Refugee Women's Resource Project, Asylum Aid
February 2001

'NO UPRIGHT WORDS'

THE HUMAN RIGHTS OF WOMEN IN KENYA

'Women have no upright words, but only crooked ones.' **Kenyan proverb**

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INTRODUCTION

After years under an oppressive regime of torture, detention and political murder, the introduction of multi-party political system in 1991 seemed to be the dawn of a new era: The Kenyan people would at last enjoy a wide range of fundamental human rights enshrined in Chapter V of their Constitution, as well as in other international treaties to which the country is party. Other measures, such as the appointment in May 1991 of Amos Wako as Attorney General, were also welcomed by international donors and Western allies such as the UK.[1]

A number of human rights and non-governmental legal organisations began to flourish with significant financial backing from international donors, whilst, for its part, the government became engaged in a continuous debate on constitutional and law reforms which should have culminated with the adoption of a new constitution by the end of 2000.[2] Issues such as governmental corruption, poor prison conditions and abuses by the security forces are a routine part of the public debate and are extensively reported by the independent press (as reflected by a number of articles quoted in this report).

Yet the country's human rights record continues to this day to be tarnished by hundreds of accounts of repression, brutality and torture inflicted on political activists as well as peaceful civilians. From Kenyan women's point of view, this is a situation not only permitted by a number of provisions or restrictions in the Law, but reflecting a culture of brutality against women widespread in Kenyan society. Other forms of violence and persecution have emerged alongside the new multi-party system: State-sponsored ethnic violence led to the deaths of thousands and the displacement of hundreds of thousands of people prior, during and after the last two general elections in 1992 and 1997/1998, ensuring both a 'geographical' majority for the ruling party, the Kenya African National Union (KANU hereafter), in Parliament and the continuation of state terror. New strategies of '*informal repression*' are being used by the state in order to intimidate and persecute political opponents.[3] In other words, a close look at the reality on the ground reveals that the image of a '*democratic and stable*'[4] Kenya, as promoted by the government of President Moi, is just a facade.

In the last few years, violence in Kenyan society has also significantly increased. The bitterness of political dispute in the 1990s is partly to blame.[5] The growing number of incidents of '*mob violence*' reflects the demise of the justice system and people's lack of trust

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[1] Amos Wako had built a reputation as a human rights advocate in senior positions at international level: He had for instance been a member of the Committee of Experts which worked on the first draft of the African Charter of Human and People's Rights. In 1991, he occupied the post of vice-chairman of the UN Human Rights Committee and travelled on several occasions as a monitor of human rights abuses. At this time, he was also on the Executive Committee of the International Commission of Jurists and later became the Deputy Secretary General of the International Bar Association. See African Rights, '*Kenya Shadow Justice*', AR, London, November 1996, p.226.

[2] By the beginning of the year 2001, there was still no consensus about who should participate in the Constitutional Revision Process. See Jacinta Sekoh-Ochieng & Muriithi Muriuki, 'Deadline on review "to be met"', *in Daily Nation*, Nairobi, 18 January 2001.

[3] See Article 19, '*Deadly Marionettes State-sponsored violence in Africa*', Article 19, London, 1998.

[4] As opposed to neighbouring war-torn countries such as Somalia and Rwanda. See African Rights, op. cit., p.241.

[5] Comments from Dr Louise Pirouet, leading expert on East Africa at Cambridge University, in personal correspondence.

in it, as well as a widespread lack of public confidence in the police force.[6] A '*Report of the Committee on the State of Crime in Kenya 1997 to 1998*' reveals that there are a number of police officers who are (…) "*bad because they are corrupt; another group is bad because it is brutal; yet another is made up of thieves.* (…) *In fact, if it were possible to obtain the actual numbers, the result would be shocking*".[7] The report also indicates that numerous reported crimes have not been investigated or pursued, resulting in the under-reporting of crime.

Given this context, the position of women in Kenya is particularly vulnerable. Traditionally as well as legally, their rights are restricted whilst they can be subjected to various forms of harassment and brutality at all levels of society, with no guarantee of protection, either by traditional institutions or the Law. As is the case for men, women who are involved in opposition politics or members of an ethnic group not known to be supportive of the KANU ruling party are potential victims of police torture and other political forms of persecution, including sexual assault. Moreover women cannot rely on the Law or law enforcement agents to protect their rights to freedom of expression, association or their right to be free from persecution either by state agents or family members.

Yet when it comes to seeking asylum in the United Kingdom, the overwhelming majority of Kenyan women are refused by the Home Office, and thus denied any form of protection. Although the available Home Office statistics are not broken down by gender, the overall statistics for Kenyan asylum seekers speak for themselves: Between 1994 and 1999, almost 93% of cases decided were refused asylum, Indefinite Leave to Remain (ILR), or Exceptional Leave to Remain (ELR) at first instance, whilst only 1.25% were granted asylum and 5.80% Exceptional Leave.[8] There was a slight improvement in 1999 when 2.90% of cases considered were granted asylum, and over 30% were given Exceptional Leave. The figures for Kenyan women are not expected to be higher.

Although not unique to women from Kenya, it is clear from the cases reviewed by this report that their claims are rarely taken seriously, and they or their legal representatives have to produce a great amount of evidence before being granted refugee status, ILR or ELR, usually on appeal. These women remain a very tiny minority.[9]

The high refusal rates can be attributed to various factors, including procedural factors, but above all a reluctance on the part of the Home Office to acknowledge the gravity of the human rights situation in Kenya, and a lack of understanding of the extent to which Kenyan women are deprived of fundamental human rights, both for social and economical reasons, but also specifically because of their gender.

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[6] African Rights, op. cit., pp.241-259. Incidents of 'mob violence' have been widely reported in the local press in the last few months of 2000. One such incident is covered by Declan Walsh, 'Great African hope spirals out of control', *The Independent on Sunday*, London, 26 November 2000.

[7] *Daily Nation*, 'Why recruitment of new police officers should be suspended', 1st October 2000.

[8] The Home Office statistics are available at http://www.homeoffice.gov.uk/rds/pdfs/ . At the time of this report, statistics were available until September 2000. The statistics provided exclude appeals and other successful challenges to first-instance refusal.

[9] See the Introduction to the companion report to this one, *'Only Crooked Words'*, for statistical trends.

THE OBJECTIVES OF THIS REPORT ARE:

- To document and publicise women's human rights abuses in Kenya and to identify the level of protection to which women have access or are denied when their rights are being infringed.
- To place the abuse of women's human rights in the context of wider societal attitudes to women.
- To provide resources for use by Home Office representatives, legal practitioners and other advisers.

In this report, we therefore endeavour to present a contemporary picture of women's rights in Kenya within the broader human rights context. We will look at abuses perpetrated against them at all levels of society including the domestic, political and civic spheres. In each case we will review the legal provisions and provide evidence of their shortcomings.

In the companion report to this one, *'Only Crooked Words'*, we review in detail refusal letters sent by the Home Office, and compare the grounds given for refusal with what we know about women's rights abuses in Kenya.

METHODOLOGY

This study uses the following approaches:

- Analysis of written information collected from as many sources as possible both in the UK and Kenya, in particular newspapers and local human rights groups (see 'REFERENCES'). The information covers various aspects of women's rights in Kenya, including abuses of women's rights, violence against women, the status of women in Kenyan society and issues of protection for women in Kenya.

- Review of other documents such as academic reports and the Home Office Country Information and Policy Unit (CIPU) assessment.

Violence against women in Kenya is multifaceted and often entrenched in gender roles and society's attitude towards women. It is cultural, social, economic and political (even religious[10]), and is both physical and psychological. As we try to highlight in this report, it is also perpetrated at all levels of society, from the family unit to law enforcement agencies. So where can women look for protection?

USE OF THE REPORT

This report was written to assist in the determination and presentation of asylum claims, both at the time of initial application and at appeal stages. We hope that the Home Office will study it in its entirety. Adjudicators and the Tribunal are already often confronted with formidable bundles of evidence. We therefore hope that they will be directed with precision to those parts of this report which are relevant to the case before them.

[10] See G. Wamue and M. Getui (ed.), '*Violence against Women: Reflections by Kenyan Women Theologians*', Acton Publishers, Nairobi, 1996.

PART I:
'*CUSTOMARY*' FORMS OF REPRESSION OF WOMEN'S RIGHTS

I.1 PREJUDICES VEHICLED BY TRADITIONAL MEDIA

How a given society at large perceives a particular group within its membership can have a significant impact on the way people behave towards this group. Simply being a woman in Kenya often means being a victim to prejudices found in oral literature such as proverbs, stories, songs and myths. These are the media that traditionally reflect the wisdom and experience of a given society, and represent the means by which it is passed from generation to generation. In Kenya, many of the various ethnic groups' traditional wisdom portrays women negatively. Focussing on three particular communities – the Luo, the Kipsigi and the Kikuyu, one university lecturer has suggested that such violence is the legacy of a sexist culture in which positive views of women (in these oral forms) are very rare indeed.[11]

In their clearly defined roles, women are depicted as possessions of males and of a society as a whole in which they are expected to be subordinate.[12] Girls are not considered as important as boys: The Luo for instance describe them as "*wildcat*".[13] In this particular group some brothers and fathers have been known to thank "*their in-laws for helping them to get rid of the wildcat*". In another Luo proverb – "*A woman is the middle bone that the clan chews after her husband's death*" –it is suggested that a widow must be remarried within the clan upon her husband's death. But she has no choice in the matter: she is the property of the clan. This practice is common in other communities; for instance, it is also expected that all Kikuyu women, including widows, should be married and have children.[14] As Ayanga notes, the proverb has deeper sexual implications since it gives any member of the clan the right to a sexual relationship with the widow. Thus, although the tradition has some economic and social basis (such as to prevent women from having children outside the family), a widow has no control over her body, she "*does not exist in her own right*", she remains the wife of the family, lineage and clan and this is better for her than "*to live alone and play the prostitute*".[15]

Women are described as weak, troublemakers, untrustworthy and unmanageable. Their value, integrity, and trustworthiness are also depicted as questionable. Proverbs within both the Kipsigi and Kikuyu say: "*Do not tell a woman secrets*" or "*Women have no upright words, but only crooked ones*". Women are considered as irrational as children, and weak: "A *woman and an invalid man are the same thing*". A Luo proverb according to which "*satisfaction is for a gentleman and a cow, constipation is for a woman and a girl*" portrays the cow as wiser than women, since a cow knows when it is satisfied.[16]

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[11] Ayanga in '*Violence against women*…', op. cit, pp.13-20.
[12] Both due to beliefs and practices of both African and Judeo-Christian traditions according to Margaret Gecaga. See Chapter 7, 'Rape as a tool of violence against women' *in* '*Violence Against Women*', p.45.
[13] According to a Luo proverb. See Ayanga, p.16.
[14] See chapter 6 'Gender violence and exploitation: the widow's dilemna', *in* '*Violence Against Women*', op. cit., p.41.
[15] Ayanga *in* '*Violence against women*…', op. cit, pp.13-20.
[16] Ibid.

In many ways this '*oral violence*', which restricts perceptions of women's capacities and roles within various groups of Kenyan society, condones, albeit subconsciously, abuses perpetrated against women. The fact that women are described in some communities as '*trouble-makers*' is reflected by the prevalence of wife-beating and other forms of domestic violence which are indeed considered '*tradition*'[17] in Kenya, and treated as such (see below PART II on 'Domestic violence').

Customs in Kenya are still a powerful medium for abuses of women's rights, so much so that women's rights groups and others have condemned people who refer to customary laws and traditions to justify violence against women (as the issue of domestic violence illustrates, see below PART II). According to the women asylum seekers we interviewed, women are consistently valued less than men, both within the family and society in general. One woman commented that "*ordinary women have no freedom, in their house they are treated by men like a master treats a slave*". Another told us "*Men value women as worth less than cows. The husband in Kenya owns you. Men* [including the police] *have all the same right to mistreat you*".

Unfortunately, it is not only customary laws that are used to violate the rights of women. Maybe it is the '*traditional wisdom*' branding women as '*trouble-makers*' that leads educated people such as President Arap Moi to say that they are '*unworthy*' of any political education (would they cause too many political troubles if they knew more about their rights?) or that makes Kenyan men react negatively to the empowerment of women's rights (see PART VIII 'LEGAL, CONSTITUTIONAL AND POLITICAL OBSTACLES TO WOMEN'S RIGHTS).

I.2 FEMALE GENITAL MUTILATION (FGM)

I.2.1 PREVALENCE OF FGM Nationally, 60% of girls were estimated to have been subjected to FGM types I, II or III[18] in 1982 whilst the current estimate is still around 50%.[19] Infibulation is reported to be practised in the Northern regions of the country bordering Somalia and amongst the Maasai. In that case, not only do girls and young women have their clitoris and labia removed, but also the two sides of the vulva are sewn together and have to be cut open again to allow sexual penetration and childbirth. In total, 7 million women are currently believed to have been excised, thus putting them at risk of considerable pain and a range of infections and complications before, during and after childbirth and throughout their lives (when the procedure itself is not fatal), including the contraction of HIV. As a direct result of the practice, mortality rates for the girl-child are high.[20]

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[17] African Rights, '*Kenya Shadow Justice',* op. cit., p.117.

[18] Definitions according to the World Health Organisation: Type I: Excision of the prepuce with or without excision of part or all of the clitoris; type II: excision of the prepuce and clitoris together with partial or total excision of the labia minora; type III: Excision of part or all of the external genitalia and stitching/removing of the vaginal opening (also called infibulation or Pharaonic circumcision).

[19] Figure for 1982 provided by the *The Hosken Report,* 1982 and quoted in Minority Rights Group International, '*Female Genital Mutilation: Proposals for Change*', MRG, London, 1992, p. 22. The more recent figure (1998) provided by WHO, see website www.who.int/dsa/cat98/fgmbook.htm#Africa. The government's estimate stands at 32% in 1999. See *Panafrican News Agency*, 'Kenya Plans to Eliminate Female Circumcision', 18 November 1999.

[20] According to WHO regional coordinator on female genital mutilation in Africa, Safatu Singweta, quoted by *Panafrican News Agency*, 'Kenya Get WHO Assistance to Combat Genital Mutilations', 8 July 1998.

FGM is still widely practised by no less than 26 tribes in Kenya, including the Abagusii (97% of women), Kalenjin (62.2%), Kamba (33%), Kisii (97%), Maasai (89%), Meru, Narok, Pokots, Samburu, Somali (over 90% prevalence for the latter), Taita/Taveta (59%).[21] The 1998 governmental demographic and health survey also reveals that 42.5% of Kikuyu women between 15 and 49 have undergone the operation.[22] Geographically its incidence varies but is most prevalent in rural areas whilst it has either been abandoned (in Nairobi) or is rapidly decreasing in urban districts. It is "*phenomenal*" in Meru, Tharaka and Nyambene in Eastern Province, Samburu and Transmara in the Rift Valley and Kissii district of Nyanza province in Western Kenya.[23] It is estimated that FGM is carried out in 49 out of 64 districts in the country.[24] A study carried out in the early 1990s by *Maendeleo ya Wanawake Organisation*[25] in the four districts of Kisii, Meru, Narok and Samburu, revealed an overall prevalence rate of 89.7%. In Garissa district (North Eastern Province) it is believed to be carried out on 99% of the women residents.[26] In Nairobi, it seems to have disappeared as a practice although it has been reported in some slums.[27] The lowest prevalence is amongst the MijiKenda of the Coast (12%). Other communities, such as some of the Kikuyu tribes, have abandoned FGM, and others such as the Luo or the Luhya do not practise it at all. As a result they are regarded by rural communities that do carry out FGM as immature people.[28]

I.2.2 IMPACT OF FGM ON WOMEN'S RIGHTS - Whether it is interpreted as a rite of passage from childhood to adulthood (although it is carried out on girls as young as five)[29] or a way to control women's sexual urges, FGM is "*held in the highest esteem*" in the communities where it is prevalent. Not to have undergone the operation carries the risk of being shunned and stigmatised by community members and not being able to marry. A Maasai woman said that as a result of circumcision she is "*respected in her society as a full-grown woman*".[30] Some girls are so stigmatised and shunned by their schoolmates that they decide to request to undergo the operation, even when their parents would have decided otherwise.[31] Communities also feel that FGM is a celebration that represents part of their identity and values. For some of the groups for which it constitutes a rite of initiation, circumcision is "*at the heart of socialisation*".[32]

Both in the short and long-term, FGM undermines the educational and economical opportunities of Kenyan girls. Because it is symbolic of a passage to womanhood, many young girls automatically drop out of school after the operation in order to get married.

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[21] *Panafrican News Agency*, 'Despite Campaigns, Female Circumcision Continues in Kenya', 23 March 2000. Figures in percentage provided by government officials quoted by *Panafrican News Agency*, 'Kenya Plans to Eliminate Female Circumcision', op.cit.
[22] *Daily Nation*, 'Escaping the knife with honour', Nairobi, 5 January 2000.
[23] *Panafrican News Agency*, 'Kenya Get WHO Assisance to Combat Genital Mutilations', 8 July 1998.
[24] Jemima Mwakisha, 'Alternatives to FGM that are working', *in Daily Nation*, 14 April 1999.
[25] *Maendeleo ya Wanawake Organisation* is the biggest women's organisation in Kenya. Politically it is believed to be close to the government.
[26] According to Womankind-Kenya, quoted *in Daily Nation*, 'Mothers in dire straits after "cut"', 11 November 1999.
[27] See note 14.
[28] *Panafrican News Agency*, 'No-win war against FGM', Nairobi, 12 October 2000.
[29] Jemimah Mwakisha, op. cit.
[30] Florence Bamanyaki, 'Two Million Females At Risk of Being Mutilated', *African Church Information Service*, 14 August 2000.
[31] *Daily Nation*, 'Escaping the knife with honour', Nairobi, 5 January 2000.
[32] *Daily Nation*, 'Alternatives to FGM that are working', Nairobi, 14 April 1999.

Therefore FGM encourages both marriage and intercourse at an early age, as girls want to put their newly acquired "*womanhood*" to the test.[33] In some parts of Kenya (such as the Northern Rift Valley, where more than 800 girls were genitally mutilated in November 1999), it is blamed for the high rate of school dropouts and low enrolment in schools (the operation is often carried out when the girl is still in primary school).[34] Among the Samburu, girls stop formal schooling once they have undergone the operation.[35] The community also believes that "*girls have no need for education because all their needs are catered for by their fathers and husbands*".[36] In the long-term, the practice perpetuates the economic vulnerability of women, resulting in a shortage of female professionals, and in a lack of female role models for children of both sexes.

Successful alternatives have been introduced by women's organisations in order to eradicate the practice. *Maendeleo ya Wanawake* has developed a new ritual called 'circumcision through words' in order to replace female genital mutilation and its dangerous and traumatic effects. 150 families have participated in the new ritual that started in August 1996, and involves a week of seclusion for girls during which they are taught about their role as women and adults and about issues such as reproductive health and self-esteem. '*Circumcision through words*' has been first introduced in Tharaka Nithi, where it is actually the women who suggested that the ceremony continue to be carried out without the cut. Since then Nyamira and Narok were also introduced to it. Although it is still a slow and very long process, 1,124 girls are believed to have been through the '*modern*' practice since its introduction in 1996.[37] In many rural areas, the issue can not be tackled head on, and campaigners have to use economic factors to convince parents of the harmful effects of FGM; the argument is that an uneducated or not fully educated girl will not be able to bring as much income to the family.

