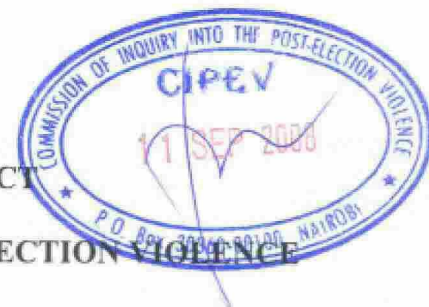


# ANNEX 8



**THE COMMISSIONS OF INQUIRY ACT**  
**THE COMMISSION OF INQUIRY INTO THE POST ELECTION VIOLENCE**  
**(THE WAKI COMMISSION)**

**SUBMISSIONS BY FIDA-K**  
**ON**  
**SEXUAL AND GENDER BASED VIOLENCE**

A. These submissions are presented by the Federation of Women Lawyers (FIDA-K) on behalf of the Inter Agency Gender Based Violence (GBV) Sub-Cluster chaired by UNFPA and co-chaired by National Commission on Gender and Development. The focus of this sub-cluster following the post election violence was coordination of GBV prevention and response including documentation of sexual violence directed, in particular, against women, and the provision of medical, psycho-social and counseling services to the survivors. While the broader term 'Gender-based Violence' encompasses all acts that are perpetrated on a person against their will based on socially ascribed (gender) differences between male and females<sup>1</sup>-which include rape, sodomy, domestic violence, defilement, sexual exploitation and abuse, we have analysed sexual abuse of women and girls during the period separately from other forms of gender based violence. This is because it was the most pervasive and was perpetrated by a diverse range of actors, including State security agents.

B. UNFPA and UNIFEM supported several sub-cluster members (CARE, FIDA, Women Empowerment Link and Catholic Diocese of Nakuru to gather evidence for presentation before the Commission. From the investigations and interventions carried out, it emerged clearly that women bore the brunt of the post election violence. Women were killed; their houses, businesses and farms burnt to the ground. Thousands were displaced, with the majority in camps for internally displaced persons (IDPs) being women. Many were shot by the security forces called in to restore peace, some in the privacy of their homes where they would have expected to be safe

C. Women were also subjected to widespread sexual violence in all the areas where post-election violence occurred. Many were sexually assaulted, gang raped, sodomised. Many of these acts of sexual violence occurred in the presence of the women's spouses, children or parents, thereby increasing the trauma, humiliation and stress suffered by survivors and their families. As a result, some victims became pregnant. Others have contracted HIV and Hepatitis. Still others have lost their homes and have been rejected by their husbands as a result of the rape. In many cases, the women knew, and could identify, the perpetrators. Some reported or attempted to report the incidents to the authorities, but many more could not identify their attackers or were not in a position, in the midst of the violence, to report the incidents. Yet others were unable to report the sexual violence to the police because the perpetrators of the sexual violence were state security agents.

D. Women have also suffered another form of violation, almost as devastating as the sexual violence: the failure, refusal or inability by State organs to recognize and deal adequately with the diverse violations that women suffered. Witnesses from Nairobi recounted to this Commission how, when

<sup>1</sup> This definition is derived from IASC Guidelines for Addressing Gender Based Violence  
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they attempted to report the incidents of rape to the police, they were told to choose between reporting cases of destruction of property or cases of sexual violence which, in any event, according to the police officers to whom they attempted to make the reports, were 'over.'

In his evidence, the Police Commissioner (CW1) admitted that his office had no data on cases of sexual violence. The Attorney General (CW134) also admitted that the police had no such data, indeed expressing his surprise that there was no data available given the fact there were reports of widespread sexual violence, and asking this Commission to investigate the matter. The Chairperson of the State human rights commission, the Kenya National Commission on Human Rights (CW125), while acknowledging that there were widespread cases of sexual violence, referred the Commission to the police for data on the numbers of victims and perpetrators. In short, there is no data from the bodies charged by law with the mandate to investigate all cases of violations of human rights and commission of crimes. The lack of data on these matters, coupled with the evidence of women on their frustrations when attempting to report violations, indicate a serious inability on the part of the State organs to see sexual violence for what it is- a major violation of human rights, which is a crime both under domestic and international law- and deal with it appropriately. In addition, it is suggestive of the culpability of the State security agencies-because many police and General Service Unit (GSU) officers reportedly perpetrated acts of sexual violence against women, the police were not willing to accept and record reports of sexual violence.

