, these will better enable women to live fulfilled, dignified lives, free from violence and with opportunities to nourish and enable more positive prospects for future generations of children and young people. This report highlights the intersecting typologies of violence that women face, both during acute episodes of violence and arising through high levels of "ordinary" domestic and sexual violence; it also accentuates the often catastrophic consequences of violence, including infection with HIV, injuries, disability, poverty, homelessness, social exclusion, and exposure to further cycles of violence.

Women in Kenya, particularly poor women, hold a very low social status. They are not given equal opportunities to participate in community discussion and decision-making, or to speak in public forums; rather, they are, in the words of one woman from Bungoma, seen as "*not a person in front of other people*."<sup>330</sup> This very low status has many effects on women's lives. It underpins attitudes that enable and normalise violence against women; makes various formal and traditional authorities largely unmoved by women's poverty, burden of violence, and physical and emotional pain; and makes it difficult for women's reports of injustice to be taken seriously, whether by police, family elders, chiefs, or politicians. Against this background of entrenched and widespread inequality, three groups of women, in particular, emerged as especially vulnerable: survivors of sexual assault (especially those who are HIV

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<sup>330</sup> Interviewed in Bungoma, April 15, 2014.

positive), widows, and displaced women. In all cases, any basis upon which these women may have their concerns heard is eroded to the point of invisibility. Women's fates after sexual assault, HIV infection, widowhood, or displacement depends on the attitudes and dispositions of surviving male relatives; such events expose the reality that very many women in Kenya do not autonomously hold enforceable rights.

The Government of Kenya has been criticised for its failure to prosecute a single case of sexual violence committed during the PEV (ICTJ 2014; COVAW 2016). The effective impunity with which these offences were committed is, sadly, not a departure from ordinary operations; both physical and sexual violence against women is rarely prosecuted. Systems in place to respond to violence are failing women, most notably the criminal justice system. Kenya's police service was particularly criticised by women in this study, who reported that the police did not take violence against women seriously, routinely failed to investigate complaints, were inefficient and/or incompetent, and were overwhelmingly corrupt. Women cited their greater poverty relative to men as a major impediment in accessing criminal justice, directly linked to corruption within the police. Most disturbingly, several women told this project that they were assaulted by police and other state-based security forces. Of equal concern are strong indications of corruption within the judiciary and in other justice-related institutions, and a lack of concerted efforts by the state to eradicate corruption in all spheres.

Women very clearly reported that they urgently need physical safety and protection from violence. It is a fundamental duty of states to protect its citizens against violence.

Several women said that they had been able to access immediate post-violence medical care, particularly through major hospitals. Access to healthcare, however, needs to be improved. Women identified several barriers to accessing healthcare, including high levels of violence and insecurity (making it physically impossible to reach a hospital during both acute episodes of violence, and, especially in Nairobi, as a continual state of affairs); prohibitive costs and fees (some legitimately charged for certain services, and some paid as bribes); and societal attitudes that stigmatise women affected by violence, and inhibit women's ability to access post-violence medical care.

Undoubtedly, the biggest gap in health care in Kenya is in psychosocial services, which are effectively unavailable outside of Nairobi. Women in this study told us that they were suffering psychologically, with depression, anxiety, and several reported symptoms that may be indicative of post-traumatic stress disorder. There is too little help available for women struggling to recover from the emotional aftermath of violence, and women in all sites said that they desperately wanted more help in this regard.

Poverty is a major concern for almost all women participating in this study. Many of the women had been thrust into poverty through violence, and this in turn heightens their risk of further violence through needing to stay in abusive relationships, insecure housing, homelessness, and the breakdown of potentially protective social networks. It can be argued that poverty in and of itself is a form of violence, particularly when it is sufficiently severe that women cannot earn enough to provide adequate food each day, and must make impossible decisions between food, medicine, or their children's education.