In their experience, social workers have indicated that the tradition continues "*unabated*"[38], and that women are in many cases its primary advocates. In September 2000, six Meru women seriously injured a schoolgirl when they attempted to circumcise her[39], whilst the elders of an Ameru community had blamed women for secretly continuing to carry out operations on young girls despite its ban (in the community) since 1954 – they also accused the local administration of turning a blind eye in exchange for bribes.[40] Whether advocated by women or men (in communities where men are the decision-makers such as the Maasai), the practice means that girls have no control over their body and are denied the right to a healthy reproductive and sexual life.
Due to the lack of meaningful commitment from the government (see below), awareness campaigns and calls for research to be carried out were taken up by women's organisations

[33] Finding of a Research carried out by the Programme for Appropriate Technology in Health. Quoted in *Panafrican News Agency*, 'Despite Campaigns, Female Circumcision Continues in Kenya', 23 March 2000.
[34] *Daily Nation*, 'Germans help fight female circumcision', Nairobi, 20 December 1999.
[35] *Daily Nation*, 'Alternatives to FGM that are working', Nairobi, 14 April 1999.
[36] *Daily Nation*, 'Resolute Battle for the Girl-Child', Nairobi, 10 January 1999.
[37] *Daily Nation*, 'Alternatives to FGM that are working', 14 April 1999. See also *Daily Nation*, 'Alternative "female cut" winning acceptance in Kenya, 1st April 1999.
[38] *Panafrican News Agency*, 'Despite Campaigns, Female Circumcision Continues in Kenya', 23 March 2000.
[39] *Daily Nation*, 'Prosecute Gang Over Forced Cut, Says Fida', Nairobi, 10 September 2000. FIDA requested that they be prosecuted in order to "*send a strong warning that the Government supports nationwide efforts to eradicate FGM and all practices undermining women's rights*" but so far it seems that no action has been taken.
[40] *Daily Nation*, 'Meru elders reject female cut', 30 March 1999.

such as the National Coalition of Kenya Women (NCKW) from 1982, or more recently by the Maendeleo ya Wanawake Organisation. The government does not seem to treat it as a priority.

I.2.3 LEGAL MEASURES AGAINST FGM - Because customary and statutory laws are both recognized in Kenya,[41] there are some contradictions with regard to the current legal status of FGM. Where it is not practised any more, the reduction of FGM is not as a result of law but of education, in particular Christian education, therefore excluding Muslims.[42]

Ostensibly some official measures have been taken to stop the practice of FGM where it is still prevalent. In September 1982, President Arap Moi banned the practice following the deaths of 14 children, requesting the police to charge with murder the practitioners whose actions led to these fatalities. Another presidential decree outlawed the practices in 1990.[43] President Moi has repeatedly said in public that FGM is a health risk and an injustice against women[44] and in November 1999, the government launched a National Plan of Action to Eliminate Female Circumcision/Female Genital Mutilation. However the reality is that the ban has not been followed by any preventive action or enforcement measures.

FGM is not actually outlawed by the Constitution, which sanctions it as a customary practice, nor has it been addressed in the traditional structures of customary laws[45]. A female Meru advocate believes that there is in fact a "'*no negotiation' attitude over female circumcision*"[46].

Although the Director of Medical Services has prohibited state hospitals and clinics from practising FGM[47] since 1982, the Kenya Medical Women's Association recently raised concerns over operations being carried out by health workers in Nairobi and other parts of Kenya.[48] In some areas the provincial administration has been accused of being "*unwilling to stop it*".[49] After extensive pressure from women's lobby groups who called for a ban on the practice, a legislative attempt to criminalise FGM was rejected in Parliament in 1996[50], and when the national plan of action to eliminate female circumcision was launched in 1999, it

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[41] Customary and statutory laws exist in parallel, even when the latter contradicts the former. In many rural areas, customary laws take precedence over statutory law unless the case is challenged (by an individual initiative) in the courts. The US Department of State writes "*the national courts use the customary law of an ethnic group as a guide in civil matters affecting persons of the same ethnic group so long as it does not conflict with statutory law*", '1999 Country Reports on Human Rights Practices', BDHRL, 25 February 2000, p.10 of 32 of Kenya report. Available at www.state.gov/

[42] Comments provided by Dr Pirouet, personal correspondence.

[43] Minority Rights Group, op. cit., p. 32, and 'Legislation on Female Genital Mutilation' *in Women's Issues Third World*, http://women3rdworld.about.com/

[44] *Daily Nation*, 'No win-war against FGM', Nairobi, 12 October 2000.

[45] *The Nation*, 'Escaping the knife with Honour', Nairobi, 5 January 2000

[46] African Rights, op. cit., p.116

[47] Anika Rahman and Nahid Toubia, *'Female Genital Mutilation: A Guide to Law and Policies Worldwide*', Zed Books, London, 2000, 249p.

[48] *Daily Nation*, 'Medics warned Over Female Circumcision', 24 August 2000.

[49] *Daily Nation*, 'Meru elders reject female cut', 30 March 1999. The Meru have many subtribes, some of which, like the Tharakas practice extensively FGM (over 90% of women circumcised). See *Daily Nation* 'Alternative "female cut" winning acceptance in Kenya, 1st April 1999.

[50] Anika Rahman and Nahid Toubia, op. cit., p.176. The Parliament is overwhelmingly male but even female MPs voted against outlawing FGM. See *Daily Nation*, 'No win-war against FGM', op. cit.

ruled out the prosecution of its practitioners (the plan focused specifically on educational programmes).[51] As the practice is deeply rooted in Kenyan culture, this is unlikely to be enough.

In the courts, the attitude towards FGM as an infringement of women's' rights is far from progressive. In theory, there are a number of provisions in the Constitution that could be used to protect the rights of girls and women against FGM. Section 250 and 251 provide respectively that: "*Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year*"; "*Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years, with or without corporal punishment*".[52] Likewise Section 234 of the Penal Code provides that "*Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment*".

Section 4 of the Penal Code states that grievous harm is defined as "*any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health (…) or to any permanent or serious injury to any external or internal organ, membrane or sense*".

However, it is very rare to hear a case going to court. Even when cases of '*forcible circumcision*' are brought to court as '*assault*', they are not taken seriously by the magistrates. When in 1996 a court convicted four women of ordinary assault for having forcibly circumcised an adult woman, the magistrate declared that they should have received heavier sentences but the leniency in sentencing was explained by the fact that the victim had not been '*bitter*'.[53]

I.2.4 INTERNATIONAL COMMITMENTS INFRINGED Kenya has ratified the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW hereafter) which has outlawed FGM and called for states to effectively eliminate it. The government has failed to fulfil its international obligations: Article 2 (f) of CEDAW provides that signatory states undertake "*to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*".[54]

Given the current national and international legal provisions, it is difficult to comprehend why the practice is still so widely practiced if it is not that the government has failed to adopt measures to uphold Kenyan girls' and women's rights to bodily integrity. The absence of a coherent governmental policy (integrating human rights and health issues with educational aspects) means that a girl's fate is determined by her ethnic background and the area she is living in, whereas according to the law she should have the right to decide for herself.[55] The reality is that until meaningful measures are introduced, women whose communities practice FGM will still have to suffer the consequences.

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[51] *Panafrican News Agency*, 'Kenya plans to Eliminate Female Circumcision', op. cit.
[52] Anika Rahman and Nahid Toubia, op. cit..
[53] See cases reported by *The Daily Nation*, 24 April 1996, quoted in African Rights, op. cit., p.117.
[54] http://www.un.org/womanwatch/cedaw
[55] Whilst denouncing the practice, President Moi has also declared that "*it was ridiculous for a woman to seek asylum in the US or UK on grounds that she was escaping forced circumcision*". See *Daily Nation*, 'Moi: Refugees not genuine', Nairobi, 27

I.3 FORCED MARRIAGE

Early or '*forced*' marriage is still widely practiced under customary law in Kenya by several communities, especially from the Western or North Eastern provinces and is reported to affect girls as young as nine years of age[56]. If a girl escapes, she can expect rejection from her family. In addition, girls under 14 can not prosecute men to whom they have been forcibly married for rape, as under Section 145 (2) of the Penal Code, it is a defence to the charge for '*defilement*' that the defendant "had reasonable cause to believe and did in fact believe that the girl was his wife". In August 2000, a girl of 11 who had been forcefully married to a man "*old enough to be her grandfather*" was rescued after the interventions by women's rights lobby group.[57] Her father, a Maasai pastoralist, had forcefully removed her from a school and taken the family to another area. He arranged the marriage for which he received a bride price of several heads of cattle and US$150.

Theoretically, the Kenyan government has outlawed forced teenage marriages (which means perpetrators are liable to imprisonment), and in principle recognises 18 as the age of majority.[58] On a few occasions, government officials have intervened to rescue girls who were, in most cases, primary school children. Some members of the community tried to avoid governmental interference by going to neighbouring Tanzania "*where they perform the marriage rituals before crossing back to Kenya*".[59] They are however still able to practise forced marriage and remain unpunished whilst the girls' educational and economic opportunities are seriously threatened. In the case of girls being forced to marry men of adult or elder age, there is also a high risk of contracting HIV/AIDS (See also below PART I.5 'TRADITIONAL BELIEFS & AIDS'). A comparative study carried out by UNAIDS in 1999 showed that "*early sexual initiation for girls and early marriage for both sexes were associated with a higher risk of being infected*".[60] Although not all HIV infections can be attributed to early marriage, it does contribute to the rate of infection amongst young girls. For instance, in Kisumu, 15-23 % teenage girls were found to be infected with HIV, compared to a maximum of 4% of boys from the same age group.[61]

Kenya's domestic law does not protect Kenyan girls from forced marriages, nor does it forbid marriage of a minor if '*permission*' from the parents is provided.

December 2000. His comments follow the announcement that a draft resolution condemning Female Genital Mutilation and providing protection for Third World women who are denouncing it had been presented in the European Parliament (*Daily Nation*, 'EU offers asylum to cut victims', Nairobi, 13 December 2000).

[56] Interview with the Deputy Headmistress of the African Inland Church Girls Primary Schools who had been assisting girls in escaping early marriage for fifteen years. 1998 FIDA Annual Report, '*Institutional Gains, Private Losses*', FIDA (K), Nairobi, September 1999, pp38-40.

[57] *Panafrican News Agency*, 'Girl Rescued From Forced Marriage', 17 August 2000 at http://allafrica.com/stories/200008170113.html

[58] Article 1 of the Convention on the rights of the Child defines a child as "*every human being below the age of 18 years unless, under the law applicable to the child majority is attained earlier*".

[59] *Africanews* 'Teenage marriages – A most foul custom', One World News Service, 17 December 1997, at http://www.oneworld.org/news/reports/an_17dec2.htm

[60] The study was carried out in Kisumu in Kenya and Ndola in Zambia. Extract quoted by UN Integrated Regional Information Network (IRIN), Johannesburg, 16 September 1999, at http://reliefweb.int.IRIN.

[61] IRIN, op. cit.

The Federation of Women Lawyers - Kenya (or FIDA-Kenya: FIDA hereafter) reports the case of a young Kenyan Somali who was kidnapped by her father and her husband-to-be, a principal of a teacher's college. During the incident, she was also subjected to physical assault and rape. A constitutional case was made in court in 1998, forbidding the '*husband-to-be'* to interfere with her rights to freedom of liberty, movement and security of person (Sections 72(b), 74 and 81 of the Constitution). However, he was not prosecuted for kidnapping the young girl, nor for physically and sexually assaulting her.[62]

Kenya has also ratified both the International Covenant on Civil and Political Rights (ICCPR) and CEDAW, both of which enshrine the rights to life, security and liberty, and, in relation to marriage, recognise the issue of consent and a minimum age. The current prevalence of the practice and the lack of effective protection for girls contravene Article 16(2) of CEDAW, which states that*:*

> *'The betrothal and marriage of a child shall have no effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.*

I.4 WIFE INHERITANCE OR '*LEVIRATE*' MARRIAGE

Wife inheritance is another customary law that infringes some of the modern rights of many women in Kenya. Traditionally, the practice provided protection for a widow who might otherwise have had no means of subsistence, and whose own birth family might not have wanted her back.[63] In some areas, such as Western Kenya, wife inheritance is widely practiced.[64]

However, it clashes with the rights of women to inherit property, which is enshrined in statutory laws adopted in the mid-1990s. The existence of the two laws in parallel creates serious conflicts for women, especially when it comes to land issues, which are the biggest source of litigation in Kenya today.[65] Whilst the law is in theory on their side, in reality there are very few mechanisms to protect the women. If they find themselves involved in violent conflict with their in-laws, they will usually come out the loser. This situation is well illustrated by a case reported by African Rights:

A widow who had been married in the Church and had bought land with her deceased husband was requested by her in-laws to marry one of her husband's brothers. The

[62] 1997 FIDA Annual Report, '*Bapo Mapambano: Kenyan women demand their rights*', FIDA(K), Nairobi, September 1998, p37-38. Please note that the report covers the period August 1997 to August 1998.
[63] Details provided by Dr Louise Pirouet, personal correspondence.
[64] See also 'Widows want commercial wife inheritance abolished', available at http://allafrica.com/stories/200012290201.html
[65] See African Rights, op. cit., Chapter 6 'Land and the People: The Politics of Dispossession', pp71-97.

brother wanted to inherit her as a wife but when she refused, they insisted she had to leave the in-laws' home and go back to her parents (in customary law, that means the woman loses all her rights to property or land). She refused but had to leave the house, when they threatened to kill her, after having beaten her and threatened her with rape. She turned to the local chiefs and administration for help but to no avail. She did not want to go the police because she feared them (see PART II.3 and III on police handling of gender-based violence; PART VI.4 on access to the judiciary and PART VIII.2 on protection against sexual assaults). She then took the case to court when she was advised to do so by para-legal workers, but as African Rights highlights, "*it would take an extraordinary amount of determination for a woman, already in fear of her life, to take on the police and the courts, knowing the prejudices that exist, not only in the institutions, but in the community at large*". Yet cases of assault and domestic abuse are said to "*frequently arise from land disputes*" (Interview with para-legal workers, *African Rights, 'Kenya Shadow Justice', op. cit., p.39).*

I.5 TRADITIONAL BELIEFS AND AIDS: THREATS TO THE RIGHT TO LIFE

I.5.1 BELIEFS AROUND SEXUAL CLEANSING - Although not based on 'traditional' values, sexual cleansing – based on the belief that a man infected with the HIV/AIDS virus can be cured if he has sex with a virgin – is widely practised in some communities such as those in Western Kenya. Despite the obvious risks for young girls, there are no laws in Kenya to protect them from this practice.[66] Yet the result can be devastating. Not only is the cost of treatment for HIV/AIDS far beyond the reach of the great majority of Kenyans, let alone women,[67] but also AIDS victims currently face isolation and considerable discrimination.[68] Many women's right to life is therefore greatly put at risk.

I.5.2 AIDS FIGURES IN KENYA - At the end of 1999, 20 years into the epidemics, AIDS was declared a national disaster and the president spoke publicly about the disease for the first time when he insisted on the necessity to use condoms.[69] According to the Ministry for Medical Services, 2.2 million Kenyans are estimated to be infected with the HIV/AIDS virus and more than 1.5 million have died from the disease so far.[70] With an infection rate of 7.2% of the population per annum, 200,000 are also estimated to be newly infected each year.[71] In some parts of Kenya, 20% of people are infected.[72] In Nairobi, one in four is believed to be infected. [73] About 600 Kenyans die every day of AIDS, and the great majority of victims (80%) are aged 14 to 49. The majority are women: at the end of 1999,

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[66] UNICEF, '*Domestic Violence Against Women and Girls*', No.6, May 2000, p.9.
[67] According to the Kenya Medical Research Institute. See *Daily Nation*, 'Kemri launches new trial Aids drug', 5 February 2000.
[68] HIV-Impact Moderator, 'Summary 4/3/00 – 4/7/00', 13 April 2000 at http://www.edc.org/GLG/hiv-impact/hypermail/0068.html
[69] Unless otherwise stated information on AIDS from www.aegis.com/news/ips/1999/ip991201.html ; also http://hivinsite.ucsf.edu/international/africa/2098.455c.html
[70] *East African Standard*, 'Aids has killed 1.5m Kenyans, says Anangwe', Nairobi, 5 December 2000, www.eastandard.net/
[71] *Daily Nation*, 'Sh 14 billion for AIDS battle', Nairobi, 2 December 2000. Also from the *Sunday Nation*, 'The right strategy to curb AIDS March', Nairobi, 3 December 2000.
[72] *Daily Nation*, 'Why epidemic spreads despite the awareness', Nairobi, 1st December 2000.
[73] According to UNAIDS, 1998. See http://hivinsite.ucsf.edu/international/africa/2098.455c.html. All figures in this paragraph are drawn from the same source.

55% of infected adults (constituting 13 to 14% of the population) were women. The prevalence rate amongst females aged 15 to 24 was 11 to 15% at the end of 1999, compared to 4.25 to 8.50% for males in the same age group. 21% of pregnant women aged 15 to 19, most of them unmarried, are living with the virus.

Half a million children under 16 are also said to have been infected with the virus. In 1998, at least 500,000 children were AIDS orphans.[74] The Ministry of Health has estimated that by 2005 the number will have doubled.[75] In secondary schools alone, 20% of the 640,000 pupils are living with HIV/AIDS. Traditional care structures are overwhelmed by the phenomenon whilst the number of street children is exceeding 40,000.[76] The number of households headed by children is increasing dramatically in villages and small towns. In some places, it is reported that the entire population aged 18 to 60 has been wiped out by the epidemics.

I.5.3 SOCIAL STIGMA - There is still a stigma about AIDS groups in Kenya, as well as discrimination. As a result, even when they are aware of it, people do not reveal their status to others. Stigmatisation also prevents people from seeking medical advice and help the disease to spread more. The Security Minister who launched an AIDS national strategy worth KSh.14 millions[77] in early December asked the insurance industry and other organisations not to discriminate against people with HIV.

I.5.4 ACCESS TO MEDICAL CARE Besides the factors contributing to AIDS infection, lack of access to medicines is one of the main reasons why people die of AIDS in Kenya. During a Conference on access to essential medicines in June 2000, it was revealed that East Africans pay as much as twice the price that Europeans pay for many essential medicines.[78] Yet they are crucial to fight opportunistic infections related to AIDS. A comparative study presented during the conference showed that '*without taxes, tariffs, mark-ups and other fees, the price of a drug in Norway is about 54% of retail, and in Kenya, about 60%*'. A doctor working for Médecins sans Frontières in Kenya also declared that he was '*tired of not being able to treat patients because the medicines are too expensive*'.[79] The situation is worse in Kenya as medicines are patent protected. For instance fluconazole, a drug used for AIDS related-meningitis, is currently 60 times more expensive in Kenya than in Thailand where a version produced locally costs only $0.30 per 200mg capsule (as opposed to $18.00 in Kenya). However parallel importing is currently illegal in Kenya and will remain illegal under the new Kenyan Industrial Property Bill if it is adopted.[80] As a result, fluconozole treatment which costs $2,500 per year in Thailand costs $5,362 in Kenya. Likewise, multi-drug-resistant TB

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[74] Ibid.

[75] Lori Bollinger, John Stover, David Nalo, '*The Economic Impact of AIDS in Kenya*', The Policy Project, The Futures Group International *in collaboration with* Research Triangle Institute and the Centre for Development and Population Activities, USAID, September 1999, 15p.

[76] Kenyan Human Rights Commission (KHRC), '*Mission to Repress: Torture, Illegal Detentions and Extra-judicial Killings by the Kenyan Police*', KHRC, Nairobi, 1998, Chap. 8. Along with street children, child prostitution is also growing fast.

[77] Exchange rate around KSch.80 to $1.

[78] Health Action International (HAI) & Médecins sans Frontières (MSF), '*Report on the East African Access to Essential Medicines Conference*', Nairobi, 15 & 16 June 2000, 5p. Available on site at www.haiweb.org/

[79] Ibid.