In the absence of data from State organs therefore, we urge the Commission to be guided in its analysis of the sexual violence perpetrated against women by evidence presented to it by the women survivors of violence and representatives from various women's organizations as summarized below, as the only documented data on cases of sexual and gender based violence.

#### **E. SEXUAL VIOLENCE AGAINST WOMEN**

Violence against women has been a matter of concern for a long time. However, the post-election period saw an unprecedented number of women subjected to sexual violence from all quarters-civilians and State security agents. In the informal settlements in Nairobi, there were reports of ethnic based sexual violence, with Kikuyu women raped by Luo men and vice versa (CW125, KNCHR, Exhibit 125). However, there appears to have been a lot more cases of individuals taking advantage of the general insecurity to perpetrate acts of sexual violence, the perpetrators sometimes being in groups of people from diverse ethnic origins. In Nairobi, **CW 15**, a survivor of gang rape and genital mutilation by the rapists, narrated to the Commission how those who raped her, four of whom she knew, her neighbours for over 20 years, also circumcised her, stating that '*Kikuyu women are circumcised and they could do it to me.*' She reported the incident to the Police and GSU at the 82 Air Force Base and later at Pangani Police Station and was given an OB number which she produced to this Commission. **CW 15** also testified that one of the men who raped her was arrested by officers based at Pangani Police Station but later released. She was reportedly asked to produce Kshs 6,000 so that the police could take the matter to court.

Incidents of sexual violence perpetrated by security agents were also reported. CW 17, a resident of Kibera, gave evidence to the Commission with regard to her rape by General Service Unit personnel who had been deployed to Kibera to quell the violence. She testified that her 15 year old daughter was also raped by the GSU officers and became pregnant.

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Evidence from the Nairobi Women's Hospital (NWH) (CW14, Dr. Sam Thenya Exhibit 14A, B and C) indicates that survivors of sexual and gender based violence arising from the 2007 elections started streaming into the Hospital on the election day-27th December 2007. The reported incidences included sexual violence (rape and defilement), domestic violence and physical violence. The number of victims increased with the announcement of the results. Survivors of violence continued to report to the hospital and to be referred to the hospital from other parts of the country for the three months-January-March 2008.

Out of the total of 653 cases of violence received at the hospital during that period, 80% or 524 were cases of rape or defilement. 275 or 95% of the adult victims of sexual violence were women while 84% or 190 of the victims were girls. 17% of the victims were children below 9 years.

While the NWH received 653 cases and partner hospital another 286 cases making a total of about 900 cases of sexual violence, Dr. Thenya conceded that the cases of rape that are actually reported are actually the tip of the ice-berg.

### E.1 IDENTITY OF PERPETRATORS

According to the NWH report, at least 207 or 40% of the victims of violence knew, and therefore could identify, their attackers. Three hundred and seventeen (317) or 60% of the perpetrators were unknown to the victims of violence. The evidence from the hospital indicated further that 42 cases or 8% of sexual violence cases involved gang rape with up to 11 men involved in a single incident. Data from partner hospitals indicated a further 286 cases of violence, with 225 of the victims being female.

E.2 While the NWH report did not indicate sexual violence at the hands of the police, the report did indicate that survivors of violence were violated within police quarters. The report illustrated this with the case of a female survivor aged 10 who sought refuge at Mathare Police Lines who was defiled by a gang of young boys within the Police Lines. It is also noteworthy that in the NWH report, 128 perpetrators of sexual violence are given as "*known but not named*."

E.3 The evidence of widespread sexual violence against women given by CW14 is borne out by other evidence presented to the Commission. Dr. Margaret Makanyengo (CW23), a Consultant Psychiatrist and Head of Mental Health Services at Kenyatta National Hospital and also Head of the Gender-based Violence Recovery Centre at the Hospital told the Commission that the Centre received a total of 184 cases of gender based violence in the period December 2007 to June 2008. She also indicated that the hospital could provide details and a breakdown of the victims, alleged perpetrators and nature of violence suffered by the victims. In a subsequent report availed to the Commission on 22<sup>nd</sup> August 2008 titled *Information on Psychological and Gender Based Violence Cases Seen at KNH due to Post Election Violence*, the Chief Executive Officer of the Hospital, Dr. J. N. Micheni, availed some of this information. Out of 70 cases shown in the report, 22 were cases of rape and 2 of sexual assaults, one of the victims of sexual assault being a 3 1/2 year old female child.