Women identified several initiatives that would help to bring them justice. Women want to come within the protective embrace of the law – they want police officers to hear and properly investigate their complaints; the criminal justice system to operate fairly,

transparently, and effectively; and their children to have a complete and uninterrupted education, and the opportunity to build safe, sustainable, and dignified lives for themselves. Women want help to recover emotionally as well as physically from the violence they have experienced. Women consistently raised the importance of reparations and compensation to help them rebuild their lives, rebuild trust in their government, and to feel a sense of justice. Lastly, women want to hold equal status with men in all areas of life. In the words of one woman, *“We are very much of importance and we deserve respect as any other human being.”*<sup>331</sup>

## 5.1 Recommendations

### To the Government of Kenya:

- The women of Kenya need the government to recognise the prevalence and seriousness of violence against women, committed both during times of emergency, and on a day-to-day basis. Reducing the unacceptably high levels of violence against women in Kenya will require committed and sustained leadership from the top down, aimed at changing social and institutional attitudes which undervalue women’s rights to safety and integrity, and which perpetuate a culture of impunity.
- To this end, the Government of Kenya should immediately task and fund an existing body, to create and maintain a national database on violence against women, with a view to establishing a comprehensive picture of the typologies of violence (their prevalence and incidence) and criminal investigations, prosecutions, and convictions, as an essential step in seriously targeting violence through policy and law. Data should be systematically and regularly collected and be made publicly accessible.
- While the Government of Kenya needs to urgently address the security and cost barriers to women accessing healthcare following violence, it additionally needs to lead a long-term public awareness campaign to change popular attitudes which blame women for being raped, and which condone men’s right to beat their wives. Public attitudes to violence against women are both enabling of such violence, and continue to impair women’s ability to access necessary services for their recovery.
- Women affected by violence need far greater access to high quality psychosocial support to aid their recovery, and facilitate their full participation in social, civic, and economic life. The Government of Kenya is urged to expand access to psychosocial services, particularly in regional Kenya.
- The Government of Kenya is urged to act on commitments made regarding reparations and compensation as a matter of urgency, and to consider the effects of evidentiary burdens on women (notably displaced women, widows, and survivors of sexual violence).
- The Government of Kenya is further urged to extend reparations beyond monetary compensation, to include law, policy, and service provision aimed at addressing the structural and systemic barriers to justice that women face.
- The Government of Kenya is urged to sincerely address issues of corruption and failure in the discharge public duties by officials of the state, including police, judiciary, and public servants. To this end, rigorous mechanisms for monitoring and evaluating police and judicial performance are called for, as is a commitment to ongoing rigorous and gender sensitive training of police and judicial actors. The

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<sup>331</sup> Interviewed during Validation Workshop, June 22, 2015.

implementation of gender-balanced representation and staff recruitment practices should also be effected throughout the justice sector.

- The Government of Kenya is urged to implement judicial strategies that recognise the especial needs of survivors of sexual violence, and accord them the support and protection needed throughout their interaction with the justice system (including implementation of mechanisms to expedite cases).

#### **To the international community:**

- Governments of donor nations and international organisations should maintain pressure on the Government of Kenya to address the status of women and the violence directed against them, in a systemic holistic and long-term manner. In particular, the international community has a key role to play in insisting that the Government of Kenya prosecute perpetrators of violence against women, and sanction state agents who fail to properly discharge their duty of care regarding women's safety.
- Governments of donor countries and international organisations have a key role to play in maintaining pressure on the Government of Kenya to enact the recommendations of the Truth, Justice and Reconciliation Commission, and to ensure that recommendations are enacted equitably, transparently, and with particular regard to their impacts on women.
- Members of the international community should provide assistance and encouragement to the Government of Kenya to eradicate corruption in key justice processes, notably (but not exclusively) the police service.
- International organisations should strive for increased inter-agency and inter-sectoral co-operation and action in the promotion of women's rights, and delivery of women-centred programs.

#### **For service delivery and programming:**

- Women need high quality and accessible psychosocial services. Such services need to incorporate both psychological counselling and more acute specialist post-traumatic care. In particular, women urgently need assistance recovering from the psychosocial effects of sexual assault.
- Education is crucial for individuals' life chances and for the well-being of society as a whole. Women impacted by violence, and their children, are disadvantaged in accessing education, and are at high risk of becoming ever-more entrenched in poverty and vulnerability to violence. Women and children should be given genuinely free access to education at all levels. Programmes specifically targeting the children of displaced, widowed, or sexually assaulted women are needed to ensure their equal and undisrupted access to education.
- Programmes aimed at women's political empowerment, targeting both skills-development among women and structures which currently exclude or marginalise women, will assist women to build a local, regional, and national political voice – a necessary step for the long term equality aspirations of Kenyan women. Such programmes need to ensure participation across class, social status, regional, and ethnic boundaries, to include those women who are most marginalised (whether through poverty, health status, displacement, marital status, or ethnicity).
- Development of programmes that genuinely afford women a voice, and recognise their agency.