[80] Parallel imports gives a country the right to import brand name products when they are sold at lower prices in other countries. For more on issues of drug patenting, compulsory licensing or parallel importing, see HAI & MSF, op. cit., and HAI & MSF, '*Access to Essential Drugs in Kenya*', meeting organised on 31 August 1999, Nairobi, 15p.

treatment costs $12,000 per year whilst the antiretroviral treatment costs about $10,000 for the same period.[81] In addition, the availability of drugs in a country like Kenya depends on currency fluctuation and market conditions.[82]

FIDA has pointed out that the situation is always worse for women living with the virus than for men in the same conditions.[83] Generally less educated than men and worse off economically, they are even less able to pay for the drugs.[84] Also, although short courses of AZT are available in some restricted facilities, there is no effective programme for HIV-positive pregnant mothers.

Also, treatment of HIV/AIDS patients requires a comprehensive and stable health care delivery system and counselling support facilities. Both of these are currently unavailable in Kenya, where there are no speciaistl medical facilities for people with HIV. In addition, public hospitals suffer from a shortage of essential medicines, bed facilities and equipment.[85] Their capacity has been dramatically overstretched by the epidemics: In some areas, over 70 percent of hospital beds are occupied by AIDS patients. Private hospitals are only accessible to a tiny minority. Kenyatta National Hospital charges $18 for a day in a general ward, whilst an in-patient to a general ward needs to pay a deposit of over $500 before admission to the Nairobi Hospital.

I.5.5 WIFE INHERITANCE & AIDS Wife inheritance is potentially life-threatening for women: With the current rise number of people living with HIV/AIDS in Kenya, the practice might have dire physical and economical consequences for women and their children. Women have been forced to marry their brother-in-law even if he has been infected with HIV/AIDS (it is also true that women who might have been infected by their husband who died of HIV/AIDS still have to marry their brother-in-law).

The lack of effective laws against wife inheritance is again a failure by the government to commit to Article 2(f) of CEDAW, as it is bound to by being a signatory state to the Convention (See PART I.2.4).

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[81] The GDP was $280 per capita in 1997. See World Bank, http://www-esd.worldbank.org/html/esd/agr/sbp/98abst/krep.htm#CC

[82] According to figures provided by the World Bank, the state of the economy in Kenya is worsening (see above footnote for sources). The Kenyan currency has devalued from 74 to $1 in December 1999 to 80 to $1 in 2000. See also *Daily Nation*, 'Why Expected Growth Is Still Just A Dream', Nairobi, 31 December 2000. http://allafrica.com/stories/200101020115.html

[83] Ibid.

[84] HAI & MSF, June 2000 Conference, op. cit.

[85] Dagi Kimani, 'Kenya's Private Hospitals an Ailing Business', *in The East African*, Nairobi, 13 November 2000. Available on site at www.nationaudio.com/News/EastAfrican/current/Regional/Regional17.html

PART II: PRIVATE FORMS OF GENDER-BASED VIOLENCE & ISSUES OF PROTECTION

II.1 DOMESTIC VIOLENCE (PREVALENCE)

Domestic violence was declared '*a national crisis*' by one of Kenya's MPs, following the funeral of a mother beaten to death in August 1999. Battering and murder of women and even children are reported to occur on a daily basis[86]. In 1999 for instance, FIDA writes that it is "*in the privacy of their homes [that] Kenya women were subjected to shockingly savage acts of violence*"[87] and gives details of 6 cases of extreme violence resulting in the death of five women and one child from October 1998 to February 1999:

> In two of the murder cases, the husbands were policemen, one of whom hit his wife on the head with a cooking stove. After six month in hospital, she died of her injuries. The other woman also died of her burns after having been set ablaze. In another case a woman was beheaded next to her eight children, and another killed with a knife and a blunt hoe by her husband, a Computer Science graduate, merely because she was being dropped and picked up from work by a colleague.

The World Health Organisation reported that 42% of Kenyan women revealed being beaten by a partner. [88] Of those, 58% reported that they were beaten often or sometimes. Although it is impossible to determine whether this is due to a wider media coverage, according to the documents that we reviewed from 1996 to 2000 (and as the above examples demonstrate), the trend has not changed. The number of cases reported shows an increase (unfortunately statistics are not readily available as the Police in Kenya do not keep gender-disaggregated data).

> The Media reported 49 cases of women killed in domestic violence incidents in 1998, a 71% rise from 1995. In 1999, FIDA reported 60 women killed and for the first 9 months of year 2000, 50 deaths and 69 injuries from domestic violence were reported in the press (i.e. every week in Kenya at least one woman is killed as a result of domestic violence). 60% of women in Nairobi report being assaulted in their homes.[89] This is regarded as normal practice or as "*an accepted way of life*".[90] Furthermore in some tribes (such as the Maasai), wife beating is considered as "*a man's way of expressing his love for his wife*".[91] Thousands more cases go unreported every year for both procedural and cultural reasons (see below).

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[86] See Hazel O. Ayanga, 'Violence Against Women in African Oral Literature As Portrayed in Proverbs', in '*Violence Against Women*', op. cit., pp 13-20.
[87] The 1998 FIDA Annual report on the Legal Status of Kenya women '*Institutional Gains, Private Loss*', FIDA(K), Nairobi, 1999 covers the period August 1998 to July 1999.
[88] Figure based on a sample of 612 women in Kissi District (1990). See World Health Organisation, http://who.int/violence_injury_prevention/vaw/infopack.htm# Violence Against Women Table.
[89] *Daily Nation*, 'Domestic violence law a step forward', 3 November 2000.
[90] *Daily Nation*, 'Taming the monster of domestic violence', 7 November 2000.
[91] *BBC News*, 'Kenya tackles wife beaters', 3 November 2000 at news.bbc.co.uk/hi/english/world/africa/

II.2 SEXUAL VIOLENCE WITHIN MARRIAGE

Sexual violence within a marital relationship is almost always met with silence, unless the case comes to the attention of the press usually due to the shocking nature of the violence. Society at large does not recognise that mistreatment can take different forms, including verbal and psychological abuse. Thus women who would have been beaten once or twice or subjected to verbal abuse including sexist comments, threats, manipulating lies, etc. would not regard themselves as battered women. If anything, domestic violence is considered a '*private affair*' as women who report to the police station are told. In the minds of many Kenyans rape within marriage is inconceivable. When in 1994 the Attorney General issued a warning that husbands who sexually assault their wives would have to face the law, he "*was accused by a cross-section of the society' of inciting wives against their husbands*".[92] Yet despite the Attorney-General's progressive position, there is in reality very little support from magistrates for women in this situation. The assumption is that a man should be able to have intercourse with his wife whenever he wants, regardless of his wife's feelings. In other words, a husband has rights over his wife's body.

II.3 POLICE HANDLING OF DOMESTIC GENDER-BASED VIOLENCE

When FIDA(K) produced the results of their Needs Assessment Survey among Police Officers conducted in late 1998, they revealed that "*a majority of the Officers thought that gender-based violence was caused mainly by a culture where men feel that they have control over women*". 43.2% indicated that gender-based violence was not handled effectively by the Police as opposed to 27% for whom it was well handled. In terms of domestic violence, a great majority (75%) said that it should be treated like any other crime but 18% said that they would refer the cases to family members and prefer not to prosecute in order to help preserve marriages.

From the women's point of view, the picture is altogether different. 80% of the women asked said that the police "*responded to them in an unfriendly manner*", including being "*shouted at, or verbally abused*", and they are often told that they are the ones to blame for their predicament. Moreover, 86% said that they felt the police had not handled their case with due seriousness whilst the burden of proof is entirely on them. Some women reported being physically abused by police officers themselves. Police officers are also perpetrators of gender-based violence and are generally not prosecuted. The two cases mentioned above were successfully brought to court only thanks to an intensive lobbying campaign from several women's organisations. However only a tiny minority has this chance (for details, see PART VI.4).

[92] See G. Wamue and M. Getui (ed.), '*Violence Against Women*', op. cit., p.14.

A woman was set on fire by her boyfriend, a constable in the Kitui police force, in his house inside the compound of the police station. He attacked her, stripped her clothes off and kicked her in full view of other police officers who did nothing to protect her (*UN Special Rapporteur's report,* Sir Nigel Rodley, '*Civil and Political Rights, including questions of torture and detention*', Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, UN Economic and Social Council, 9 March 2000*, p.37*).

As FIDA notes, women who denounce domestic violence are seen as urban middle-class women who '*do not represent the interests of a predominantly rural working class female population*'.[93] The reality of course, is rather different.

In September 1997 headlines were dominated by the story of a Maasai woman who had filed both a civil and a criminal suit against her husband who allegedly had assaulted her (and had been beating her for 13 years). She was now demanding the Court of Appeal to declare that Maasai customary law permitting a husband to beat his wife was both unconstitutional and amounting to cruel, degrading and inhuman treatment.[94] It was the first time in Kenyan history that a woman had sought a Court declaration according to which "*if a customary law permits domestic violence, it is unconstitutional*". She won her case, but FIDA lawyers points out that customary law is more often used as an excuse for an otherwise inadmissible phenomenon. Many women, especially from rural areas, do not realise that they can challenge customary laws in court and even if they do, they may not have the means to do so.[95]

In August 1999, the Chairperson of the Kenya Women's Political Caucus officially launched an anti-domestic violence campaign at the funeral of another woman beaten to death by her husband, and various female MPs have since made strong public statements against domestic violence. Some ministers have also spoken up against domestic violence but, as FIDA reports, always strictly '*inside the confines of Parliament*' when gender related motions were brought before Parliament, never outside it.[96] Any such statement is yet to be heard from President Moi.

II.4 LACK OF LEGAL SUPPORT IN THE COURTS

Kenya is no exception to the worldwide problem of prosecuting domestic violence cases. Few women would take the step of filing a charge against their husband to bring him before the law. They might be afraid of the consequences, even further reprisals from their

[93] 1997 FIDA Annual report, '*Bapo Mapambano…',* op. cit.
[94] 1998 FIDA Annual report, op.cit., p.33.
[95] See **PART VI.5**.
[96] 1998 FIDA Annual report, op. cit., pp.6 and 47.

attacker. In rural areas, where customary laws usually take precedence over statutory ones, the problem is even more acute. In domestic conflicts, the family and then local chiefs are approached, as it is considered more important to preserve harmony in the family and/or the community than to fulfil individual rights.

One woman explained the cultural difficulties in reporting domestic violence: "*It is very difficult to do anything if your husband is beating you. These cases are not really possible because if you try to take the case to court, the husband would be feeling undermined – and the village would say the wife is ruling the home and the husband is voiceless*" (*African Rights, 'Kenya Shadow Justice', op. cit., p.42*).

Provision of evidence is another major difficulty women face in attempting to get redress from the court. In many cases only children are witnesses to the violence within marriage but the law requires that a minor's evidence be corroborated by other material evidence or by another adult witness. In terms of material evidence, a doctor's corroboration is necessary, but women are usually unaware of the procedure and turn directly to the police , where officers are renowned to be , insensitive to gender issues and in particular domestic violence (see above survey conducted by FIDA). The cost of medical consultation is another obstacle (see PART III.1.3). In addition women in Kenya are more often than not badly informed about their rights (see PART VI.5.4).

Also the level of sentencing, no matter how serious the assault is in terms of injury, or even how much medical evidence is provided, discourages many women: The perpetrator of an assault occasioning actual bodily harm on his wife risks a 3-month suspended sentence as opposed to assault occasioning grievous harm on a non-relative which carries a maximum sentence of life imprisonment with or without corporal punishment.

In December 1997, a national paper's headlines referred to the case of a woman who was brought to hospital in a coma after her husband had beaten her severely around the head, raped her and then inserted the leg of a broken stool up her vagina. She remained in hospital for another month but despite the horrendous attack she suffered and the serious threat to her life, little consideration was given to her case either by the police or by the court. Two days after the alleged attack, no police officers had visited the scene of the crime. Her husband was only charged with assault occasioning actual bodily harm despite the fact that Section 2 of the Penal code Cap.63 defines '*grievous harm*' as '*harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends (…) to any permanent or serious injury to any external or internal organ, membrane or sense*'. He was not charged with any offences relating to sexual assault. (*The East African Standard*, '*Drunk husband uses torture thorns on wife*', *Nairobi, 8 December 1997*).

In another domestic violence case, a Senior Magistrate described domestic violence as "*the African man's way of disciplining his wife*" and reduced a murder charge to manslaughter (*1997 FIDA Annual Report, op. cit., p.37*).[97]

[97] The husband had kicked his wife's cooking stove which exploded. As a consequence of the burns she suffered, she died four days later.

Even when the case goes as far as the Court of Appeal, the trend is not in favour of women victims of domestic violence. In December 1995, a woman died of severe burns in hospital after being attacked by her husband two weeks before. She allegedly had a lover. More than a year later, the husband was convicted and sentenced to death for her murder but his sentence was reduced by a Court of Appeal in November 1997 on various grounds including the fact that the trial judge did not consider the fact that the husband had denied confessing the crime. The Court stated that '*we suspect the appellant most likely had something to do with the death of his wife. But suspicion alone (…) can not take the place of (…) proof required on the part of the Prosecution*'.[98] The husband had claimed at first instance that his wife's death was due to a gas accident, yet no evidence of a leak or anything deficient was found with the family gas cooker. Moreover, it was alleged that the husband had threatened to kill his wife several times during phone calls to his in-laws. No fresh evidence could overturn the decision of the Court of Appeal.

II.5 VICTIMS OF INCEST

Incest is a crime which is rarely prosecuted because it is rarely reported, due to the nature of the offence itself and, as in all societies, the stigma attached to it. In fact, as a woman reported, "*most women can't speak about it – (…) it is very bad for them. You can't take that sort of thing to the chief, because he will want to listen to your husband*".[99] Yet again, social and cultural attitudes are not the only obstacles when it comes to seek justice for incest victims. One of the major obstacles is a legal requirement that demands that the Attorney General provides consent to prosecute, which may take a long time to obtain (sometimes a few years).[100] Also incest (like rape) is a bailable offence. Both provisions leave room for the accused to interfere with the course of justice by threatening the complainant(s) and witness(es), and this is often the case.

FIDA reports the case of a father who was charged with two counts of incest by a male (he had sexually abused his twin daughters aged nine at the time of the assault). It was more than a year after the time the case was first brought to court and before permission to prosecute was obtained from the Attorney General, and four years before the final ruling was delivered. When the father was bailed (he pleaded not guilty), the prosecutor had to beg the court to '*warn*' him from threatening the two girls. The key factor in the case was however the medical evidence (the two girls had contracted a venereal disease). The father was charged with failing to consult a medical practitioner for venereal disease treatment (Section 163 of the Public Health Act). However the sexual offences were dismissed because the ruling said that "*there was a lack of material evidence implicating the accused person with the offence*". The mother's evidence was also dismissed on the ground that the mother "*had been quarrelling with the accused person until she later left him*" and was preparing for a divorce. In other words her evidence, it was inferred, must have been "*motivated by malice*"[101] (*FIDA report for 1998, op. cit., pp.18-19*).

[98] 1997 FIDA Annual Report, op. cit., p36.
[99] African Rights, op. cit., p.42.
[100] 1998 FIDA Annual Report, op. cit., pp16-19.
[101] FIDA's own words, 1998 FIDA Annual Report, op. cit., p.19.

Kenyan law provides that incest against victims under 13 carries a maximum life penalty whilst if the victims are over 13 the sentence is dramatically reduced to a maximum of 5 years.[102] If the victim is over 16 years of age, she too may be charged with incest as Section 167 of the Penal Code states that: "*Any female person of or above the age of sixteen years who with her consent permits her grandfather, father, brother, or son to have carnal knowledge of her knowing him to be her grandfather, father, brother or son, as the case may be) is guilty of felony and is liable to imprisonment for five years*".[103]

[102] 1997 FIDA Annual Report, op. cit., p.41.
[103] 1998 FIDA Annual Report, op. cit., p.16.

PART III: PROTECTION FOR VICTIMS OF SEXUAL ASSAULT

III.1 SEXUAL ASSAULT – A DAILY THREAT FOR WOMEN IN KENYA

Sexual assaults are on the increase in Kenya, yet, as is the case with domestic violence, women find few mechanisms for protection and support.

III.1.1 THE SCALE OF THE VIOLENCE According to a former lecturer at the University of Nairobi, '*every woman in our society finds herself a potential victim of sexual assault'*. Rape alone is reported to have become such a prevalent form of sexual violence in Kenya that it is the most common of all human rights abuses and crimes reported by the local media, according to the Kenya Urban Research and Development Centre for Africa (URDCA).[104]

The phenomenon seems to be on the increase, although it may simply be that it is now more widely reported (see below for figures). Rape involves sometimes extremely high levels of brutality, which may explain the increasing media coverage in the last few years. Victims range from baby girls to elderly women, as the case reported on the front page of the *East African Standard* on 16 July 1999 ('*Girl 3 raped, killed, eyes gouged out*') illustrates. A commentator on the *Daily Nation* describes in February 2000 the various cases of rape that occurred in the recent past:

> "A female student is gang-raped on the matatu[105] going home in the evening. A young mother is raped in the presence of her small children in one of the many carjackings in Nairobi. A 20-year-old on a business trip with her father is raped in full view of the old man. Elsewhere, a teenager is raped by her own father. A 65-year-old grandmother is sexually assaulted by raiders in Laikipia out to make a political point – of sorts. (…) Age is no protection: Victims of sexual assaults in this country have been as young as nine-months-old and as old as 80".[106]
>
> Recently the Daily Nation writes how "two news items from Western Kenya serve to illustrate the fact that we still do not take rape seriously enough". One of the cases reported is that of a 16-year-old arrested for a minor offence who claimed to have been raped by an administrative policeman in a "night-long ordeal". As a formal investigation was launched, the family said that they had received threats. The other case is that of two teachers sanctioned over a conspiracy to rape a student (*Daily Nation, 'Let's act promptly on rape incidents',* 28 October 2000*).*

Indeed, the prevalence of rape crimes at all levels of educational institutions, by either fellow students or teachers, is extremely alarming, a sign of a careless and lawless society as

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[104] 33% of local media coverage on crimes relates to rape which is followed by torture at 23%. See *Panafrican News Agency*, 'Kenyans Grapple With Rape', 24 August 2000 on http://allafrica.com/stories/200008240175.html
[105] A matatu is a private minibus used for public transport.
[106] Lucy Oriang, 'Change law to help, not obstruct rape victims', *in the Daily Nation* 8 February 2000.

far as the rights of girls and women to safety is concerned. So grave is the situation that an organisation such as the Kenyan Human Rights Commission has been at the forefront of the campaign against the '*rampant sexual harassment and exploitation of female students in higher learning by their lecturers*'.[107]

According to the Forum for African Women Educationalists, sexual harassment has been identified as one of the obstacles to the educational advancement of women who constitute less than 30% of the student population.[108] A female university lecturer testified that female students are continuously subjected to various forms of harassment (such as groping, fondling, cat-calls and rape). Girls are also incessantly pressurised for sex and some have been attacked in their own rooms, a situation that leads to numerous rapes. There are no guidelines to regulate behaviour in public universities and actions are rarely taken in favour of the complainant (some girls have been expelled from their university).