The telling information from this report is the identity of the alleged perpetrators of sexual violence. 12 of the alleged perpetrators were security agents- GSU officers. The victims of rape by GSU officers were, according to the KNH report, raped within the confines of their homes in Kibera.

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CW15-18, women victims of sexual violence who testified in camera before the Commission, also corroborate this evidence of widespread sexual violence, perpetrated by both civilians and security agents.

**E.4** The cases of sexual violence were reported from all over the country. Michael Gachanja Wachira, of the Centre for Education of Rights and Awareness (CREAW) (CW13, Exhibit13A and 13B) presented witness accounts of widespread rape in the course of the post election violence, both within the areas where violence occurred but also where the victims of violence sought refuge. Again, the evidence was that the acts of sexual violence were perpetrated by both civilians and state agents-among them police officers. In Eldoret a rape was perpetrated by a police officer in the school where the IDPs had gone to seek refuge. In another incident, in Eldoret, a 15 year old girl was locked up in a house and raped by a police officer while her father was pleading in vain with other officers outside to rescue his daughter. Two witnesses who had suffered gang rape testified in camera before the Commission in Eldoret

Other cases of widespread sexual violence against women and children took place in Naivasha, Nakuru, Kisumu and indeed in all areas of Kenya affected by the post-election violence. In Kisumu, evidence presented by CARE Kenya showed some 48 cases of sexual violence, the majority of whom were returnees from Naivasha, Eldoret, Nakuru, and Nairobi. The ages of the victims of violence ranged from 18-73 years. Young girls were also gang raped, with the rapes resulting in pregnancy or the victims contracting sexually transmitted infections and HIV.

While it is not possible or necessary to detail all the incidents of sexual violence against women by both civilians and security personnel, it is imperative that the Commission focuses on this very grievous violation of women's human rights. The evidence on record suggests that State agents failed to appreciate the magnitude of sexual violence, particularly rape and defilement of women and girls, and the grave physical and psychological consequences of such violence on the victims. While to some rape may appear to be a minor violation of rights-so that police officers see no reason to follow up such cases or even to record them-psychologists will testify-and indeed Dr. Thenya's report does so indicate-that the long-term psychological impact of rape and other sexual violence on women is devastating. Indeed, as we illustrate later, so seriously is rape taken under international law that its perpetration in conflict situations has been declared a crime against humanity.

**E.5** Given the lack of data from state agencies and only scattered data from non-governmental agencies and hospitals, it is not possible to state with certainty the number of women who were subjected to sexual violence in the post election violence. However, if we can extrapolate from the available information, it is possible to indicate the incidents of sexual based violence as follows:

Reports to Nairobi Women's Hospital	-	524
Reports to Partner Hospitals of NWH	-	286
Reports to Kenyatta National Hospital	-	184
Reports from Kisumu (Care-Kenya)	-	48
Other cases of GBV	-	129
<b>Total</b>	-	<b>1171</b>

It should be noted that the figures above represent only a few areas of the country affected by the

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violence, and only those survivors who sought assistance from hospitals or other service providers. If the 1171 reported cases of rape and other forms of gender based violence represent only the 'tip of the iceberg', the extent of the sexual violence experienced by women must be truly awful. That there is no information about it from the police and other state organs is unforgivable.

The Commission should address itself to certain questions with regard to the issue of sexual violence. Granted that there were difficulties for women accessing police stations to report violations, why would the State organs treat the issue of gender based violence so casually? Is it because the State security agents such as the GSU and police were themselves perpetrators of violence? Is it because they rank sexual violence below other crimes – hence the injunction to women to choose between reporting arson and reporting rape? Do security organs *even see* rape as a crime at all, deserving of punishment under the law?