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## APPENDICES

### Appendix A: Research assistants

<b>Name</b>	<b>Role in Project</b>
Christen Athos	Research Assistant
Andréa Brown	Research Assistant
Lucy Cameron	Research Assistant
Emma Campbell	Research Assistant
Natalie Czapski	Research Assistant
Lydia Gitau	Research Assistant
Chrisanthi Giotis	Research Assistant
Justine Gleeson	Research Assistant
Shirley Huang	Research Assistant
Alesia Kurlek	Research Assistant
Georgina Meikle	Research Assistant
Jesica Mwithia	Research Assistant
Danny Noonan	Research Assistant
Fiona Vuong	Research Assistant
Lara Warren	Research Assistant
Ellie Wolfenden	Research Assistant
Remona Zheng	Research Assistant
Judy Zhu	Research Assistant

## Appendix B: Demographic information – Kenya women participants\*

\*Locations reflect location of interviews/regions women came from. Incomplete demographic data was collected and is presented as ‘unknown’ in this table.

		TOTAL	Bungoma	Kisumu	Marafa/ Tana Delta	Nairobi (Kibera and Mukuru)
<b>Total interviewed</b>		63	15	15	17	16
<b>Marital status</b>	<b>Married</b>	31	4	9	14	4
	<b>Widowed</b>	21	11	4	0	6
	<b>Cohabiting</b>	1	0	0	0	1
	<b>Separated/divorced<sup>332</sup></b>	5	0	2	1	2
	<b>Single/unmarried</b>	5	0	0	2	3
	<b>Unknown</b>	1	1	0	0	0
<b>Age</b>	<b>18–25</b>	6	0	4	1	1
	<b>26–40</b>	30	6	4	8	12
	<b>41–55</b>	20	6	5	6	3
	<b>&gt; 56</b>	7	3	2	2	0
	<b>Unknown</b>	1	1	0	0	0
<b>Educational level</b>	<b>None</b>	11	5	4	2	0
	<b>Primary (no year given)</b>	29	7	8	14	0
	<b>Primary 1-4</b>	3	0	0	0	3
	<b>Primary 5–8</b>	9	0	0	0	9
	<b>Secondary</b>	10	3	2	1	4
	<b>Tertiary</b>	1	0	1	0	0

<sup>332</sup> This includes women who were deserted by their husbands.

## **Appendix C: Key informants' organisations**

This table includes a list of the organisations which our key informants were drawn from. This list is based on the consent that was provided at the time of interviewing.

### **Organisation**

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Winam Law Court  
FIDA Kenya  
Government of Kenya  
Conflict prevention and peace building consultant  
Reforms and Accountability Programme  
Government of Kenya  
Malindi Education and Development Association  
Local Area Authority Committee  
National Gender and Equality Commission  
Kenyatta National Hospital  
Kenya Human Rights Commission  
State-based advocate

## Appendix D: International treaties and regional policies relevant to Kenya

	<b>Dates (Kenya)</b>	<b>Details</b>
<b>African Charter on Human and People's Rights ('Banjul Charter')</b>	Ratified January 23, 1992	<ul style="list-style-type: none"> <li>• International human rights instrument providing for the observation and protection of basic human rights</li> <li>• Article 18(3) – provides for the elimination of every form of discrimination against women, while ensuring the protection of the rights of women and children as stipulated in international declarations and conventions</li> </ul>
<b>Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa</b>	Signed December 17, 2003  Ratified October 6, 2010	<ul style="list-style-type: none"> <li>• African Union agreement focusing on the elimination of discrimination against women</li> <li>• Article 5 – eliminates practices harmful to women's rights and their health, such as genital mutilation</li> <li>• Articles 6 and 7 – equal rights in marriage, and in cases of separation, divorce, and annulment of marriage</li> <li>• Article 9 – guarantees women the right to take part in the political and decision-making process</li> <li>• Article 12 – reinforces women's and girls' right to education and training</li> <li>• Article 13 – guarantees women equal opportunities in work and career advancement, social welfare, and other economic opportunities</li> <li>• Article 14 – allows women control of their reproductive health</li> </ul>
<b>Protocol Relating to the Establishment of the Peace and Security Council of the African Union</b>	Ratified December 19, 2003	<ul style="list-style-type: none"> <li>• Protocol adopted by the African Union to establish the Peace and Security Council, which is in charge of enforcing the AU's decisions</li> <li>• Article 13 – to provide training to civilian and military personnel, with particular emphasis on the rights of women and children</li> <li>• Article 14 – to assist member states that have been adversely affected by violent conflicts, by, inter alia, providing assistance to vulnerable persons (e.g. children, women, the elderly, and other traumatised groups)</li> </ul>