Rape is also prevalent in secondary schools and little has been done since the horrific 1991 incident in which 71 girls were victims of an orgy of rape by boys from a neighbouring school. 19 of the girls subsequently died.[109] Not only were the boys never prosecuted, but also when the headmaster expelled the boys from his school, he was sued by their parents and subsequently ordered by the court to re-admit them unconditionally. He was later given a six-month sentence for contempt of court when he refused to provide them with boarding facilities.[110]

A local Probation Officer, commenting on this incident, said that rape was "*part of school life*" and that if it was not for the deaths, the case would probably never have hit the headlines.[111] Since the incident, however, the papers have been reporting regularly on cases of young girls who have been '*defiled*' by their teachers. At the end of October 2000, the *Daily Nation* reported on the case of two teachers who had been "*indicted over a conspiracy to rape a student*". At the same time, another teacher was accused of the '*defilement*' of no less than nine Standard Two girls.[112]

Despite the launch of an investigation, the teacher was allowed to continue to teach in the school. (*Daily Nation, 'Fast action needed on sexual offences', Nairobi, 31 October 2000*)

Not only do young girls or students have to deal with the fear of being sexually harassed, but they are also at risk of contracting HIV/AIDS and/or unwanted pregnancies.[113] In the

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[107] *Panafrican News Agency*, 'Kenyans Grapple with Rape', op. cit.
[108] The information in this paragraph is drawn from the *Daily Nation*, 'Sexual harassment rife in institutions', Nairobi, 24 April 2000.
[109] 1997 FIDA Annual Report, op. cit., p.41. See also *Daily Nation*, 'Alarm over attacks on girls' schools, Nairobi, 27 November 2000.
[110] African Rights, '*Crimes Without Punishment – Sexual harassment and violence against female students in schools and universities in Africa*', Discussion paper No.4, AR, London, July 1994, 25p.
[111] Judy Gikaru, '*Report on the review of the current status of women in Kenya with specific reference made to the Nairobi Forward-Looking Strategies*', Kenya, September 1994, p.31. See also *Daily Nation*, 'Alarm over attacks on girls', op. cit.
[112] Standard Two is the second year of primary school which most pupils would start at five or six.
[113] Pregnancy Crisis Ministry, a Kenyan NGO , estimates that at least 700 Kenyan girls ages 9 to 15 have abortions each day. See http://hivinsite.ucsf.edu/international/africa/2098.455c.html

great majority of cases, victims have to live in the same community as their attackers (See PART I.5.2 for more details on HIV/AIDS in Kenya).

III.1.2 INCIDENCE OF RAPE The number of rape cases for which a record was made increased from 383 in 1990, to 417 in 1991, to 454 in 1992. In 1997, the figure for rapes or attempted rapes reported to the police in seven provinces out of eight rose to about 940, and in 1998 to 1124.[114] For the first six months of 1999 alone, the police recorded 756 cases reported to them (and 1329 cases for the first nine months, according to the latest Home Office CIPU report).[115] Undoubtedly these figures are far lower than the reality. Also the police do not distinguish between rape and '*defilement*' (the rape of girl under 14) whilst more than a third of the 300 incidents of sexual assaults reported by the East African Standard from June 1998 to June 1999 were '*defilements*'.

The Rift Valley and the Coast, two of the most 'sensitive' areas politically, saw an increase of 69% and 20% of reported cases respectively between 1997 and 1998.[116] Figures for another highly sensitive area, the Eastern Province, are however not included in the statistics because rape offences are counted in the Penal Code offences. Also in North Eastern province, a very volatile area bordering Ethiopia and Somalia, which is renowned for banditry and lawlessness, and where human rights abuses have been widely documented,[117] police reported only 7 instances of rape in 1998 as opposed to 351 reported by the KHRC in three refugee camps in January alone. According to FIDA, this might be an attempt to conceal the involvement of security forces in some of the rapes committed.[118] This also suggests that from one province to another police may be collecting statistics on rape at their discretion (and political reasons should not be excluded) and their figures cannot therefore be totally relied upon.

III.1.3 WHY WOMEN DON'T REPORT SEXUAL ASSAULT The figures available on sexual assaults represent an understatement of the real picture since, as in most parts of the world, many cases remain unreported for a wide range of reasons. Women may not know either where to go or who to report to, or what procedure to follow with the police; unreported rape crimes are also due to fear, shame, a sense of helplessness or a feeling that there is a lack of ability and/or will on the part of the authorities to bring about redress. Other considerations mentioned by URDCA, based on their research, include the cost of medical consultation, the lack of awareness of the medical consequences of rape and the lack of health facilities set up to respond to the needs of rape victims.[119] Also many rape victims would not report to the police for fear of discrimination and rejection by their communities, especially if the perpetrator is known to the victim or is a close relative. Victims may be under considerable pressure from relatives and acquaintances not to

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[114] These two latest figures are taken from 1998 FIDA Annual Report, '*Institutional Gains, Private Losses*', op. cit. They are compiled from the Annual Report of the Commissioner of Police 1998. The former figures are from G. Wamue and M. Getui (ed.), '*Violence against Women: Reflections by Kenyan Women Theologians*', op.cit.

[115] The Home Office reports 903 cases for 1998. See www.homeoffice.gov.uk/ind/asylum/asylum_Kenya, p.7.

[116] The Coastal area is predominantly Muslim and the lower percentage might reflect the fact that Muslim women are reluctant to report the crime for fear of being stigmatised in their own community.

[117] See KHRC, '*Haven of Fear: The Plight of Women Refugees in Kenya*', KHRC, Nairobi, 1999.

[118] 1998 FIDA Annual Report, op. cit., p.12.

[119] See *Panafrican News Agency*, 'Kenyans Grapple With Rape', op. cit.

disclose the assault, and consequently many fail to report it or even withdraw their statements. If a case reaches court, witnesses who could provide evidence may refuse to collaborate.

In addition, date-rape is not a crime in Kenya, because according to cultural standards a woman who has no ties of consanguinity with a man should restrict contacts with him and in any case refuse any invitation (this would be tantamount to agreeing to a sexual favour). As a result, it is considered *'inherently contradictory and ridiculous for a woman to report that she was raped by her friend or boyfriend who invited her for a date*'.[120]

III.2 POLICE DEALINGS WITH SEXUAL ASSAULTS

"*Why are law enforcement officials so unable to contain rape? Why does our justice system seem so toothless where such crimes as rape are concerned?*" (*Chaacha Mwita, 'Is society incapable of dealing with rape? in the Daily Nation, 27 June 2000*).

Another obstacle to women reporting cases of rape is the way police officers deal with their case. They might fear that it would not be taken seriously and that the police would not handle the situation with appropriate confidentiality.[121] A woman who had been raped and reported to a police station in tears was laughed at and told to go back home to clean herself. It has also been often reported that police officers will ask the victim if she was sure '*it*' was not consensual, whilst others reported having been physically abused by the police (see also PART II.3).[122]

Campaigners recognise that they need to do much more in terms of sensitising law enforcement agencies and in particular police officers. They denounce the lack of a national programme to prevent and control the escalation of sexual crimes and also to facilitate their reporting to law enforcement agents. Not only the police, but also the Law (Penal Code) and the Courts do not have a gender-friendly approach when it comes to sexual offences.

III.3 SEXUAL OFFENCES IN THE LAW & THE COURTS

In this area too, there is an urgent case for speeding up the legal processes and for changes in legal provisions, with the introduction of stiffer penalties and the systematic removal of perpetrators from positions of trust such as teachers or lecturers.

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[120] Prisoners Abroad, '*Information on the Criminal Justice System of Kenya*', London, last updated 28 October 1999.
[121] *Panafrican News Agency*, 'Kenyans Grapple with Rape', op. cit.
[122] Chaacha Mwita, 'Is society incapable of dealing with rape?', *in the Daily Nation* 27 June 2000.

Under the Penal Code, Chapter 63, section 140, of the Laws of Kenya, rape, incest, sexual harassment and other forms of sexual assault are considered offences "*against morality*" and not offences against the person.[123]

III.3.1 SEXUAL HARASSMENT Sexual harassment is not unequivocally illegal in Kenya unless accompanied by a violent physical assault. Thus other forms of sexual harassment such as verbal and psychological sexual abuse are not recognized by the Law. For instance, women victims of sexual harassment in the work place would find very little support in the law as one woman, who made history by filing such a case in 1997, found out.[124]

She filed a civil suit claiming that her senior manager made constant suggestions to her about the size of his penis, touched her in various parts of her body and made comments to colleagues about her breasts. He had also promised to promote her if she "*did the needful*" or on the contrary threatened to sack her on several occasions whilst denying her benefits available to other members of staff. As her lawyer commented, they were "*quite ready to be thrown out of court*" because there is no legislation against sexual harassment in Kenya.

Yet, 96.4% of respondents who took part in a study carried out by the Support Kenyan Women Against Sexual Harassment Forum indicated that they had suffered sexual harassment in one form or another.[125] Over 40% said it had an impact on their emotional and physical conditions whilst a third said it affected the quality of their work.

III.3.2 INDECENT ASSAULT Victims of indecent assault also find very little support for their cases in court: According to Section 144(1) of the Penal Code, "*Any person who unlawfully and indecently assaults any woman or girl is guilty of felony and is liable to imprisonment with hard labour for five years, with or without corporal punishment.*"[126] In theory, '*ordinary*' indecent assaults are punishable by imprisonment for five years with hard labour with or without corporal punishment. This is the case for instance for the forced insertion of objects into the vagina or forced anal and oral sex (both are a common complaint of torture victims, see PART V) which are classified only as an indecent assaults or "*carnal knowledge against the order of nature*".[127]

III.3.3 INTERPRETATION OF THE LAW IN THE COURTS FIDA reports that the interpretation by the Courts of what constitutes '*indecent assault*' is very narrow as is illustrated by a case brought to the High Court in January 1999.

[123] The Kenyan Penal Code is one of the laws inherited from the British colonial system and in the case of sexual assaults is underlined by Victorian moral philosophy.
[124] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., pp.43-44.
[125] 1997 FIDA Annual Report, ibid.
[126] 1998 FIDA Annual Report, '*Institutional Gains, Private Losses*', op. cit., p.14.
[127] 1997 FIDA Annual Report, op. cit., p.41.

According to the evidence produced in Court, a man who was drunk went to the appellant's home and indecently assaulted her by touching her underwear. The appellant was convicted by the Resident Magistrate and sentenced to three years and one stroke of the cane for indecent assault. However the ruling was overturned by the High Court stating that although the appellant had attempted to remove her underwear, she had fled, therefore '*there was no evidence or proof of the offence*' (indecent assault). In the eyes of the High Court, indecent assault consists only in touching a person's private parts but not his/her underwear. The High Court further cited another appeal case in which the Court had defined indecent assault as touching '*the private parts of the complainant (…)* [which means] *the genitalia of the complainant and no other part of her body*'. As the Court stressed in that case, '*the appellant had merely touched the bottoms of the complainant and put his hand under her blouse*'. (Omambia v R. CR. Appeal No.47/95, quoted by *1998 FIDA Annual Report, op. cit. p. 15*).

As FIDA highlights, the message sent to men as the case law stands is that they are free to remove women's underwear, and touch their bottoms and bosoms without fear of being found guilty of indecent assault.

III.3.4 SENTENCING[128] The rape of a girl or woman over the age of 13 by her father, grandfather, brother or son carries a maximum sentence of five years of imprisonment whilst the '*defilement*' of girls under 14 years of age is punishable by a maximum of 14 years imprisonment with hard labour. The same sentence would be meted to a woman or man "*who permits a male person to have carnal knowledge of him or her against the order of nature*". The rape of a girl or a woman over 14 is liable to a maximum life sentence, although recent cases show that this is a highly unlikely sentence. Compared with the crime of robbery with violence which is classified as a capital offence, the legal system in Kenya seems to value more property than women.

III.3.5 PREJUDICE IN THE COURTS The law does not require corroborative evidence, yet the Courts have warned trial magistrates "*of the dangers of convicting on uncorroborated testimony of the complainant*" and how "*it is really dangerous to convict on the evidence of the woman or girl alone (…) because (…) human experience has shown that girls and women do sometimes tell an entirely false story*".[129]

These remarks are reflected in the fact that in practice the courts, overwhelmingly staffed by men, have adopted a lenient attitude to rape and sexual abuse. It is usually believe that most victims contributed to the assault they suffered. This '*attitude*' is somehow condoned by a discriminatory section of the law (Section 163 (1) (d) of *The Evidence Act Cap. 80 Laws of* Kenya) which states that: "*When a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character*".[130] This provision means that the defence can bring up in court details of the complainant's sexual history and there is no doubt that it acts as a deterrent in cases being reported. The result is that except in the

[128] Information in this paragraph drawn from the 1997 and 1998 FIDA Annual Reports, op. cit.
[129] Remarks from Chief Justice Mwendwa (Court Appeal Case R-v- Maina) quoted by FIDA, 1997 Annual Report, op. cit., p42.
[130] A magistrate also wrote that the court should also look at "*the other side of the coin, that is the extent to which rape victims contribute to the offence*" in *Hakimu the Official Newsletter of the Kenya Magistrates' and Judges' Association*, Nairobi, January 1997. See FIDA, ibid.

most serious cases where "*one is mutilated, seriously wounded or killed in addition to being raped, one is suspected to having provoked, initiated or even consented to or even enjoyed the act*".[131] The survivor/victim is almost always under interrogation as if she was the perpetrator of the crime, and consequently women feel both intimidated and unprotected by the law and the procedures employed by law-enforcement agents. As Lucy Oriang put it, "*the legal process is so tedious and distressing that many women prefer to suffer in silence*". [132]

A recent case made headlines when a 17 year-old girl claimed that her first cousin, cabinet minister Sunkuli, had abused her repeatedly when she was 14. However the Nairobi Chief Magistrate who initially declared that "*the proposed charges appear (…) to disclose offences known in the law*"[133] ruled that the minister did not have to answer the charges. His decision came after the minister requested that the case be thrown out on the ground that the young girl did not have legal rights to bring proceedings either personally or through another party since she was under 18 and that the lawyers representing the girl (two lawyers from FIDA(K)) were legally strangers in the case. He added that the complainant's lawyers had ulterior motives.[134]

In line with the minister's request, the girl applied to withdraw her case against him stating in a written affidavit to the court that "*she believed it was being used by the Kenyan federation of women lawyers to settle political scores with her alleged rapist*".[135] The Cabinet Minister later threatened to sue FIDA for prosecuting a rape case against him.[136]

FIDA(K) reported that during the case the lawyers had been insulted by the ministers' supporters and intimidated when traditional weapons and swords were brought into the court. They requested the magistrate to warn them against such intimidation and even threaten to conduct the trial in camera if court's directions were not followed.

Not only are women under scrutiny and rarely taken seriously but the current legal system also fails to compensate them adequately. In addition to the trauma caused by the attack, victims of rape are potentially exposed to the infection of HIV which, with the current level of health provisions and resources in Kenya, would seriously endanger their lives (see PART I.5).

In this hostile context, various women's organisations have been requesting (at least since 1994) that the law provide special courts and police stations to handle rape and related crimes.[137] Women's human rights organisations have also advocated that sexual offences be prosecuted by State Counsel and not the police as is currently the case. Stiffer penalties

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[131] G. Wamue and M. Getui (ed.), '*Violence against Women*', op. cit., p. 52.
[132] Lucy Oriang, 'Change law to help…', op. cit.
[133] *Daily Nation*, 'Cabinet minister to face court in sex case', Nairobi, 10 June 2000.
[134] *Daily Nation*, 'Throw out this sex case, says Sunkuli', 24 June 2000 and *BBC News*, 'Kenyan girl withdraws minister rape case', August 2000.
[135] *BBC News*, op. cit. The case had been partly brought to the public attention by the American priest John Kaiser, a fierce critic of the government human rights abuses record who was murdered a few days before the girl withdrew her charges.
[136] *Daily Nation*, 'Sunkuli threat to sue FIDA', Nairobi, 29 November 2000.
[137] Including the Coalition on Violence Against Women (COVAW), FIDA(K), the Independent Legal Medical Unit (ILMU), Kenya Anti-Rape Organisation, the Kenya Human Rights Commission (KHRC), Maendeleo Ya Wanawake Organisation (MYWO) and URDCA.

have also been requested but there has been no signs from the government to indicate that the Law will change in the near future (see PART VIII).

PART IV: WOMEN'S RIGHTS VIOLATED BY THE STATE

Hopes for a democratic Kenya were short-lived after the introduction of multi-party politics in 1991, when it soon appeared that new forms of violence were being used by the security forces – sometimes with the assistance of pro-KANU youth groups – against political opponents, peaceful protesters and other groups such as women. These new forms include 'ethnic' clashes orchestrated by state supporters, use of emergency 'ethos', the limitation of access to areas declared 'security zones' and the criminalisation of political activists. In all cases, women invariably become victims of state violence with no one to turn to for protection.

IV.1 '*ETHNIC* POLITICS IN KENYA

Political and ethnic violence are prevalent in Kenya and, due to the nature of the Kenyan political organisations, especially since 1991, often represent the two sides of the same coin. Politicians appeal to tribal loyalties or ethnic divisions to gain votes as political parties' membership is largely based on tribal or ethnic lines.[138] For instance, the ruling party, KANU, has recruited from among the Kalenjin and the Maasai tribes as well as other pastoral communities known as the Kamatusa tribes, the Kisii, sections of the Abaluhyia and of the Kamba, Taita and the Coastal peoples.[139] Pokots, Turkana and Samburu are also known to support KANU. Safina receives support from the Kikuyu and the Meru. Kikuyu are also strong supporters of the FORD-Asili party (as are the urban poor from Nairobi), with the exception of the Nyeri Kikuyu who support the Democratic Party of Kenya, etc.[140]

Disguised under so-called 'ethnic clashes' or also 'land clashes', pre- and post-election violence has been a systematic feature of Kenyan political history since 1991 and is widely believed by human rights observers to be state-sponsored.

IV.1.1 CONTEXT OF THE 1991 '*ETHNIC* CLASHES[141] The clashes occurred in the Rift Valley where two ethnic groups had conflicting claims to land dating from the British colonisation. Prior to the arrival of the Europeans, the Maasai (a sub-goup of the Kalenjin) herded their cattle on these lands. They were however cleared off at the beginning of the century to allow the settlement of European farmers. Kikuyu were also cleared off their lands for the same reasons, leaving an increasing number of them landless (many ended up '*squatting*' European farms before being evicted). Following independence, many white farmers sold their land to Kenyans, the majority of whom were Kikuyu.
In the 1992 elections it was clear that the Kikuyu, along with a number of other ethnic groups, would not be supporting President Moi's campaign for re-election (the Kikuyu had

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[138] For full details of ethnic-based political support, see Kivutha Kibwana, '*Sowing the Constitutional Seed in Kenya*', Claripress Ltd, Nairobi, 1996, p. 165.
[139] The Tugens, Marakwet, Nandis and Kisiis are all Kalenjin. See Article 19, '*Kenya: Post-Election Political Violence*', Article 19, London, December 1998, p.22.
[140] There are currently 30 political parties lawfully registered in the country, two awaiting registrations (The United Democratic Movement and Saba Saba Asili) and two currently banned (the February Eighteenth Resistance Army and the Islamic Party of Kenya) and thus barred from participation in the political process.
[141] This section relies heavily on information given to Asylum Aid by Dr Louise Pirouet of the University of Cambridge. For more details on the background to the ethnic clashes, see 'REFERENCES' on land and ethnic issues.

lost power when Moi succeeded Kenyatta in 1978). Ethnic support was more than ever crucial for the outcome of the elections and along with Nairobi, the Rift Valley was the most contested area due to its ethnic mix. The Kalenjin, who considered the land in the Rift Valley as theirs, drove out more than a quarter of a million Kikuyu and killed 1,500 (in some areas, like Njoro, the violence carried on until mid-1994). The Kikuyu were at the same time disfranchised of their rights to vote in the province. The political factors, along with the re-possession of the land, led some observers and academicians to describe the ethnic violence as '*ethnic cleansing*'.[142]

IV.1.2 INCITMENT TO VIOLENCE CONDONED BY THE AUTHORITIES The role of politicians and the police in fanning the violence or failing to take appropriate action to guarantee the safety of the public are indications of the political basis of clashes. In the Rift Valley incidents, evidence revealed that politicians "*had urged members of particular ethnic groups to take action against other groups which had not supported them during the elections*".[143] Several months before the attacks, members of Moi's cabinet had publicly called on the Kalenjin communities and other pastoralist groups to expel the Kikuyu, Luo, Luhyia and Kisii farmers (labelled as '*foreigners*') from the Province. Already in 1991, KANU politicians had started to call for '*majimboism*' which aimed at creating "*ethnically 'pure' homelands and so-called 'KANU' zones*".[144] Threats were also carried out throughout 1992 in the run-up to the first multi-party elections in December 1992: For instance, in June 1992 a government minister declared that non-Maasai in Narok (traditionally a Maasai area), would not be allowed to vote unless they owned land or property. Three Kikuyu were killed and four others injured a week later when Maasai warriors attacked them at a voting registration centre.