## F. OTHER ASPECTS OF GENDER BASED VIOLENCE

While it is generally accepted that women, on the whole, were not inciters or perpetrators of violence, it is recognized that they suffered the most from all forms of violence, the worst and most personal being the sexual violence detailed above. Their gender, however, and the manner in which gender power relations are organized, mean that in times of crisis and conflict such as the post election violence, they suffer other forms of violence, physical and psychological, that are purely gender based. Victims of rape gave evidence to the effect that as a consequence of the rape that they had suffered, their spouses had ejected them from home, leaving them with no option but to remain in the IDP camps. At the time of the Commissions sittings in July and August, many women, abandoned by their husbands after suffering sexual violence, were still living in camps in Nairobi and other parts of the country, in informal settlements or with friends. A few illustrations will suffice.

A victim of the violence in Naivasha watched helplessly as her five children were burnt to death. She took the bodies to her husband's rural home for burial. After the burial her husband and his family refused to allow her to stay at their rural home. They accused her of having taken the children with her to live and work in Naivasha with the intention of killing them. Her parents would not accept her either, and she was living with a friend. In Nairobi, **CW15**, who was gang raped in her home and her husband seriously injured, was abandoned by her husband after the rape. She was still living at the IDP camp at the time she gave her testimony. She had contracted HIV, and had no means of earning a living or buying the ARV drugs that she needed

Other women suffered not only rape but also great cruelties in the course of rape, including insertion of crude weapon in the vagina. From Naivasha, evidence indicated that one woman was attacked in her home with her husband in the evening hours. Her husband was hacked to death while a group of four started to rape her. She had a condition where her cervix was too tight and the rapists could not penetrate so they used a crude weapon to cut her cervix so that they could rape her. She also contracted HIV.

Many marriages have also broken up following the violence due to the inter-tribal animosities that followed the violence. Those whose marriages have ended, who have lost all means of earning a living, who, because of the patriarchal land ownership and inheritance system do not own any land, have been reduced to homeless destitutes. In such circumstances, it is not really surprisingly that many

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have been forced into engaging in commercial sex, as detailed in various reports presented to the Commission (**Exhibit 13 A and B by CREAM, Exhibit 11, FIDA-K report; Care Kenya report on Kisumu returnees**)

## **G SEXUAL VIOLENCE AGAINST MEN**

While women and girls were the main victims of the post election gender based violence, men and boys were also subjected to such violence. Dr. Thenya of the Nairobi Women's Hospital indicated that 22 men and 37 boys, victims of rape or defilement received treatment at the hospital. However, given the shame and stigma associated with sexual violence against men, it is possible that many more cases of violence went unreported.

Violence against men was also informed by cultural prejudices held against some ethnic groups. The post-election violence was insidiously ethnic, pitting those ethnic communities who were deemed to have supported PNU against those who supported ODM. The violence therefore took, in some areas, an ethno-cultural bent. Those from ethnic communities who do not carry out male circumcision were subjected to forced male circumcision and in some cases, castration. This was the evidence that emerged from Naivasha, where attacks on members of the Luo ethnic group took place. One woman narrated to the Commission sitting in Naivasha the fate that befell her brother. She had managed to run away from the wild youth with her husband to her place of employment. She however, received information that her only brother had been attacked and was writhing in pain because there was no one who could help him. She went to check on him and found him alive but with his private parts mutilated and stuffed in his mouth. He also had severe cuts in his body. She tried to get him to hospital but was threatened that she might suffer the same fate as her brother if she stayed longer.

The tragedy for male victims of sexual violence-or ethnic based attacks that target their private parts-is that most of them would not testify about their ordeal. As a result, the perpetrators, even if known or identifiable, will go scot-free as they will have no fear of the information ever reaching the authorities. Worse still, however, is the fact that such men will never get the psychological support that they should get, and will live damaged and traumatized lives,

## **H. THE LEGAL POSITION**

Many arguments and viewpoints have been presented about the causes of the post election violence. Many have argued before the Commission, and even before it was set up, that the post election violence was precipitated by the announcement of President Kibaki as the winner of the 2007 elections. Others have argued that the violence was a result of inter ethnic hostilities that had not been addressed over the years and which were now coming to the surface. The issue of historical injustices pertaining to land and sharing of national resources has also been cited as a cause of the violence. Incitement by political leaders and use of hate speech in the media even before the elections and the bitter competition for political office have all been cited as possible causes of the violence. The crucial point that the Commission must emphasise, however, is that none of these reasons justify the post election violence against innocent civilians. Nothing in the Constitution of Kenya or international law permits protests about electoral outcomes to take the form of ethnic killings. And certainly, nothing either in domestic or international law allows for conflicts, any conflicts, to be fought in the bodies of women and children.