		<ul style="list-style-type: none"> <li>• Article 20 – to encourage non-governmental organisations and community-based efforts(particularly by women’s organisations) to actively participate in promoting peace, security, and stability in Africa</li> </ul>
<b>Convention on the Rights of the Child (CRC)</b>	<p>Signed January 26, 1990</p> <p>Ratified July 30, 1990</p>	<ul style="list-style-type: none"> <li>• Treaty adopted by United Nations, setting out the civil, political, economic, social, health and cultural rights of children</li> <li>• Preamble recalls the provisions of the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, in setting out the provisions of the treaty</li> </ul>
<b>International Covenant on Civil and Political Rights</b>	<p>Acceded May 1, 1972</p>	<ul style="list-style-type: none"> <li>• International UN treaty committing States to respect the outlined civil and political rights and freedoms of all persons</li> <li>• Article 3 – ensures the equal right of men and women in all civil and political rights</li> <li>• Article 6(3) – capital punishment shall not be imposed on pregnant women</li> <li>• Article 23 – equal rights of men and women as to marriage, both during the marriage and at its dissolution</li> </ul>
<b>Universal Declaration of Human Rights (UDHR)</b>	<p>Ratified July 31, 1990</p>	<ul style="list-style-type: none"> <li>• Declaration adopted by the General Assembly of the United Nations, stating the basic rights and fundamental freedoms to which all human beings are entitled</li> <li>• Article 2 – right to equality</li> <li>• Article 7 – right to protection under the law</li> <li>• Article 16 – equal rights of men and women as to marriage, both during the marriage and at its dissolution</li> <li>• Article 17 – right to own property alone or in association with others</li> </ul>
<b>Convention on the Elimination of Discrimination against Women (CEDAW)</b>	<p>Acceded March 9, 1984</p>	<ul style="list-style-type: none"> <li>• Often described as the “international bill of rights for women,” it is the most comprehensive international treaty protecting women’s rights</li> <li>• Part I – defines “discrimination against women,” and covers policy measures; a guarantee of basic human rights and fundamental freedoms; special measures; sex role stereotyping and prejudice; and prostitution</li> <li>• Part II – covers political and public life; representation; and nationality</li> </ul>

		<ul style="list-style-type: none"> <li>• Part III – covers education; employment; health; economic and social benefits; and rural women</li> <li>• Part IV – covers the law; and marriage and family life</li> </ul>
<b>Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women</b>	No action	<ul style="list-style-type: none"> <li>• International treaty establishing complaint and inquiry mechanisms for the CEDAW, requiring ratifying States to recognise the competence of the CEWAW to receive and consider complaints from individuals or groups within its jurisdiction</li> </ul>
<b>The Convention on the Rights of Persons with Disabilities</b>	<p>Signed March 30, 2007</p> <p>Ratified May 19, 2008</p>	<ul style="list-style-type: none"> <li>• International UN treaty intended to protect the rights and the dignity of persons with disabilities, through the protection and promotion of specified rights</li> <li>• Preamble – recognises that women and girls with disabilities are often at greater risk, both within and outside the home, of experiencing violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation</li> <li>• Article 6(1) – requires parties to recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms</li> <li>• Article 6(2) – commits parties to taking all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention</li> <li>• Article 16(5) – requires parties to put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted</li> <li>• Article 28(2)(b) – requires parties to ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty</li> </ul>