The government was accused of having programmed the attacks in order to demonstrate that the introduction of multi-partyism had resulted in political chaos, just as President Moi had predicted. It was also the result of explicit incitement by leaders of the ruling KANU party, determined not to cede their political monopoly, to "*ensure regional support by 'evicting' opposition supporters, and rewarding the loyal with land*".[145] The attacks ensured that a vast majority of opposition supporters would be evicted from their land whilst KANU supporters would be rewarded with the abandoned land. The result was indeed devastating with more than 1,500 dead and 300,000 displaced.

A Parliamentary Select Committee set up in 1992 reported on the violence, and singled out the Vice-President and a minister for responsibility, along with many government officials, security officers and provincial administrators. The PSC report reflected the findings of the National Council of Churches of Kenya which published its own report in 1992. Yet the (single-party) KANU Parliament rejected the report and no official was ever apprehended, let along prosecuted for his actions.[146]

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[142] In particular, Ahmednasir Abdullahli, Human Rights Watch, and David Throup and Charles Hornsby. See 'REFERENCES' on land and ethnic clashes issues.
[143] See Article 19, '*Post-election political violence in Kenya*', Article 19, London, December 1998, p.8.
[144] African Rights, '*Kenyan Shadow Justice*', op. cit., p.72.
[145] African Rights, ibid., p.73. See also, Alamin Mazrui, '*Kayas of deprivation, Kayas of blood: Violence, Ethnicity & the State in Kenya*', KHRC, Nairobi, 1997.
[146] Article 19, '*Deadly Marionettes, State-Sponsored Violence in Africa*', Article 19, London, October 1997, pp.16-17.

IV.1.3 THE 1997 ETHNIC CLASHES - The same scenario was reproduced in the months preceding the December 1997 elections.[147] The first clashes broke out in August and then September in Likoni, a suburb of Mombasa, when up to 100 armed raiders attacked homes and businesses owned by '*up-country*' people (Luos and Kikuyu) who had thriving business in the tourist industry but were traditional opponents of the government. The International Federation of Human Rights Leagues reported that the enmity between the Muslim population from the coastal area and the '*up-country*' people (fuelled by economic deprivation – for the Muslims – and land disputes) was exploited for political reasons when hundreds of young men were offered training in the forest surrounding Likoni, and a reward of KSh. 10,000 for each Kikuyu they killed, and twice as much for each Luo. In the event, the raiders also attacked the local police station, killing several policemen and stealing a large number of guns.

Again, the Likoni attack is widely believed to be part of political operations by government-backed youth groups who initially tried to scare off '*up-country*' ethnic groups from opposition strongholds by circulating leaflets warning them to return to their "*ancestral homes*", with the ultimate goal of reducing their electoral power. Their goal was successful with the attacks as an estimated 100,000 people fled the area with little hope of returning before the elections whilst more than a thousand were killed. Hundreds of families took refuge in churches and mosques.[148] For those who chose to remain in the area, voting was not an option any more, for fear of further reprisals.

IV.1.4 THE POLICE'S ROLE IN THE 1997 CLASHES Evidence from various international and national observers shows that the government did nothing to prevent the clashes, nor to bring to justice those responsible or compensate the victims. In its July 1997 report, African Rights says that the police "*have become a 'force for hire' for local political activists, politicians and business tycoons*".[149]

IV.1.5 THE 1998 POST-ELECTIONS VIOLENCE Political violence did not cease after the elections. KANU remained the majority in Parliament, but by only 4 seats.[150] A woman (a widow) from the Rift Valley Province was to be the first victim of another series of inter-communal attacks when in early 1998, members of the Pokot and Samburu ethnic groups (Kalenjin) raided her home, raped her and stole some of her livestock. As Kikuyu men retaliated by mutilating livestock belonging to the Samburu, the violence escalated further, and after two months of attacks and counter-attacks, the police counted at least 127 deaths. Over a thousand had to flee the area and were living in very poor conditions in temporary camps where they were subjected to further abuses (see below).[151]

The 1998 incidents were jointly investigated by Article 19, Human Rights Watch and Amnesty International, who discovered that the clashes only occurred in those areas

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[147] Unless otherwise stated, the following information is drawn from Article 19's reports, '*Deadly Marionettes …*', op. cit, and '*Kenya Post-election political, violence*', December 1998. Also, Amnesty International, '*Women in Kenya, Repression and Resistance*', AI, London, July 1995.
[148] FIDH, '*An unlevel playing field, FIDH Report on mission to Kenya*', FIDH, Paris, November 1997.
[149] KHRC, '*Mission to repress…*', op. cit., p3. Reference made to African Rights, '*Destroying Soweto: the Burning Issue of Land Rights in Kenya*', African Rights, London, July 1997.
[150] For the detailed results per party, see Article 19, '*Kenya: Post-Election Political Violence*', op. cit., p.4.
[151] *Daily Nation*, 11 March 1998.

(Laikipia, Nolo and Nakuru Town) that had become DP constituencies as a result of the December 1997 elections.[152] Furthermore, "*the Central Province and the Rift Valley constituencies in which the DP had obtained seats are populated mainly by Kikuyu. The rest of the Rift Valley has a Kalenjin population*". The sites of the attacks had also been the sites of land allocation schemes implemented by the government and involving the resettlement of Kikuyu and Kalenjin who had been displaced during the 1992 pre-election clashes. In particular, some Kalenjin were resettled in an area that had been banned to the Kikuyu on the ground that the settlement would damage the environment.

Again, the police had '*failed*' to take appropriate action against the perpetrators and whilst no Kalenjin was charged with murder (in total at least 84 Kikuyu had been killed), a number of Kikuyu were charged and subsequently tried for murder for the deaths of Kalenjin killed during the clashes.

In all incidents (1992, 1997 and 1998), the inter-communal clashes were closely interlinked with a government-based political agenda and the issue of land appropriation, a massive violation of human rights abuses in a country where land is a precious commodity for survival amongst the rural communities.

On a political level, the displacement of so many people belonging to ethnic groups traditionally opposed to the government meant that the outcome of the elections was drastically altered (the KANU party retained a majority in Parliament).

Land appropriation by 'KANU' loyalists was also at the heart of months of ethnic clashes between Bukusu (Luhya) and Sabot (pro-government Kalenjin) groups in Bungoma District in 1992. The district, located in Western Kenya, is known to be an opposition stronghold.[153]

IV.1.6 '*ETHNIC* POLITICS TODAY Ethnic-based political violence is certainly not a thing of the past. The government has been recently accused of inciting ethnic violence against the Kikuyu.[154] Commenting on the current political changes, a leading human rights activist wrote that "*there has been considerable propaganda directed to the Rift-Valley that when Moi leaves office, the Kikuyu and others will 'finish' the Kalenjin*".[155]

The Asian community has also been targeted in the last few years. A number of Asian businessmen recently protested in the streets of Mombasa and Nairobi to highlight the fact that premeditated acts of gangsterism against Asian Kenyans are often perpetuated "*in full view of passive police officers who simply looked the other way*" and with such confidence that the police seems to collude with the criminals.[156]

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[152] Article 19, '*Kenya: Post-Election Political Violence*', op. cit., p.6.
[153] Western Kenya is the most densely populated region of the country and the most productive economically. Details from African Rights, '*Kenya Shadow Justice*', op. cit., p.78.
[154] *Daily Nation*, 'MPs warn on "hate campaign by State", Nairobi, 9 February 2000. Two MPs said they had sent a message to the UN secretary general to "'*alert' him of impending genocide in Kenya"* (quoted in the text by the *Daily Nation*).
[155] Prof. Kivutha Kibwana, 'A blueprint for new Kenya', *The Media Institute*, Nairobi, 2000, available at http://www.kenyanews.com/eXpression
[156] Robert Oduol, 'Growing hostility towards the Asian community', *in ANB-BIA Supplement*, No. 393, 01/07/2000.

The government seems as determined to repress the rights of ethnic groups that are known to be opposed to its rule as it was five or ten years ago, as the recent banning of radio broadcasting in vernacular languages illustrates. The President ordered Information Minister Musalia Mudavadi and Attorney General Amos Wako to draw up legislation that would ban private radio stations from broadcasting in Kenya's indigenous languages, allowing only English and Kiswahili, the only two official national languages, to be used. Making reference to the experience of Rwanda, President Moi argued that the aim of the new law would be to prevent activities that would foster '*tribalism and disunity*'. Yet he also revealed the true intentions behind the ban when he declared that the dialect broadcasts of the state-owned Kenya Broadcasting Corporation '*ensured that national unity is not undermined*'.[157] Three stations were targeted by Moi's directive but most people believe that it directly aimed at the largest and most popular station Kameme 101.1 FM, which broadcasts exclusively in Kikuyu and is controlled and owned by the Kikuyu community.[158] The President's statement reveals that in fact the issue is not about language but ownership and content of the broadcast. Kameme FM started to broadcast in and around Nairobi in spring 2000 and it is believed that the law would be a means to contain criticism of the government over the airwaves just two years before the next general elections (despite the fact that the radio restricts its broadcasting to entertainment and commercial programmes). Moi said that unless the stations "*became transparent*", they would be banned.

The presidential directive reflects years of repression of freedom of expression and strict control over airwaves in a country where even few literate people can afford to buy a newspaper. As a result, the radio is hugely popular notably amongst the rural population (and amongst them women).[159] It also illustrates the continuing attempt by the government to stir up tensions between Kikuyu and the state and legitimise the oppression of groups traditionally opposed to the regime.

IV.2 WOMEN VICTIMS OF '*LAWLESSNESS*'

In the context of lawlessness that prevailed, many women found themselves at the centre of the clashes and violence against them took many forms.

Bukusu women (of the Luhya group) became the victims of forced mutilation which was inflicted on them by Sabot men during ethnic clashes in the Bungoma district (see above IV.1. 'ETHNIC' CLASHES IN KENYA). Traditionally, the Luhya do not practise FGM and within the Sabot community itself, FGM is strictly practised by women.[160] Despite local press

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[157] CPJ, '*Radio Interference*', New York, 8 September 2000. Also BBC News, '*Moi seeks to restrict language broadcast*', 1st September 2000, at http://news6.thdo.bbc.co.uk/hi/english/world/africa. Dorothy Kweyu, '*Kameme lock-out will amount to linguicide*', *Daily Nation*, 10 October 2000 at www.nationaudio.com/News/DailyNation/10102000

[158] The other two are Rehema Radio which broadcasts religious programme in Kalenjin and East FM which targets an Indian audience and broadcasts in English and Hindi. *BBC News*, 'New threat to Kenya vernacular radio', 10 October 2000, see note 115 for website address; also the *Daily Nation*, 'Ethnic Radios face a ban, warns Moi', 9 October 2000 and 'Moi's threat to ban Kameme criticised', 10 October 2000.

[159] Despite that the media were liberalised in 1996, licensing is still strictly controlled by the state. Also the rural areas, stronghold of the regime, are not '*negotiable broadcast space*'. See Kwamchetsi Makoha, 'The bid to ban ethnic radio targets peasants', *in the Daily Nation*, 13 October 2000. For more on the history of repression of Kenyan media since 1991, see KHRC, '*Shackled Messengers The Media in Multi-Party Kenya*', KHRC, Nairobi, 1996. Also Article 19 & KHRC, '*Media censorship in a plural context, A report on the Kenya BKC*', Article 19, London, 1998.

[160] As the fact that the mutilation was carried out by men and on married women with children demonstrates.

coverage and exposure by local human rights organisations, when a woman Member of Parliament raised the issue in Parliament, the government denied the incidents had taken place in the first place and no official investigation was ever carried out.[161]

Wagner Mathieu, a woman MP, was also once threatened by a male MP and Assistant Minister Paul Chapbook who said he would circumcise her if she dared to return to visit the displaced ethnic clashes victims of the Rift Valley (*Judy Gikaru, 'Report of a review on the current status of women in Kenya with specific reference made to the Nairobi Forward-Looking Strategies', Kenya, September 1994, p.33*).

In the Likoni incidents, several human rights organisations reported that women became targets of torture and rape by both the raiders and the police forces who retaliated with fierce brutality targeting the Dingo Muslim group.[162] FIDA reported testimonies from several of these women, who were severely beaten or raped simply because the police or the security forces were looking for their sons, husbands or brothers.

One woman was taken to the Criminal Investigation Department (CID) headquarters four days only after the raid. She was subsequently tortured whilst asked to hand over her 16 year old son and the stolen rifles. Two weeks later, she was taken to court and charged with "*robbery, oathing, killing and raiding the Likoni Police station*". As she stressed in her narrative, "*the police were saying that they were looking for [her] son. They couldn't find him so they charged [her] with the crimes" (1997 FIDA, Annual Report, op. cit., pp.47-49).*[163]

A married woman with two daughters was beaten by the General Service Unit (a paramilitary unit) to confess where '*her son*' was hiding. Her pregnant daughter was also severely beaten and suffered pains months after the ordeal. Other men and women were gathered in her shop and were beaten until some fell unconscious. The police claimed they were looking for the guns that had been stolen during the Likoni raid, despite the fact that "*Likoni is all the way in the other district*". Another woman narrates how her six-year-old sister was beaten "*so hard that she is deaf in her left ear*". She had been interrogated about the whereabouts of her parents.

Another consequence of the Likoni incident is that vulnerable women became deprived economically as their homes, their shops and their land was either destroyed or taken away from them. A mother of six explains how she lost every means of living and feeding her children when she was forced to move upcountry where she had no land. Like for many other families, everything in her house had been taken by the raiders (including the doors and windows in some cases). Other women lost their husbands in the clashes leaving them economically destitute.

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[161] Amnesty International, '*Women in Kenya …*', op. cit., p.18.

[162] Alamin Mazrui, '*Kayas of Deprivation, Kayas of Blood Violence, Ethnicity and the state in Coastal Kenya*', KHRC, Nairobi, 1997.

[163] Unless otherwise stated, all testimonies below are quoted from the same report.

Even if they still have access to their land, many would not dare to return to it for their own safety. One woman who lost her husband during the clashes explained why she refused to go back four years after her family was forced to leave their family land: "*It would be better to be back on the land, but the area is still a bit insecure, especially at night. (…) I fear to go back as a woman because I can be raped – rape cases are very, very common for people like us. As an only woman without my husband, these bandits might get me*'.[164]

IV.3 WOMEN IN ZONES OF '*INSECURITY*' OR IN CAMPS

The northern, eastern and North Eastern areas of Kenya (along the borders with neighbouring countries) have always been a zone of insecurity partly because they are weakly governed, but also due to the influx of small arms and automatic weapons from war-torn neighbouring countries. The government has been accused of wilfully neglecting the region by failing to take any concrete action to secure the areas where pillage, robbery attacks and murder occur frequently[165] (the regions have common borders with Somalia and Sudan and accommodate over 200,000 refugees from neighbouring countries). One MP also accused the government of perpetuating poverty in the district.[166]

The reality in the regions confirms the accusations: There have been no meaningful measures from the state to guarantee the safety of Kenyan people living there.[167] At best, the government has resorted to arm local residents who act as police reservists in order to provide some security to the population, whilst there has been no attempt to develop the judicial administration which is almost non-existent.[168] The result has been a rise in the number of incidents and an administration of justice '*driven*' by guns and an intensification of '*inter-communal*' clashes. In the last few months alone, Northern Kenya has been engulfed in ethnic fighting and 35 people were killed when inter-clan clashes erupted in Wajir in July 2000, bringing the official number of deaths to 120 in 15 different confrontations.[169] Local leaders said the figure was much higher. NGOs also report that torture has been carried out by the military and the police in the northern part of Kenya as a form of communal punishment.[170] Women are, even more than any other part of Kenya, extremely vulnerable to abuses (see also PART VII.2).

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[164] African Rights, op. cit., p.79.
[165] According to UNHCR, vehicles travelling in the region need to be escorted. See Jeff Crisp, '*A state of insecurity: the political economy of violence in refugee-populated areas of Kenya*', Refworld, December 1999, at http://www.unhcr.ch/refworld/pub/wpapers/wpno16.htm, p.6 of 25.
[166] *Daily Nation*, 'Clan wars in northern Kenya', 22 July 2000.
[167] For background information see J. Caneiro, '*The Forgotten People: Human Rights Violations in Moyale and Marsabit Districts*', KHRC, 1997, Nairobi, 66p.
[168] African Rights, op. cit., Table B 'Lawyers in Kenya – Regional Representation'.
[169] *Daily Nation*, 'Clan wars in northern Kenya', op. cit.
[170] Reported by the UN Special Rapporteur, Sir Nigel Rodley, '*Civil and Political Rights, including questions of torture and detention*', Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, UN Economic and Social Council, 9 March 2000, p.6.

The UN Special Rapporteur reports that in August 1998, in Isiole district, a group of 10 women and young people were assaulted by a contingent of 1,000 uniformed and armed men searching for stolen guns and livestock. They were all severely beaten and some of the women were raped whilst being interrogated about the stolen guns.[171]

Kenyan women who had been displaced by the '*inter-communal*' fighting and were relocated with their children and families in camps were also victims of violence, mostly in the form of rape. In all such cases, there has never been provision for security or police protection to guarantee the safeguarding of women's rights to freedom from insecurity and gender violence.

Indeed reports of '*women being raped with impunity in camps*' are numerous and the stories of women from Maela camp – established as a result of political clashes – is by no means exceptional.[172]

Following an attack on Kikuyu in Enosupukia in October 1993, 12,000 Kikuyu were relocated in a camp set up near Maela town in December 1993. The attack followed a decree by the Minister which declared the zone a water catchment area, which means it could not be farmed. The District Commissioner was also about to carry out – after many similar attempts – an eviction order against the Kikuyu who had rented or bought land and had been living in the Maasai area, in some cases for up to 20 years. Whilst the Minister labelled the Kikuyu 'foreigners', the latter accused him of retaliation for opposing him politically in the previous general election. No one was allowed into the area without official permission whilst the General Security Unit surrounded Enosupukia for almost a year. The Maela camp was formally set up when it became clear that the Kikuyu would not be able to return to their homes.

Due to the way the camp was set up and the lack of protection provided, many women became victims of rape by men living in the camps, local residents, police, security personnel and the military. For instance the camp was divided in such a way that women had to travel several kilometres from one part to another in order to get food. Distribution of food was often carried out at 5pm and by the time the food was collected, women had to get back home in the dark.

One woman testified that "*the GSU were based in the area surrounding Enosupukia. At that point there was a number of women raped by GSU. They came in groups at night, around 30 men and they picked younger women from the camp*".[173] Some women were also abducted and subsequently raped. A number of incidents were reported to the Nakuru district officer but no assistance was ever provided. Many women failed to report their ordeal fearing they would be victims of further attacks and that their case would not be taken seriously. Indeed, there were neither investigations nor prosecutions for any of the alleged attacks.

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[171] UN Report of the Special Rapporteur, op. cit., p. 35.

[172] The account on incidents in the Maela camp is taken from Amnesty International, '*Women in Kenya…*', op. cit., p.16. See also Article 19, '*Deadly Marionettes…*', op. cit., p.22.

[173] Amnesty International, op. cit., p.17.

Commenting on the incidents of August 1997, FIDA can rightly question the legitimacy of a government that not only "*fails to protect its own officials*" but also showed "*a complete disregard for the lives of Kenyan women, men and children*" and failed to order adequate investigations into the raids and the killings.[174] Political objectives seem to be more important for the government of Kenya than the rights of women to safety and freedom from torture.