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## H.1 DOMESTIC LEGISLATION

In all the cases detailed above, offences under the Sexual Offences Act 2006 and the Penal Code, Cap 63 Laws of Kenya, were committed.

Section 3 of the Sexual Offences Act 2006 defines rape while Section 5 deals with sexual assault. Section 8 of the Sexual Offences Act 2006– defines the offence of defilement, which is unlawful sexual intercourse with a minor. The Sexual Offences Act at Section 10, deals with the offence of gang rape.

Under section S 162 of the Penal Code, Cap 63 of the Laws of Kenya:

“Any person who has carnal knowledge of any person against the order of nature is guilty of a felony and liable to imprisonment for fourteen years.”

The proviso to the section states that

“Provided that in the case of an offence under paragraph the offender shall be liable for twenty one years if:

- i) the offence was committed without the consent of the person who was carnally known
- ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind.....”.

## H.2 INTERNATIONAL LAW PROVISIONS

International law on perpetration of rape in conflict situations is clearly set out in the Rome Statute establishing the International Criminal Court. Article 7 of the Statute titled “Crimes Against Humanity” includes *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.*” as crimes against humanity ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack

Article 8 defines war crimes to include

*(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;*

The acts that were perpetrated against women in the post election period doubtless constitute crimes against humanity. The question is who should be held liable for their commission.

In his article on **Rape and Sexual Violence in International Law: ICTR Contribution** Alex Obote-Odora, 2002 Special Assistant to the Prosecutor of the International Criminal Tribunal for Rwanda, notes that

*“One cannot equate the death toll with the number of women who were victims of rape and sexual violence. Sex-based crimes are not easily identifiable, like gunshot wounds or amputated limbs. This is because these crimes inflict physical and psychological wounds, which women can conceal to avoid further emotional anguish, ostracization, and retaliation from perpetrators who may live*

<sup>7</sup> The Inter Agency Gender Based Violence (GBV) Sub-cluster includes the following organizations: UNFPA, UNIFEM, MUGEN, CREA, Kenya Youths Against Gender Violence, Women For Justice, UNHCR, IRD, Save the Children, Internews, Women Shadow Parliament-Kenya, Wangu Kanja Foundation, IMC, Women’s Rights Awareness Program (WRAP), SOA TF, OXFAM, Women’s Empowerment Link, Africa Woman, CARE International, FIDA-K, Mama na Dada, AMREF Headquarters, Gender Commission, COVAW, UNICEF, KRCS, African Family Health



*nearby.”*

International jurisprudence has also provided a definition of rape and sexual violence in the case of **Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).**

Rape is defined in that case as *“a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.”*

The same case defines sexual violence, giving it a much wider definition than rape. Sexual violence is here defined as *“any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”*

The ICTR found Akayesu guilty of rape even though he had not himself committed the actual physical acts of rape. By encouraging or facilitating others to commit rape during the Rwanda genocide, he was himself found guilty of rape.

From the evidence before the Commission, it was not clear, and may never be clear, how many people died during the post election violence. It may not even be possible to tell how many incidents of rape took place, for some victims may never speak of it. Yet, there are victims of rape for whom life is a living death. Evidence indicates that some women who watched their husbands and children being killed, but who were themselves raped but left to live, wish that they had also died. As Major Brent Beardsley, Deputy Commander of UNAMIR noted in the Akayesu trial in Arusha cited above, *“Massacres kill the body. Rape kills the soul.”*

Those who may have incited or facilitated the widespread rape of women should not be allowed to get away with it.