		reduction programmes
<b>Convention on the Nationality of Married Women</b>	Notified March 18, 1958	<ul style="list-style-type: none"> <li>• International UN treaty that recognises the loss or acquisition of nationality by a woman as a result of marriage and/or its dissolution</li> <li>• Article 1 – prevents automatic changes to a wife’s nationality, following marriage or its dissolution with an alien</li> <li>• Article 2 – requires that neither a person’s voluntary acquisition or renunciation of nationality shall prevent the retention of that same nationality by the wife of the acquiring/renouncing person</li> <li>• Article 3 – outlines the ways in which a wife may voluntarily acquire the nationality of her husband</li> </ul>
<b>International Covenant on Economic, Social and Cultural Rights (ICESCR)</b>	Acceded May 1, 1972	<ul style="list-style-type: none"> <li>• International UN treaty committing parties to grant specified economic, social and cultural rights to all individuals</li> <li>• <b>Article 3</b> – requires parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant</li> <li>• Article 7(a)(i) – requires parties to recognise the right of all to fair wages and equal remuneration for work of equal value without distinction of any kind; in particular, requires women to be guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work</li> </ul>
<b>Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime</b>	Acceded January 5, 2005	<ul style="list-style-type: none"> <li>• An international protocol to the Convention against Transnational Organised Crime, committing parties to preventing and combatting trafficking in persons, and helping victims from becoming revictimised</li> <li>• Preamble and Article 2(a) recognise the particular vulnerability of women and children to trafficking in persons</li> <li>• Article 9(1)(b) – requires parties to protect victims of trafficking in persons, especially women and children, from revictimisation</li> <li>• Article 9(4) – commits parties to taking or strengthening measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable</li> </ul>



		<p>to trafficking, such as poverty, underdevelopment and lack of equal opportunity</p> <ul style="list-style-type: none"> <li>• Article 9(5) – requires parties to adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking</li> </ul>
<p><b>Rome Statute of the International Criminal Court</b></p>	<p>Signed August 11, 1999</p> <p>Ratified March 15, 2005</p>	<ul style="list-style-type: none"> <li>• The instrument which created the first treaty-based permanent international criminal court, the International Criminal Court</li> <li>• Article 7(1)(g) – defines “crimes against humanity” to include “rape, sexual slavery, enforced prostitution, force pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity”</li> <li>• Article 36(8)(b) – requires parties to take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children</li> <li>• Article 42(9) – requires that the Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children</li> <li>• Article 43(6) – requires the Registrar to set up a Victims and Witnesses Unit within the Registry which shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses; the Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence</li> </ul>
<p><b>Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography</b></p>	<p>Signed September 8, 2000</p>	<ul style="list-style-type: none"> <li>• United Nations Protocol which aims to extend the measures Member States are required to undertake in order to guarantee the protection of child from the sale of children, child prostitution, and child</li> </ul>

		<p>pornography</p> <ul style="list-style-type: none"> <li>• Preamble recognises that girl children are a particularly vulnerable group, being at greater risk of sexual exploitation, and disproportionately represented among the sexually exploited</li> </ul>
<b>Convention Against Torture</b>	Acceded February 21, 1997	<ul style="list-style-type: none"> <li>• International UN treaty committing parties to preventing and eliminating torture and other acts of cruel, inhuman or degrading treatment or punishment</li> <li>• Jurisprudence establishes that the treaty's provisions apply to such forms of SGBV as rape (including with foreign bodies), domestic violence, female genital mutilation, sexual humiliation and slavery, and trafficking<sup>333</sup></li> </ul>
<b>Convention relating to the Status of Refugees (CSR)</b>	Acceded May 16, 1966	<ul style="list-style-type: none"> <li>• International UN treaty that defines a refugee, and sets out both the rights of those granted asylum, and the responsibilities of State parties that grant asylum</li> <li>• Article 24(1)(a) – parties must accord to refugees the same treatment as accorded to their nationals, in respect of, inter alia, women's work (insofar as it is governed by laws or regulations, or subject to the control of administrative authorities)</li> </ul>
<b>Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No. 182)</b>	Ratified May 7, 2001	<ul style="list-style-type: none"> <li>• A general conference of the International Labour Organisation, on the need to eliminate the worst forms of child labour (e.g. child slavery) through such measures as free basic education, and rehabilitation and social integration programs addressing families' needs</li> <li>• Article 7(2)(e) – requires that measures taken to implement and enforce provisions giving effect to the Convention's aims (including on the provision of education to all children) to "take account of the special situation of girls"</li> </ul>

<sup>333</sup> United Nations Voluntary Fund for Victims of Torture, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* (United Nations Office of the High Commissioner for Human Rights, 2011) <[http://www.ohchr.org/Documents/Issues/Torture/UNVFT/Interpretation\\_torture\\_2011\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Torture/UNVFT/Interpretation_torture_2011_EN.pdf)>.