IV.4 THE '*CRIMINALISATION*' OF POLITICAL ACTIVISTS & THE IMPACT ON WOMEN

IV.4.1 THE CRIMINALISATION OF POLITICAL OPPONENTS In a climate of intense domestic and international pressure over the deteriorating human rights situation and the politicisation of inter-communal relations, the government has resorted to a '*new formula*' in order to disguise the extent of its repressive methods: the criminalisation of political opponents.[175] The process consists in arresting people on suspicion of '*robbery with violence*', raiding a police station or possession of firearms. Robbery with violence is particularly convenient as by law it is a non-bailable offence which carries the death penalty. This means that people arrested on these charges can be detained on remand for unlimited periods – up to several months if not years. It is also convenient because people arrested on suspicion of criminal activities are less likely to attract international attention. Many are arrested in these conditions and are removed in courts outside Nairobi, i.e. "*away from the capital and removed from scrutiny* [where] *the courts and security agents work hand in hand*".[176] As African Rights points out, this is a way of holding political activists opposed to the regime under *'detention without trial'* as well as a way to isolate them from press exposure, pressure groups and potential legal support (see PART VI.3). This form of prosecution is also used to arrest and imprison relatives of political activists and many others who speak out about human rights in Kenya.

The most prominent case of a political activist who was charged with robbery with violence is that of former MP Koigi wa Wamwere who was charged in November 1993 on that ground. He was later found guilty of another charge (raiding a police station) and sentenced to four years.[177]

The widespread use of these methods might explain why the evidence shows that, whilst the government keeps declaring its commitment to human rights, the number of reports of torture has increased dramatically in the last few years. For instance in 1995/96, reports of human rights abuses were far more numerous than five years before.[178] Unfortunately, the situation has not improved since then (see PART V).

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[174] The officials FIDA refers to are the police officers who were killed during the raid on the Likoni Police Station in August 1997. See FIDA, 1997 Annual Report, op. cit., p49.

[175] See African Rights, 'Finding A New Formula: Criminalising Political Opponents' in '*Kenya Shadow Justice*', op. cit., pp.129-149. Also Amnesty International, '*Kenya, Tanzania, Uganda, Zambia and Zimbabwe: Attacks on human rights through the misuse of criminal charges*', AI, London, January 1995, 12p.

[176] African Rights, ibid., p.141.

[177] African Rights, ibid., p.134. For a detailed account of the conduct of the trial see Article 19, '*Censorship in Kenya, Government Critics Face the Death Sentence*', Article 19, London, March 1995, pp15 to 30.

[178] African Rights, op. cit., p. 130.

In the case of ethnic clashes and crackdowns on political opponents there has been continuous criticism of "*selective prosecution*"[179] or "*selective application of justice which amounts to sanctioning violence by the state*": Opponents of the regime are arrested and charged with incitement to violence or sedition whilst supporters to the regime who have been accused of inciting ethnic clashes remain totally unchallenged. In January 2000, an opposition MP was arrested and charged with inciting public violence following an outbreak of violence between rival gangs in the constitutional process. He had been attacked – along with a fellow opposition MP – by four activists from the National Democratic Party (NDP, allied to the KANU party) in front of Parliament. His arrest followed a presidential directive to the Commissioner of Police to arrest all those who instigated the violence.[180] However his attackers were freed as soon as they gave statements.[181] Opposition politicians were quick to question how "*high-powered politicians on the Kanu Government's side had been cited in election violence* [but] *the Government has not deemed it necessary to prosecute them*". On the other hand, a lawyer said that the presidential directive was illegal as according to the Constitution and the Police Act, "*the Commissioner of Police was supposed to operate without taking directives from any powers or authority*".[182]

IV.4.2 WOMEN TARGETED FOR POLITICAL REASONS Even when they are not political activists themselves, women are still targeted simply because they are the relatives of a male member of their family sought by the police (see example above PART IV.2). According to Section 72(1) of the Kenyan Constitution, "*No person shall be deprived of his personal liberty save as may be authorised by law*" (that is usually unless he/she is a suspect or a Court produces an order). Yet FIDA reports that "*the use of the torture and false arrest of female relatives of male suspects seems to be a systematic component of the tactics employed by the Kenyan police in obtaining information*".[183] The torture is used in order to extract confessions (the police in Kenya are notorious for lacking the skills and resources for investigative procedures to find the evidence they require to open a prosecution case).

The wife of a co-accused in the Koigi wa Wamwere trial was arrested in 1992, detained and brutally tortured for a period of two years. Her sister-in-law, Josephine Nyawira Ngrugi became the most prominent woman political prisoner after she was also arrested in 1994.[184] She was accused of being '*Koigi's sister*'.

Josephine Ngrugi was a political and human rights activist in her own right as a founding member of the Release Political Prisoners Pressure Group (RPPPG) which was denied legal registration by the government. She was charged with robbery with violence alongside people she had never met before. She was released two years after only to be almost immediately rearrested, savagely tortured (including the insertion of an object in her

[179] *Sunday Nation*, 'Ochuodho, the Judiciary and the Opposition', 29 October 2000.
[180] *Daily Nation*, 'Political thuggery that shames us all', Nairobi, 15 January 2000. See also *Sunday Nation*, 'Outrage over reform attacks' and 'Mayhem as reform rivals clash', Nairobi, 16 January 2000 and *Daily Nation*, 'MPs take attackers to police', Nairobi, 19 January 2000.
[181] *Daily Nation*, 'Moi's order to police "illegal"', Nairobi, 19 January 2000.
[182] *Sunday Nation*, 'Ochuodho, the Judiciary and the Opposition', 29 October 2000.
[183] 1997 FIDA Annual Report, '*Bado Mapambano*…', op. cit., p.47.
[184] Full details of their stories are provided in African Rights, op. cit., pp.132-138.

vagina) and charged with a capital offence in May 1994. Her case lasted another two years before release (*African Rights, op. cit., pp132-138).*

A few months after her release in 1996, she was re-arrested along 20 other members of the RPPPG for protesting against the unsolved murder of the Group's former Chairman assassinated in March of the same year. They were charged with holding an illegal meeting and possession of seditious documents and denied bail for two weeks.

More recently, FIDA reports the case of Mariam Mweu who was arrested in March 1997 and put on remand as a suspect for robbery with violence.[185] Both her husband and her brother were also arrested and her husband appeared in court 17 days after his arrest. She was arrested when she attempted to visit him in court and taken to Pangani police Station along with her one-year-old son. The following day she was taken blindfolded to a forest and was raped by one of the police officers whilst he threatened her with a gun. She had been ordered to leave her child by a pool of water located near the police car. After her ordeal, she was forced to wash in the water and was beaten on her head and various parts of her body by other officers who forced green pepper into her vagina, at which stage she passed out. Few days later, she was taken again outside the police station and suffered further torture. She was later told to get her cellmates to rub her wounds with Vicks and salt, later realizing that "*they wanted [her] to heal before the doctor examined [her]*". Indeed, she also stated that she was never beaten inside the police station and the only witness to her allegations was her son.

While torturing her, the police requested her to hand in her husband's gun – about which she knew nothing – and on another occasion they said that they were looking for her brother and forced her to lead them to him (he was arrested). Whilst she was charged with armed robbery, FIDA says that none of her torture allegations were ever investigated although the UN Special Rapporteur reports that "*an investigation into these allegations has reportedly been ordered by a court*" (*op. cit. p.29).*

The same methods were used by the police during the ethnic clashes, and they are also used during repressive swoops against particular groups. In March 1998, the Mbalambala police retaliated brutally following the death of a police officer and arrested and tortured 38 residents. They also conducted house searches during which an 18 year-old-woman was requested to give details of her husband's whereabouts. When she indicated he was out of town, they left but came back the following day with the same request. She was later raped by a police officer for several hours in front of her younger sister who was holding her baby.[186]

Even when there is no evidence of criminal charges against a '*suspect*', relatives are sometimes obliged to continue to report to court for '*mention*' for months even years after

[185] 1997 FIDA Annual Report, '*Bapo Mapambano*', op. cit., p.45.
[186] UN Report of the Special Rapporteur, op. cit., p33.

the charges were dropped, thus condemned to '*detention without bars*'[187] or a silent form of oppression.

[187] African Rights' words in '*Kenya Shadow Justice*', op.cit., p.132.

PART V: WOMEN IN DETENTION

There is a widespread lack of public confidence in the police force in Kenya and this has been reflected by an upsurge of '*mob justice*' in the country. A '*Report of the Committee on the State of Crime in Kenya 1997 to 1998*' reveals that numerous reported crimes have not been investigated or followed up, resulting in the under-reporting of crime. It confirms that the lack of public trust in police competence and investigation procedures is justified. The report also adds that there are a number of police officers who are (…) "*bad because they are corrupt; another group is bad because it is brutal; yet another is made up of thieves.* (…) *In fact, if it were possible to obtain the actual numbers, the result would be shocking*".[188] These are the same officers with whom Kenyan women have to deal whenever they are seeking justice or being detained and/or with or without good causes.

V.1 - DETENTION PROCEDURES: THE LAW & THE PRACTICE

V.1.1 LEGAL PROVISIONS - Those suspected of offences other than murder or robbery with violence (non-bailable offences) are not supposed to be detained *incommunicado* for more than 24 hours, after which period their relatives and lawyers should be informed.

Section 72(2) of the Kenyan Constitution states that "*A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention*"[189]. Article 72(3) also provides that "*[a] person who is arrested or detained (…) and who is not released, shall be brought before a court as soon as it reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from the commencement of his detention, or within 14 days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or is about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with*".[190]

V.1.2 – DETENTION IN PRACTICE Human rights organisations and lawyers have argued that the police have been using the vagueness of the terms '*reasonably practicable*' to delay the production of a person in court, and that it is during this initial period of detention in custody that detainees are most vulnerable to ill-treatment and torture. Many people arrested on suspicion of robbery are "*registered as being suspected of robbery with violence*",[191] thus allowing the police to keep them in detention for 14 days. And whilst the Chief Justice is adamant that magistrates will request an immediate inquiry if the law has not been duly respected in terms of detention in police custody, in reality this is rarely the case.

In practice detainees are frequently detained for periods of up to several months before being officially charged. They are also often moved from one police station to another, making it difficult for relatives to find out where they are detained, but also helping to cover up their injuries when they have been tortured.

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[188] *Daily Nation*, 'Why recruitment of new police officers should be suspended', 1st October 2000.
[189] FIDA(K), 1997 report, p. 46. See also KHRC '*Death Sentence: Prison Conditions in Kenya*', KHRC, Nairobi, 1996.
[190] See Section 72 (3) (c) of the Constitution of Kenya, at http://www.richmond.edu/~jpjones/confinder/Kenya.htm
[191] UN Report of the Special Rapporteur, op. cit., p15.

V.2 WOMEN SUSPECTED OF CRIMINAL OFFENCES

Women suspected of robbery or even minor criminal offences are also subjected to horrendous treatment by the police forces. FIDA reports the cases of the sister-in-law and the wife of a criminal suspect who were taken to a police station in May 1997 and then requested to report everyday to the station without their "*ammunitions*" (meaning their lawyers). Their houses were also searched without a warrant. After extensive coverage in the press, the police dropped their '*request*'.[192]

In September 1998 a woman was arrested on suspicion of robbery by the '*flying squad*', an informal police unit set up in 1995 in order to deal with carjackings in urban centres. In order to force her to confess, members of the flying squad subjected her to sexual torture (her breasts were reportedly pricked with needles and her genitals burnt with cigarette butts) and raped her. She was later taken to court, charged with robbery and detained on remand.[193]

Another woman suspected of theft was arrested on 25 July 1999 and taken to a bush near her house where she was subjected to serious beatings on various parts of her body. She was only taken to the police station later that night and was sent to hospital for two days. Despite her complaints about the beatings to the officer-in-charge to whom she also handed in a P3 form,[194] no investigation was known to have taken place.

Two young women, aged 15 and 17, arrested on suspicion of having participated in a carjacking, were beaten with various objects whilst being interrogated about the carjackers. They were denied medical treatment even though the youngest woman had also been raped by one of the carjackers. She was later sexually abused by a policeman and allegedly forced to have oral sex with some others. The family of the 17 year-old was never informed about her arrest.

As we will further demonstrate below and as FIDA notes, "*the greatest challenge faced* [by women] *is establishing the veracity of the allegations and prosecuting the perpetrators*".[195]

V.3 CONDITIONS IN POLICE CUSTODY AND PRISONS

The government, in its unremitting attempt to conceal the gravity of the human rights situation, is doing everything possible to hide the real picture as far as the rights of prisoners or people on remand, including political and human rights activists, are concerned. In December 1999, the Kenyan Human Rights Commission reports that it was still extremely difficult for both national and international organisations to gain access to Kenyan prisons in order to monitor their conditions as well as the compliance to

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[192] Quoted in inverted comas by 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., p.46.
[193] The information and the two following cases are drawn from the UN Report of the Special Rapporteur, op. cit., p.37.
[194] In order to file a complaint for assault, a victim has to obtain a P3 form from the police station and ask a doctor to complete it with medical evidence.
[195] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit.

international standards in terms of prisoners' rights.[196] One year later, Amnesty International records the same difficulties.[197] The US Department of State report for 1999 also records how "*government officials including the President continued to intimidate and threaten to disrupt human rights organisations and other NGOs*" monitoring human rights abuses.[198]

V.3.1 PRISON CONDITIONS In all instances where monitoring was made possible, prison conditions in Kenya have been reported to be extremely harsh by many independent observers.[199] Kenya's Attorney-General, Amos Wako, described the conditions as "*de-humanising*" whilst a Social Democrat MP said that "*the prisons have been described as 'death chambers' where people are sent to die*".[200]

There are currently 78 prisons in Kenya with a capacity of 15,000,[201] the biggest one being the Kamiti Prison in Nairobi.[202] However, recent media reports indicated that over 50,000 prisoners were being held in the prisons and other detention facilities.[203] The situation reveals a very serious problem of overcrowding with all the inevitable consequences in terms of prisoners' rights and in particular health issues. Many prisoners get sick due to water-borne diseases or the appalling hygiene conditions in the cells, and the lack of access to proper medication.

HIV/AIDS represents also a threat to prisoners' life and health (see PART I.5.2). A epidemiologist with the Ministry of Health recently revealed that 50-70% of blood donated from prisons in Kenya during the national blood donation day was found to be contaminated.[204] The new Commissioner recognized that prisons were unable to cope with the large number of prisoners who had contracted the virus but declared that "*only one percent of the prisoners contract the disease in prison*". This view was not shared by the epidemiologist, according to whom the risk of contracting the disease in prison is significant, because homosexuality amongst inmates is rampant.[205] The Chairman of

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[196] During the UN Special Rapporteur visit in September 1999 when hundreds of prisoners were removed just days sometimes hours before his visit to various prison facilities. See his report on '*Civil and Political Rights, including questions of torture and detention*', op. cit., paragraph 44. (the case of Nakuru GK Prison).

[197] Amnesty International, , '*Kenya, Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*', AI, London, December 2000, 7p.

[198] US Department of State, op. cit., p.22 of 32 of report on Kenya.

[199] Unless otherwise stated, the information on prison conditions and torture is drawn from Amnesty International report '*Women in Kenya*', op. cit., the KHRC's reports '*A Study of Conditions of Women's Prison and Women Prisoners in Kenya*', Nairobi, 1995; '*Death Sentence: Prison Conditions in Kenya*', 1996 and '*Mission to repress: Torture, Illegal Detentions and Extra-judicial Killings by the Kenyan Police*', KHRC, Nairobi, 1998 and the UN Special Rapporteur on Human Rights report, March 2000, op. cit. The latest report reveals that the information provided by previous reports on prison conditions remain valid.

[200] Yvonne Sampoda, '*Communities to benefit prisoners*', in ANB-BIA Supplement, Issue Nr 367, ANB, 1st May 1999.

[201] Yvonne Sampoda, op. cit. Amnesty International provides the same figures, in '*Kenya, Prisons…*', December 2000, op. cit.

[202] The UN Special Rapporteur, Nigel Rodley, reported that he did not have access to Kamiti prison in September 1999, despite a formal request accepted by the Commissioner of Prisons (op. cit., p.10). This may change with the new Commissioner of Prisons, Abraham Kamakil, who "*has ordered all warders to open their doors so the public can scrutinise these institutions continually and help the authorities to improve them*", see *Daily Nation*, 'Let us all support new Prisons chief', Nairobi, 15 December 2000.

[203] The real number remains unknown. A recent press article put the number of prisons at 87 and the population at 30,000 inmates, see Muriithi Muriuki, 'Plea over inmates with Aids', *in Daily Nation*, Nairobi, 15 December 2000.

[204] Muriithi Muriuki, 'Plea over inmates with Aids', op. cit.

[205] According to the Commissioner, the issue of homosexuality in prisons had been blown out of proportion by the media. See Muriithi Muriuki, ibid.

Kenya Legal Ethical Network, Ambrose Rachier, further declared that the government had a legal duty to protect prisoners from contracting HIV.[206]

Whislt meeting the UN Special Rapporteur, the former Commissioner of Prisons recognized that overcrowding was one of the two most important problems facing the prison system (along with access to potable water).[207] Other chronic and grave problems include the lack of adequate access to medical care, food, clothing, and hygiene conditions and facilities. The prison authorities usually refer to the lack of funding as a reason for not resolving the situation. Yet Kenyan laws have incorporated the Prison Act, which guarantees a number of minimum rights to prisoners.

V.3.2 WOMEN IN PRISONS There have been continuous reports of women being kept in the same cells as male detainees or, in the case of police stations, in the same area with no secure separation.[208] In police stations, women are thus at risk of sexual assault not only from police officers but also male inmates who have in some cases been encouraged by the police to harass and/or rape women kept in the same cell.

Whilst there are not as many women as men in prisons,[209] they are detained in the same conditions and are denied the same basic rights in contravention of international standards. The problem is particularly acute for women because there are generally more prison cells for men than for women. In 1999, the KHRC reported "*inhuman and intolerable*" conditions for women in jails.[210] The report said that cells were holding sometimes more than three times their capacity and in some prisons, women (sometimes with their babies) had been found to be detained in the prison corridors due to overcrowding. As in male prisons and detention facilities, sanitation and medical care were described as deplorable, and women often do not have a blanket or mattress. Pregnant women are forced to give birth on the cell floor in appalling hygiene conditions and without medical assistance (except from their co-prisoners), unless there are complications that require their transfer to a hospital.

Women are usually held in wards separate from those housing men, but sexual abuse by prison warders has been often reported: although there are no statistics available on female warders, there is no evidence that the Prison Service has incorporated gender issues in its recruitment process. They are also at risk of being repeatedly beaten, just as male prisoners are.

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[206] Ibid.
[207] UN Report of the Special Rapporteur, op. cit., p.11 (paragraph 43).
[208] Amnesty International, '*Women in Kenya, Repression and Resistance*', op. cit., p.12 and '*Detention, Torture and Health Professionals*', op. cit., p.2.
[209] Unfortunately, at the time of this report, numbers of women prisoners in Kenya were not available.
[210] Catherine Jenkins, 'Kenya's women jails "inhuman"', in *BBC News*, 8 December 1999.

V.4 TORTURE BY SECURITY FORCES AND PRISON WARDERS

V.4.1 PREVALENCE OF TORTURE. Torture by police or soldiers is rampant in Kenya and has been systematically and consistently reported by various human rights organisations over the last few decades.[211] Human rights monitoring organisations have reported that torture of political prisoners has considerably diminished since 1991 and the subsequent dismantlement of the National Intelligence Service Branch. It has also been reported that most victims are suspected of criminal offences. Yet this does not mean that political detainees or prisoners are exempt, and in any event the police are more and more often using the charge of '*robbery with violence*' to justify detaining a wide range of people from petty criminals to political opponents. As indicated above, this is because robbery with violence, like murder, is a non-bailable offence and therefore allows the police to detain a suspect as long as they see it as '*reasonably practicable*' (article 72(3) of the Constitution). Moreover, a charge of robbery with violence carries a maximum life sentence (and in terms of human rights watchdogs, attracts much less publicity).