## RECOMMENDATIONS

As a result of the post election violence, the lives of thousands of women have been irretrievably damaged. Aside from the ones who lost their lives in the violence, there are also thousands who lost their families, their spouses and their children in the violence. There are also thousands who lost their property, their homes, and their means of earning a living and are living in camps for the displaced, facing a bleak and uncertain future. Then there are the hundreds, maybe thousands who, as detailed in these submissions and in evidence before the Commission, suffered grievous acts of sexual violence. And there are those who suffered from all these forms of violence-their families murdered, their homes and livelihoods destroyed, and they themselves raped and their bodily integrity abused by both strangers, neighbours and in some cases, the guardians of law and order.

The Commission must find a way to ensure redress for these victims of gender based violence. Those who instigated the violence, and those who carried out the acts of violence must not be allowed to get away with it, for then the culture of impunity will have been solidly planted in Kenya.

We therefore make the following recommendations to the Commission with regard to the post election violence and the sexual and gender based violence perpetrated in the course of the violence.

The Inter Agency Gender Based Violence (GBV) Sub-cluster includes the following organizations: UNEPA, UNIFEM, MEGEN, CREFAW, Kenya Youths Against Gender Violence, Women For Justice, UNHCR, IRD, Save the Children, Internews, Women Shadow Parliament-Kenya, Wangu Kanja Foundation, IMC, Women's Rights Awareness Program (WRAP), SOA TF, OXFAM, Women's Empowerment Link, Africa Woman, CARE International, FIDA-K, Mama na Dada, AMREF Headquarters, Gender Commission, COVAW, UNICEF, KRCVS, African Family Health

## 1. Investigation of Cases of Sexual and other Gender based Violence

### 1.1 Need For Thorough Investigation

The evidence before the Commission is that State organs have not taken seriously the issue of sexual and gender based violence. The Attorney General conceded as much in his evidence and requested this Commission to investigate the matter. The Commission should therefore make a specific recommendation for a thorough investigation of all incidents of sexual and gender based violence that took place in all parts of the country in the post election period.

### 1.2 Investigation and Prosecution of Known or Identifiable Perpetrators

There were, however, specific cases of sexual violence presented before the Commission where the perpetrators were known and had been identified. In at least 40% of the cases of sexual and gender based violence in which victims were treated at the Nairobi Women's Hospital, the perpetrators were known to the victim. In all such cases, and in all other cases presented before the Commission where it is apparent that an offence was committed by an identifiable person(s), the Commission should recommend that the relevant authorities be directed to initiate and complete investigations and charges be preferred within a time specified by the Commission.

### 1.3 Inciters, Planners and Facilitators of Post-election Violence Ultimately Responsible for ALL forms of Violence

In many of the cases of sexual violence, however, it may not be possible to identify the perpetrators. Indeed, given that many victims took days, sometimes weeks or months, to report the violence, establishing who actually committed the sexual violence would be a tall order. No medical evidence was collected, and so linking the act of rape to any perpetrator would not be possible.

However, the incidents of rape were part of a much wider series of violent acts. The Commission has received evidence that points to the violence having been pre-planned, organized, and facilitated by actors within the political class. As indicated above, under international law, those who incite such violence in conflict situations and encourage and facilitate those who commit acts of rape and sexual violence are themselves culpable for those acts of rape and sexual violence. *Should the Commission find that anyone was responsible for inciting the post election violence, that anyone planned, organized and facilitated the violence, then, even in the absence of evidence on who committed acts of rape and sexual violence, the Commission should find such person/persons who planned, organized and facilitated the violence responsible for all the incidents of rape and sexual violence committed during the post election violence, and should recommend further investigation of his/her/their conduct and subsequent prosecution.*

### 1.4 The Role of the Attorney General

In his statement before the Commission, the A-G detailed the steps he has taken to ensure proper prosecution of cases under the Sexual Offences Act, from training of prosecutors to setting up of a task force to oversee the proper implementation of the Act. He, however, indicated that he had no data on the commission of sexual offences during the post election violence, and that he could not understand why as he knew that some sexual violence had occurred. He expressed powerlessness in relation to investigation of gender based violence. In other words, the A-G has put in place what he deems an efficient system for prosecution of sexual offences without a corresponding mechanism to ensure that acts of sexual violence are properly investigated and arrests made.