The situation is so bad with regard to '*criminal*' suspects that a number of human rights organisations in Kenya have stepped up their campaign against police and prison torture.

Torture is used to extract information or, in the case of politically active opponents, to intimidate in an attempt to stop political activities. One organisation writes that "*Torture, ill treatment and the use of police as a tool of political suppression have assumed a pattern that amounts to a virtual policy*". [212] Torture and ill treatment of prisoners and persons in custody are in contravention of the rights of prisoners to be treated with humanity and other rights as recognized in the Prison Act.[213]

The Kenyan Human Rights Commission has documented hundreds of cases of police torture and of illegal confinement between 1995 and 1997. To this day it continues to do so on a regular basis with the production of '*Quarterly Repression Reports*'[214]. Another recent report with international importance on torture in Kenya is that of the UN Special Rapporteur on Human Rights who received detailed information on 265 cases of torture by law enforcement officers[215], members of the Kenya African National Union (KANU) Youth wing – the youth division of the ruling party - and officers of the Kenyan Wildlife Service between January 1997 and September 1999.[216] According to the information gathered, 99 persons were reported to have been subjected to torture by law enforcement officers in 1998 and 148 in 1999 alone. However as the report notes, there are many more cases that remain unreported.

V.4.2 METHODS OF TORTURE In all the cases documented by the UN Special Rapporteur, torture was used to obtain a confession, and methods included: "*beatings, especially with*

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[211] All reports relating to human rights abuses quoted so far record that torture is systematic.
[212] KHRC, '*Mission to Repress…*', op. cit.
[213] For a full account of prisoners' rights, see KHRC, '*Prisoners's Rights in Kenya*', KHRC, Nairobi, 1997.
[214] Although KHRC has a website address, none but one of its publications are currently available online.
[215] There are 7 types of internal security forces including the '*flying squad*' which is part of the Criminal Investigation Department (CID) and is specialized in dealing with violent robbery.
[216] This number does not include cases where the police were just standing by whilst a person was being subject to an attack.

wooden or plastic sticks; whippings on different parts of the body, especially the feet; beatings to the soles of the feet while suspended upside down on a stick passed behind the knees and in front of the elbows; rape and other genital abuses, such as inserting objects into the vagina and pulling of the penis or pricking it with pins".

Beating and caning is the most widely used form of torture which can have severe, if not fatal consequences.

98 % of the 400 cases of torture referred to the Independent Medico-Legal Unit (IMLU, a local NGO) between September 1998 and August 1999 were musculo-skeletal injuries allegedly caused by beatings with blunt objects.[217] A quarter of the patients consulted by the IMLU had sustained neurological injuries affecting their vision or hearing. In addition, out of 40 post-mortems of death in police custody carried out by the organisation, 90% revealed that the cause of deaths was internal injuries due to external trauma.

Torture also includes the flooding of prison cells where prisoners are forced to sleep without a mattress or a blanket. Many prisoners contract pneumonia in this way, thus critically endangering their health. Last but not least, torture is compounded by the deliberate denial of medical treatment, which constitutes another form of torture in itself. Additional forms of torture against women and men include threats of rape to self or family members.

V.4.3 TORTURE OF WOMEN PRISONERS - Amongst the reported cases of torture victims for the period 1997 to 1999 mentioned in the UN Special Rapporteur's report, there were at least 40 women, ranging from 11 to 69 years old.[218] As with the great majority of men, the women had suffered severe beatings and whippings, with the use of clubs, guns and rubber strips. In addition at least 27 were subjected to rape and sexual assaults including insertion of foreign objects in the vagina. No consideration was given to their age and their health and two out of three pregnant women who were kicked in the stomach consequently miscarried.

In September 1999, the Special Rapporteur interviewed two teenage girls of 15 and 17 years old at the Kikuyu Police Station arrested on the suspicion of having participated in a carjacking. During the interview he was able to observe many signs of torture including swollen feet and open wounds and haematomas. They had however been denied medical treatment and the mention "*appear fit*" had been written down in the occurrence book. Despite a request from the Special Rapporteur, he was able to verify that they had not been provided with medical care and following his first visit, the girls were summoned and asked by police officers to repeat what they had told the Special Rapporteur.

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[217] *The Media Institute*, 'Media Institute on Police Torture in Kenya', May 2000, p.2; see also Wanyama wa Chebusiri, 'Police torture rampant in Eldoret', April 2000 available at www.kenyanews.com/eXpression/may2000/torture.html or /april2000/eldoret.html respectively.

[218] UN Report of the Special Rapporteur, op. cit., pp. 26 to 49.

The two girls' denial to access medical care whilst in detention, despite the fact that they had been transferred to three different prisons, was in contravention of a number of provisions in Kenyan Law. Rule 24 (I) of the *Prison Rules* provides that '*(I) The medical officer shall examine a prisoner on each of the following occasions – (a) on the prisoner's admission to prison; (…) (c) before the prisoner undergoes corporal punishment or any other punishment likely to affect his health, and shall certify whether the prisoner is fit to undergo the punishment; (d) during the course of infliction of corporal punishment; (e) before the prisoner is discharged from prison; (f) before a prisoner is transferred to another prison*. In addition Section 74 of the Constitution of Kenya provides guarantees against "*torture or inhuman or degrading treatment"*.

A prominent case of torture came to the attention of the media when a woman, arrested and tortured for allegedly being "*the most-wanted carjacker*" (nicknamed the '*Intercooler*' revealed she planned to sue the Kenyan state over torture.[219] The woman was arrested along with her husband, charged in court with violent robbery and remanded for four months before being discharged for lack of evidence few days after the real '*Intercooler*' was arrested.[220] She recounted to journalists how several police officers stripped her and beat her on different parts of the body using wooden clubs and stuffed paper into her vagina. She accused the police of '*not admitting liability and refusing to apologize*'.

In May 2000, a 21 year-old pregnant woman died in police custody where she had been held for three days for interrogation, accused of stealing KSh. 3,000 from her employer.[221] Her relatives claimed the police had tortured her, allegations that were corroborated by a post-mortem revealing that she had succumbed to internal bleeding and that "*these injuries would [be] consistent with infliction by direct blunt trauma and were symmetrical due to systematic infliction*".[222] She had told her cellmates that she had been tortured both by her former employer and a police officer who beat her on the head with a club (her forehead had signs of injuries and 50% of her body was said to have been covered with bruises). She was allegedly beaten until she collapsed and subsequently taken to a local medical centre by other women cellmates who were ordered to do so by the same police officer.

In March 2000, two women were arrested amongst 11 human rights activists charged with "*unlawful assembly*" whilst held for several days in Nakuru prison in the Rift Valley. The women were put in a large cell where there were already 39 women, "*many of whom were sick and suffering from diarrhoea*". Amnesty reports: "*Upon arrival the women were forced to strip naked in full view of other prisoners and jeering prison guards. When interrogated they were beaten with sticks if they failed to address the prison guards as 'madam'.* (…) *Whenever a prison guard entered the overcrowded and dirty cells, the women were made to squat in rows and on one occasion when they refused to eat a meal, because the food had not been cooked properly, they were beaten with canes and forced to eat the food.*" According to the organisations, no official investigation into the alleged torture had taken place (*Amnesty International,* , '*Kenya Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*', AI, London, *December 2000, p.2*).

[219] *Daily Nation*, 'Women Plans to Sue State Over Torture', Nairobi, 22 May 2000.
[220] We do not have information on the subsequent fate of the real '*Intercooler*'.
[221] *Daily Nation*, 'Pregnant woman dies in custody', Nairobi, 28 May 2000.
[222] Extract of the post-mortem, *Daily Nation*, ibid.

V.4.4 TORTURE AND ACCESS TO MEDICAL CARE DENIED - Access to medical care is one of the measures taken by the authorities to conceal the extent of torture inflicted on people detained in police custody or in prison.

Very few prisons in Kenya have a doctor and rely instead on occasional visits by the District Medical Officer. As for medication, resources are extremely limited and many prisoners reported being given aspirin for any sort of condition, including wounds inflicted through torture. Yet Rule 26 of the *Prison Rules* provides that:

> *(I) The medical officer shall (a) see every prisoner at least once a month; and (b) see every prisoner held on a capital charge or sentenced to death or in close confinement once every day; and (d) at least once every month inspect the whole prison, paying particular attention to the cooking and sanitary equipment in the prison.*

Doctors' access to people detained in police lock-ups is an extremely rare occurrence since doctors have no guaranteed legal right to do so. Remand detainees have a legal right to be seen by a doctor according to Rule 10,2 which states that:

> *(3) An unconvicted prisoner on remand or awaiting trial shall be allowed to see a registered medical practitioner appointed by himself[/herself] or his[/her] relatives or friends or advocates on any weekday during working hours in the prison, in the sight, but not in the hearing, of the officer in charge or an officer detailed by him.*

Yet again magistrates invariably order examinations by a government doctor who are either put under pressure to cooperate with the police in concealing torture evidence or are doing so willingly.[223] Even when a detainee is transferred to a hospital, s/he is examined by a government doctor. If a doctor takes the step of criticising the police or providing a '*proper*' medical report, s/he risks either being transferred to another prison or losing her/his job and with it her/his government housing. The role of government doctors and sometimes others in concealing evidence is being stretched to the limits: Amnesty International reported several times on cases when doctors had to falsify death certificates as well as post-mortem reports under police pressure.[224]

As for private doctors, their access to prisoners requires a court order which is rarely granted; even then they would need the consent of the prison doctor and consultations would have to be carried out in the presence of the latter, thus infringing confidentiality.

V.4.5 DEATHS IN PRISON Unhygienic conditions, torture and denial of access to adequate medical care means that the death toll of inmates in Kenya is reported to be high. Amnesty International recently reported that "*in October 1995 a government minister stated that more than 800 prisoners had died in the first nine months of the year*".[225] Two years on, the number was officially 630. According to the organisation, in the year 2000 "*at least 10 prisoners died in prisons as a result of torture*".[226]

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[223] See UN Report of the Special Rapporteur, op. cit., p.16.
[224] Amnesty International, '*Women in Kenya*…', op. cit. and '*Kenya: Detention, torture and health professionals*', AI, London, 1997.
[225] Amnesty International, '*Kenya Prisons*…', December 2000, op. cit., p.1.
[226] Ibid.

One prominent human rights lawyer who was detained for over two years pending a treason trial that never took off declared that "*being sentenced to a prison term in Kenya is being subjected to a fate worse than death itself*".[227] Others talk about "*death-chambers*" and one commentator recently wrote that "*the daily murder of inmates is not a matter that requires* [the Ministry of Home Affairs] *urgent indulgence* (i.e. meaning '*attention*')".[228]

He was referring to the murder in early September 2000 of six would-be escapees by prison warders who clubbed them to death, gouged out their eyes and mutilated their bodies.[229] The police tried to cover up the crime by saying that they had been shot but there was no evidence of gunshot wounds on their bodies. The prison authorities came up with another version and claimed that the men had died following a fall from a 24 feet perimeter wall whilst trying to escape from King'ong'o Maximum Security Prison in Nyeri. An examination by two senior doctors later revealed that the inmates had fractured arms, legs and joints, severe skull fractures, and that some had had their eyes gouged out. A survivor who was recaptured and suffered torture under interrogation from prison warders confirmed statements by other witnesses blaming the prison warders for the deaths.[230] In December 2000, it was revealed in court that the prisoners had been hacked with pangas (traditional machetes) and axes before being shot dead by prison warders.[231] An inmate who narrowly escaped death in the same conditions testified that the six had not attempted to escape and that the grilles to the cells had not been cut as alleged.

V.5 OBSTACLES TO PROSECUTION FOR TORTURE VICTIMS

Women who have been victims of torture in custody and/or in prison face a number of obstacles when it comes to seek justice. Besides the obstacles highlighted in PART II, III & VI, they are intimidated by police officers not to talk about what happened to them, on pain of re-arrest or maybe a grimmer fate.[232]

V.5.1 COMPLAINTS PROCEDURES There are major procedural obstacles that reflect the lack of an independent system for investigating allegations of ill treatment and torture. In order to file a complaint for assault, a victim has to obtain a P3 form from the police station and ask a doctor to complete it with medical evidence. The role of doctors in the covering-up of human rights abuses against detainees and prisoners, whether by will or '*under duress'*, has already been mentioned. However it is also the case that the police – who also need to fill in the form – will in most cases refuse to investigate and prosecute cases of torture by fellow police officers, and women are misinformed about their rights. In July 1999, a woman, who had been seriously beaten by the Assistant Chief of Ol-Kalou police station, obtained a P3 form in which a doctor provided medical evidence to support her claims.

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[227] *BBC News* on http://www.news6.thdo.bbc.co.uk/hi/english/world/africa/newsid_977000/977263.stm
[228] The commentator is being ironical. *Daily Nation*, 'State of our jails is immoral, criminal', Nairobi, 17 September 2000.
[229] The murders were covered by the *Daily Nation* throughout September 2000. See in particular the following articles: 'Brutal deaths of convict', 14 September 2000 and 'Apologies and justice wanted over jail deaths', 22 September 2000.
[230] *BBC News*, 'Row over Kenyan prison deaths', 14 September 2000 and *Daily Nation*, 'Escape survivor blames warders', 18 October 2000.
[231] Please note the conflicting information about the gunshot marks on the bodies. Pamela Chepkemei, 'King'ong'o Six cruel death', in the *Daily Nation*, Nairobi, 14 December 2000. At this date, the hearing was continuing.
[232] See above the example of the two young girls visited by the UN Special Rapporteur, op. cit (PART V.4.3).

She was however told that "*the Assistant Chief could not be prosecuted as he was a senior public officer*".[233]

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Amnesty International reports that they "*received numerous reports of victims either being threatened by the police not to report torture, too scared to go to the police station to obtain a P3 form, or refused a P3 form by the police*".[234] If the victims manage to get the form duly filled with strong medical evidence supporting their claims, the police will simply not take the necessary steps to allow prosecution, as the two examples below , from the March 2000 report of the UN Special Rapporteur, Sir Nigel Rodley, illustrate.

An eight-months pregnant woman was beaten at her home by administrative police officers in January 1999 whilst being interrogated about suspects accused of drinking illegally brewed beers. The beatings and kicking in her stomach led her to lose her baby, which left her depressed and traumatised. She immediately sought medical care and filled a P3 form that was returned to the police, and she also wrote a statement. 8 months later she still had not heard anything about her complaint.

A woman who refused to leave her house that was about to be destroyed, was brutally assaulted by the Assistant-Chief at the Ol-Kalou police station in February 1997.[235] She consequently miscarried and sustained other serious injuries, which were reported by a doctor whom she consulted her after she had obtained a P3 form from the same police station. However, the officer in charge refused to take action and when her lawyer wrote to the Commissioner of Police in August 1999, they were informed almost four months later that the investigation had been closed due to lack of evidence.[236]

In other cases, P3 forms have been "*lost or removed from case files held by the police*".[237] In addition, doctors working in private hospitals or medical facilities are often pressurized not to act as witnesses in court and ultimately the court might even reject the medical evidence anyway. Last but not least, the fact that usually there are no witnesses to the crimes committed means that prisoners cannot effectively seek redress.

As a result, women's organisations like *FIDA(K)* or *Kituo Cha Sheria* who have assisted women in pursuing their cases in court have faced difficulties in getting to this stage. Where cases have been brought to justice, this has been solely due to their particular gravity. Even in this event, rarely are police officers convicted, and the great majority of police officers accused of rape have so far remained on duty.

V.5.2 LEGAL SHORTCOMINGS There are other major deficiencies in the legal system, which include the position of the judiciary with regard to human rights. Despite the fact that Kenya has ratified the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in February 1997; and that Article 74 of the Constitution of Kenya states that "*no person shall be subject to torture or to inhuman or degrading*

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[233] UN Report of the Special Rapporteur, op. cit., p 46.
[234] Amnesty International, '*Kenya: Violations of Human Rights*', AI, London, September 1997, p10 of 23.
[235] It is not known if it is the same Assistant Chief who assaulted another woman in July 1999 (see three paragraphs above).
[236] UN Report of the Special Rapporteur, op. cit., p 30.
[237] Amnesty International, op. cit. See also KHRC, '*Mission to repress…*', op. cit.

punishment or other treatment", there are no provisions relating to torture in either the Penal Code or the Code of Criminal Procedure. [238]

The only provision with regard to torture appears in an amendment to the Police Act dated November 1997 (Section 14 (A) (2) and (3)) which reads that "*(2) No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment. (3) Any police officer who contravenes the provisions of this section shall be guilty of felony*".[239]

Yet, the UN Special Rapporteur reports that according to the information he received during his visit in September 1999, "*the High Court has decided that it has no jurisdiction to enforce the human rights provisions in Chapter V of the Constitution*".[240]

Wanjiru Muiga of the International Commission of Jurists (Kenya Section) and Willy Mutunga go even further by writing that "*The Kenyan judiciary has completely refused to embrace and develop human rights jurisprudence. The most glaring omission is the failure to enforce the fundamental rights entrenched in the national constitution. The judiciary has rendered the Kenya Bill of Rights inoperative*".[241]

This could be another reason why it is extremely difficult to bring torture cases to court and, even in this eventuality, a reason why adequate sentences are rarely given out to those found guilty of human rights abuses, especially if they are state agents.

V.5.3 OBSTACLES IN THE COURTS There are also obstacles in the procedures in Kenyan magistrates' courts. The defence is not able to access the evidence gathered by the prosecution, nor the list of prosecution witnesses, which makes the preparation of the defence case extremely difficult.[242]

Also, despite the fact that a confession extracted by use of torture is not admissible in Kenyan Law, the allegations would not be investigated *per se*. If a victim complains that s/he was forced to confess a crime under torture, a trial-within-a-trial is ordered, not to investigate the allegations of torture but to provide for further examination of the admissibility of the victim's confession.[243] In this case, "*the investigation task goes back to the same police force that were the alleged perpetrators*".

[238] UN Report of the Special Rapporteur, op. cit., p.14.
[239] Ibid., paragraph 57.
[240] Ibid., paragraph 58.
[241] Evelyn A. Ankumah and Edward K. Kwakwa, ed., '*The Legal Profession and the Protection of Human Rights in Africa*', Africa Legal Aid, Maastricht, 1999, p.161.
[242] Article 19, '*Censorship in Kenya*…', op. cit., p.18.
[243] KHRC, '*Mission to Repress*…', op. cit., Chapter 3 'Torture and Illegal Confinement'.

V.6 - GOVERNMENT DENIAL VERSUS EXPOSURE FROM PROFESSIONALS

Whenever the government is confronted with allegations of torture, it dismisses them as being rare and the result of '*over-reaction*' by a restricted number of security officials. The government also insists that torture is illegal in Kenya.

Despite much evidence provided on the extent of systematic use of torture in police custody during the visit by the UN Special Rapporteur, the Minister of State in charge of Internal Affairs and the Assistant Minister for Foreign Affairs affirmed that "*in their opinion, police violence was nevertheless not a widespread phenomenon*". They also assured the Special Rapporteur that in all instances where "*there appeared to be an overreaction by law enforcement officials, the government was committed to taking all relevant measures*".[244]

This is not the view of a group of human rights workers who, in February 2000, launched a campaign to help victims of torture to seek justice in the courts condemning the widespread torture in Kenyan jails and police stations.[245] The group indicated that they were planning to take on at least 10 cases over the next year whilst they have about 800 cases recorded on their books. Although the Attorney General also affirmed that the government did not condone the torture, human rights activists indicated that no government action had been taken to eliminate it. A few months later, in spring 2000, the Kenyan Medical Association launched '*a campaign to stop torture and the inhuman treatment of prisoners and accused people*', a move that had long been encouraged by the Law Society of Kenya.[246] The campaign also aims to '*address issues that contributed to the abuse of prisoners, including the poor conditions under which prison warders work*'.