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The Commission will note that S 26 of the Kenya Constitution vests all investigation and prosecution powers in the Attorney General. Under S 26(4)) he has power to require the Commissioner of Police to carry out investigations, and the Commissioner is obliged to comply. For the A-G to express his inability to order and ensure that investigations of all offences, but in particular sexual violence, is basically to confess that he is unable to do the work that he is constitutionally bound to do. *The Commission should therefore recommend the investigation of all cases of sexual violence committed during the post election violence by an efficient, independent body.* It may not be possible, at this stage when time has passed and evidence lost, to get and prosecute the actual offenders. It may however, in those cases where the perpetrators were known and can be identified, help to send a message that such gross violation of the rights of others, particularly their right to bodily integrity, will not be tolerated.

### 1.5 Training on, and Reporting Mechanisms for Gender Based Violence

The evidence before the Commission has illustrated not only the limitations in the understanding and appreciation by State security organs of the gravity and enormity of sexual violence, but also the huge gaps in the knowledge of where and to whom to report such violations, and the means of documenting and collecting evidence of sexual violence.

The Commission should therefore in this regard:

1. Recommend that State security agents undergo intensive training on sexual and gender based violence to enable them properly handle victims of violence and investigate and prosecute such cases effectively.
2. Recommend that a reporting link be set up between the police and health facilities so that all cases of sexual and gender based violence that are dealt with at all health facilities are followed up, investigated and prosecuted by the police.
3. Make recommendations on the establishment of effective and gender sensitive reporting mechanisms available to victims of gender based violence. Aside from the failure or refusal of police to receive reports of sexual violence, many victims of violence could not report because they did not know where to report, were afraid of the reception they would get, or did not trust the judicial process to deal adequately with the offence committed against them.
4. Recommend that adequate medical interventions for victims of sexual violence be available, free of charge, in health facilities, both private and public, in situations such as that prevailed in the post election. The first 72 hours are crucial in such cases in order to avoid pregnancies and contracting HIV/AIDS and other sexually transmitted diseases. Some of the victims of violence who contracted HIV and hepatitis could have been protected had such interventions been available.

## 2. Breach of International Obligations by the State

2.1 During the post election violence, a large proportion of the Kenyan population was left to their own devices in terms of security. State security organs either took sides in the conflict, or stood aside and allowed perpetrators of violence to carry out their criminal acts without hindrance. Yet, the State has an obligation under international law to ensure security for all its citizens. *We invite the Commission to consider and make a specific finding on whether the State was in breach of its obligations to its citizens to protect the citizens right to life security, property and other rights both*

<sup>10</sup> The Inter Agency Gender Based Violence (GBV) Sub-cluster includes the following organizations: UNFPA, UNIFEM, MEGEN, CREFAW, Kenya Youths Against Gender Violence, Women For Justice, UNHCR, IRD, Save the Children, Internews, Women Shadow Parliament-Kenya, Wangu Kanja Foundation, IMC, Women's Rights Awareness Program (WRAP), SOA TF, OXFAM, Women's Empowerment Link, Africa Woman, CARE International, FIDA-K, Mama na Dada, AMREF Headquarters, Gender Commission, COVAW, UNICEF, KRCS, African Family Health



*under the Constitution and International law as set out in the various international and regional instruments to which the country is signatory.*

2.2 The post election violence saw not only the widespread violation of citizens' civil and political rights, but also their economic and social rights as set out in international conventions to which Kenya has acceded, particularly those relating to women's rights.<sup>2</sup>

*The Commission should make a recommendation that the State begins to show real commitment to securing women's rights, and to meeting its obligations to women under international law.*

It is clear from all the evidence before the Commission that women who have lost property and are living in camps, and have been abandoned by their husbands because they were the victims of rape or as a result of breakdown of inter ethnic marriages require State assistance to pick up the pieces of their lives. *The Commission should recommend the establishment of a fund to compensate women for their losses, to enable them find shelter, access medical and psychosocial support and a means of earning a living.*

**Dated at Nairobi this 5<sup>th</sup> day of September 2008**

  
**Mumbi Ngugi**

**Advocate**

**for Federation of Women Lawyers**

**FIDA Kenya**

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The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of all Forms of Discrimination Against Women, the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the AU Solemn Declaration on Gender Equality, The International Conference on the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, The International Conference on the Great Lakes Region Protocol on the Protection and assistance to Internally Displaced Persons and Rome Statute of the International Criminal Court

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