The government of Kenya's position in this matter is complete denial, as a government response to Amnesty International 1995 report on torture in Kenya typically illustrates: "*Kenya needs no international pressure in order to improve its human rights record because Kenya is committed to promoting and protecting the human rights of her inhabitants*".[247] More recently, and despite the fact that the new Commissioner of Prisons pledged to eradicate torture in prisons, President Moi maintained the official line of denial when he expressed his "*surprise at reports that* (…) *Kenyans* [living in camps in Tanzania] *had fled persecution*".[248] According to the President, they were not genuine refugees. Unfortunately, the fact that human rights activists are able to denounce torture and other forms of inhuman treatment in Kenya does not equate to the end of torture. Indeed they still believed in 2000 that "*there was little evidence that the authorities were intent on eradicating it*".[249]

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[244] See UN Report of the Special Rapporteur, op. cit., p.19.
[245] The group includes the KHRC, People Against Torture as well as a number of lawyers and doctors. *BBC News*, 'Group to fight torture in Kenya', 11 February 2000.
http://news6.thdo.bbc.co.uk/hi/english/world/africa/newsid_639000/639327.stm
[246] Reported by the '*East African*' weekly newspaper and quoted by IRIN News Brief for East Africa, 24 May 2000 (irinatocha.unon.org or see www.reliefweb.org/)
[247] Amnesty International, '*Detention, torture and health professionals*', op. cit., p.12.
[248] *Daily Nation*, 'Moi: Refugees not genuine', Nairobi, 27 December 2000.
[249] *BBC News*, 'Group to fight torture in Kenya', op. cit.

PART VI:
'*THE COSTS OF JUSTICE ARE CRUEL*': THE KENYAN JUDICIAL SYSTEM

The justice system in Kenya, which is inherited from the colonial British system, is in deep crisis. Although there are on-going debates about court cases and reforms of the law and daily coverage in the press, African Rights writes that the public face of the justice system in Kenya is a "*façade*". According to the organisation the "*government has used the law, the security forces and the courts to discipline and intimidate, rather than to encourage a positive attitude towards the protection of basic rights*".[250] The 2000 Human Rights Watch Report records that "*the link between corruption and eroded respect for human rights was most evident in the judiciary, the provincial administrations and the police. The government had always used the judiciary for political ends*". It also reports that "*none of the grand gestures made by the President Moi in 1999 addressed civil and political rights abuses*".[251]

The decay of the justice system – which is said by some to have been better during the repressive years of the 1980s[252] – has profound implications for the daily life of Kenyans and has certainly promoted the escalation of violence and '*mob justice*' in the last few years.

VI.1 - LACK OF INDEPENDENCE OF THE JUDICIARY

The lack of independence of the judiciary might explain its position vis-à-vis human rights. There is a major controversy around the issue of the independence of the judiciary and judicial appointments, because the present system is that of a lack of separation between the 'Executive' and the 'Judicial' powers, and indeed a domination of the former over the latter.[253]

VI.1.1 APPOINTMENT PROCEDURES Judges are appointed by the President on the advice of the Judicial Service Commission, whose members are themselves appointed by the President. They include the Attorney General, the Chief Justice, three judges and one representative of the Public Sector Commission of Kenya.[254] However the advice of the Commission is not legally binding upon the Head of State. The Judicial Service Commission is also responsible for the appointment of magistrates, but there have been complaints that the judges are more often appointed from the rankS of magistrates than from among lawyers practicing privately.[255] Thus, magistrates who are seen to have "*rendered services to the system*" are being rewarded by being appointed judges to the High Court.[256] The selection of judges is, in the eyes of the public, an exercise carried out by the

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[250] African Rights, '*Kenya Shadow Justice*', op. cit., p.2.
[251] Human Rights Watch, '*HRW World Report 2000*', HRW, New York, December 1999, p.48.
[252] According to a Nairobi University Law lecturer. See Stephen Mburu, Special Report 'Why Judiciary needs a complete overhaul', *Sunday Nation*, 29 October 2000 at www.nationaudio.com/News/*Daily Nation*/29102000/Comments/Special_Report1.html.
[253] For full details on the structure of the judiciary and the appointment of judges, see '*Laws of Kenya The Constitution of Kenya*', Revised Edition (1998) 1992, the Government Printer, Nairobi, at http://www.richmond.edu/~jpjones/confinder/Kenya.htm
[254] *Daily Nation*, 'Lawyer calls for vetting', Nairobi, 5 June 2000, seen on http://www.africa.news.org
[255] Isaac Nyangeri, 'The Judiciary – room for improvement', Kenya, September 1997, in *ANB-BLA Supplement*, Issue No 337, 1st January 1998. For details on the magistrates' court system, see Article 19, 'Censorship in Kenya…', op. cit., p.20.
[256] A lawyer's statement, in 'The Judiciary – room for improvement', op. cit.

President and the Chief Justice. Parliament has no power to vet presidential appointments, which is seen by some as a major weakness in the Constitution.

VI.1.2 DISMISSAL PROCEDURES By amending the Constitution[257] in 1988 the government removed security of tenure from members of the judiciary, giving the President the powers to hire and dismiss judges at will.[258] It was forced to restore it two years later following substantial national and international pressure. Currently members of the judiciary can only be removed by a separate tribunal, but again the five-member tribunal is appointed by the President.

VI.1.3 RECENT EXEMPLES OF EXECUTIVE-BACKED APPOINTMENTS A typical '*Executive-backed*' judiciary appointment is illustrated by the case of William Tuiyot who, on 2nd June 2000, was sworn in as a judge of the High Court before President Moi, along two other members of the judiciary. William Tuiyot had no formal training in law (Magistrates and Judges should hold a Law Degree) and first served as an interpreter in the African Native Courts until their abolition in 1967. Yet within less than two years, between 1993 and early 1995, he was elevated from principal magistrate to senior principal magistrate to chief magistrate.[259] As he had served as a magistrate since the late 1970s, he was eligible to be appointed to the High Court judge.[260]

The Daily Nation reported how the appointment was immediately condemned by the Law Society of Kenya, saying that it was a setback to the judiciary and requesting him to resign within seven days.[261] Their objection was based on his professional credentials, and his past performance, in particular in the prominent political case of MP Koigi Wamwere who, following several arrests because of his political activities, was eventually charged with robbery with violence. During his trial Tuiyot had made a number of legal mistakes.[262] The LSK requested the Chief Justice, Bernard Chunga, not to allocate work to the new appointee, who was also accused of being involved in the disappearance of several case files in order to prevent people from making appeals or challenging his "*illegal orders*".[263] The People Against Torture and the Release Political Prisoners Pressure Group also condemned the appointment, declaring it to be "*a mockery of justice and a disgrace*", and requested its immediate revocation.[264]

In 1999, the appointment of Chunga itself had already caused an uproar in the legal community. Successor to Chief Justice Chesoni who died in 1999, he is known for "*his zealous prosecution of government critics*".[265] According to HRW, his appointment was seen "*to signal a serious step backwards for judicial independence*".

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[257] An amendment to the Constitution only needs 65% of Parliamentary votes to go through.
[258] African Rights, '*Kenya Shadow Justice*', op. cit., p.34.
[259] *Daily Nation*, 'LSK protests over new judge', Nairobi, 3 June 2000.
[260] *Daily Nation*, 'More protests over Tuiyot's promotion', Nairobi, 4 June 2000.
[261] Ibid.
[262] For full details on Koigi Wamwere's case and the conduct of Magistrate Tuiyot, see Article 19, '*Censorship in Kenya…*', op. cit., pp.13-22.
[263] Statement from the Law Society of Kenya, see above note 68.
[264] *Daily Nation*, 'More protests over Tuiyot's promotion', op. cit.
[265] HRW, '*HRW World Report 2000*', op. cit., p.48.

VI.1.4 'EXECUTIVE' INTERFERENCE IN COURT CASES - Direct interference from the Executive with the proceedings of cases is another way to exercise control over the judiciary and is an open secret. Few judges have openly criticised the practice and none has publicly resigned to protest against it.[266] In 1997 Justice Richard Kwach, a judge renowned for his professional integrity, withdrew from a case saying he could not make an '*independent judgment*' on it.[267] Interference by the Executive, which according to African Rights' own research has worsened in the 1980s (along with corruption), is not limited to cases in Nairobi. It is also endemic in the provinces but disguised by prevailing corruption. According to a lawyer interviewed by the organisation, "*seeking influence has become an integral part of the formal system*": Magistrates would sometimes receive a phone call about the "*instructions* (…) *concerning certain cases*".[268]

Executive interference remains a major problem in the judiciary. At the end of November 2000 a seminar of judges, magistrates and lawyers organised by the International Commission of Jurists (ICJ) called for an urgent comprehensive reforms in the judiciary, including the removal of the President's power to appoint chief justice and judges and other measures to fight corruption in the judiciary.[269] A senior judge pointed out that "*The problem is that the judiciary is seen as a third arm of the Government. But this notion is wrong. The judiciary is the most powerful arm of the Government*".

VI.2 JUDGES & MAGISTRATES INCOMPETENT

The current appointment procedures might explain the fact that the judiciary is the source of continuous criticism in Kenya. The incompetence of many judges was dramatically exposed recently when a university law lecturer declared in a seminar organised by the Law Society of Kenya, and later in an interview published by the *Sunday Nation* on 29 October 2000 and other media, that judges and magistrates were "*corrupt, incompetent, inefficient (…) and lacked professional knowledge to administer the law*".

Ahmednasir Abdullahi further asserted that "*most appointments are based on tribalism, nepotism and political expediency rather than one's professional capability*".[270] Referring to his own experience as a teacher, he explained how the judiciary was manned mainly by "*low calibre (…) magistrates and judges*" and that many of his students at "*the bottom 10 of their class usually opted to become magistrates (…) who usually lobby to be appointed judges after some time in the Judiciary*". Others would lobby to be appointed judges because of their incompetence as private practice lawyers. He was sternly criticised for his remarks by a High Court judge, whilst representing a client's case in a Commercial Court. The judge refused to hear him and requested a personal apology.[271]

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[266] African Rights, '*Kenya Shadow Justice*', op. cit., Chapter 5 'A rotten system corruption in the court', p.65.
[267] Isaac Nyangeri, op. cit. Justice Kwach was one of the members of the Commission set up to enquiry the murder of Foreign Minister Ouko (see below).
[268] African Rights, op. cit., pp65-66.
[269] *Sunday Nation*, 'Reforms in judiciary urged', Nairobi, 26 November 2000.
[270] Stephen Mburu, Special Report '*Why Judiciary needs a complete overhaul*', *Sunday Nation*, 29 October 2000 at www.nationaudio.com/News/*Daily Nation*/29102000/Comments/Special_Report1.html
[271] *Daily Nation*, 'Attack on Judiciary galls judge', Nairobi, 1 November 2000. Abdullahi replied to the request by stating that he had only used his constitutional right to freedom of expression and that the Judge should reply to his

VI.3 CORRUPTION IN THE JUDICIARY

Corruption was also highlighted by Ahmednasir Abdullahi as another major deficiency in the system. Whilst recognizing that judges of great professional integrity are sitting in the High Court and the Court of Appeal, the lecturer declared: "*Magistrates are the most corrupt of the lot and must never be appointed judges. They bring along with them the rot and mess they had been presiding over at the district level, perpetuate and perfect that corruption and mess in the High Court*".[272]

Corruption was also one of the issues raised at the November 2000 seminar organised by the ICJ (see above). It is prevalent and in addition to "*manipulation and abuse*", it is reported to have created "*a culture of impunity*".[273] Chief Justice Bernard Chunga declared in May 2000 that the endemic corruption in the courts of law had left the judicial system in shambles.[274] Corruption is not believed to be due to the fact that judges are not "*paid adequately*" but to the fact that only a few "*work with honour and integrity*".[275]

Ahmednasir Abdullahi claims that corruption is endemic as "*accused persons find it cheaper to deal directly with magistrates than defence lawyers because, at a fee, magistrates, unlike the lawyer, can guarantee the results*". It is known for instance that when people are caught in police '*swoops*' (which target specific groups and are often politically motivated) and brought to court, there is no trial as such (usually they are arrested on a week-end and appear in court on a Monday) because "*the magistrate wants to dispose of them quickly, and usually with fines. (…) Lack of evidence is not an issue (…) there is no prosecution. There is no concern with guilt and innocence*".[276] If people claim '*not guilty*', they get a very harsh sentence or fine which is a way to discourage others to follow suit.

A lawyer revealed how magistrates who try to do their job with integrity are penalized: "(…) *the high point in my practising career was when one of the magistrates here would routinely grant bail unless there was an objection from the prosecution. He was transferred*".[277]

VI.4 CONSEQUENCES FOR DETAINEES OR PRISONERS

The picture is that of a judicial system with major shortcomings in terms of integrity and accountability. Indeed, the interference of the Executive, the incompetence of appointed judges and the widespread corruption are factors that are directly undermining the rule of law in Kenya. There are implications not only for the quality of trials conducted in courts, but also for the life (or death) of people awaiting trial.

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criticism via the media. This was done by Justice Richard Kwach in the *Sunday Nation*, 'Judiciary: The claims and the true position', 12 November 2000.

[272] Stephen Mburu, op. cit.

[273] African Rights, '*Kenya Shadow Justice*', op. cit, p.2. Also Chapter 5 'A rotten system: Corruption in the court pp62-70.

[274] *Daily Nation*, 'Judiciary broke, Chief Justice admits', Nairobi , 16 May 2000.

[275] The comment is from MP Kihoro who also declared that greed alone was behind judges' unethical practices. *Daily Nation*, 'Judges pay demand is supported', 16 October 2000.

[276] Testimony from the chairman of International Commission of Jurists Kathurima M'Inoti, interviewed by African Rights, '*Kenyan Shadow Justice*', op. cit., p.10.

[277] African Rights, ibid., p.67.

VI.4.1 PEOPLE ON REMAND & PRISONERS - The prevailing corruption is responsible for many people being detained on remand when they should be released on bail. According to a lawyer "*if the magistrate is bad – and (…) most of them are – bail is not granted.* (…) *Why no bail? It boils down to corruption*".[278]

For prisoners awaiting trial, including victims of the clashes and criminalized political activists, these factors, along with the shortage of crucial resources, mean that they can be detained for months before being heard. According to Amnesty International, "*much of the overcrowding is due to the large number of people held on remand* (…) *who often wait up to three years for their case to come to court*".[279] For prisoners on capital charges, the wait might be as long as five years. Dreadful detention facilities might lead to the death of these prisoners and/or they might be victims of all sorts of ill-treatment that could also be fatal (see PART V.4.1 to V.4.5).

VI.4.2 IMPACT ON COURT CASES Delays in court cases and the disappearance of case files handled by court clerks are said to be current practice. Another major failure in the administration of justice is the absence of law reporting which, in addition to the fact that some judges do not understand the law adequately, results in "*inconsistency in the application of law*".[280] It also allows judges to bend the law according to the whims of those in power. The problem is said to be particularly acute in the provinces. Two people charged with the same crime are often given different sentences. Worse, people who plead guilty are given "*favourable*" sentences compared to those who refuse to do so (who might therefore be subject to further degrading treatment or torture at the hands of the police) which reveals a system that "*operates more on an assumption of guilt than innocence*".[281]

VI.5 ACCESS TO JUSTICE

According to information provided by lawyers and victims of arbitrary arrests, the main reasons why people do not contact a lawyer are cost, ignorance of the law and lack of confidence in the system.[282] However, there are also other obstacles which make recourse to justice even more difficult for the average Kenyan.

VI.5.1 THE SHORTAGE OF RESOURCES IN THE JUDICIARY Lack of courts and a shortage of magistrates represent another serious infringement to access to justice, especially in zones outside of Nairobi and other major towns such as Mombasa or Nakuru.

According to figures provided by African Rights, in 1996 there was 1 magistrate (standing magistrate or judge) for 119,259 people in the Rift Valley as opposed to 1 magistrate for 20,215 in Nairobi.[283] A similar proportion of magistrates (one for a population of 120,000 to 130,000) was found for the Western Province, Nyanza and Eastern Province. The worst

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[278] Ibid.
[279] Amnesty International, '*Kenya, Prisons…*', op. cit., p.3.
[280] Stephen Mburu, Special Report '*Why Judiciary needs a complete overhaul*', *Sunday Nation*', 29 October 2000., op.cit. Also reported by African Rights, op. cit.
[281] According to African Rights, op. cit., but Article 19 and other human rights group have also highlighted the phenomenon, in particular in the context of the ethnic clashes. See REFERENCES on ethnic clashes.
[282] African Rights, op.cit., p.9.

situation is in North Eastern Kenya for which the proportion was 1 to 151,148 people (at the time there was no High Court in this province). In comparison, the South-East of England has a ratio of 1 judge for 13,220 and the North East one for about 8,300 people.[284]

The situation has not improved much since, as Chief Justice Bernard Chunga recently declared that the judicial system could not effectively dispense justice due to a lack of resources, including judges (currently 26), and inadequate court facilities countrywide.[285]

VI.5.2 THE COST OF JUSTICE The great majority of people cannot even afford to pay the fee to open a file. Case and court fees are each about twenty times as much as the filing fee. In the words of a legal practitioner, "*the costs of justice are cruel*".[286]

Based on a system that sought to maintain a small political elite, Kenyan justice discriminates *de facto* against the great majority of Kenyan people. In terms of representation, it is estimated that only 10% people benefit from some form of legal aid, usually from private funds as there is no official legal aid system in Kenya. People with low income may apply to a voluntary organisation working under the auspices of the Law Society for assistance but very few have this opportunity. There is also no legal aid provision for those facing capital offences, contrary to Article 14.3 (d) of the ICCPR to which Kenya is a signatory.[287]

Women are victims both for economic and social reasons. Women are the poorest in Kenya[288] but many are arrested on minor offences for activities they undertake to provide for their families, such as selling second-hand clothes or brewing alcohol (for which they need a licence) or prostitution. If they are caught, they face jail sentences, as they are usually unable to afford to pay the fine (between $10 and $20: an average labourer's income is estimated to be less than $1 a day), let alone a lawyer.[289] Many destitute people are also arrested during '*emergency ethos swoops*' under the '*Vagrancy Act*' and are often charged with being "*vagrant, suspicious and malicious*".[290]

In the absence of a proper legal aid system, recourse to representation is therefore extremely limited especially for the most vulnerable groups.

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[283] African Rights, Table B, op. cit., p.268.
[284] UK figures include circuit full-time Circuit and District Judges and part-time Deputy District Judges. Figures (as per 1st November 2000) provided by the Lord Chancellor's Department. Population figures obtained from www.ons.gov.uk (estimates for 1999).
[285] *Daily Nation*, 'Judiciary broke, Chief Justice admits', op. cit.
[286] African Rights, op. cit., p.64.
[287] Article 19, '*Censorship in Kenya, government Critics face the death Sentence*', op. cit., p. 18.
[288] It was estimated that 47% and 29% of the population was living below the poverty line ($1 per day) in rural and urban areas respectively at the end of 1999. 80% of people are living in rural areas of which 90% earn their livelihood from agriculture. The great majority of women are living in rural areas or in the poorest parts of urban areas. See Lori Bollinger, John Stover, David Nalo, '*The Economic Impact of AIDS in Kenya*', the Policy Project, September 1999. Also Diana Lee-Smith, '*My house is my husband: A Kenyan study to women's access to land and housing*", Lund, Lund Univ., Lund Institute of Technology, 1997, 192p.
[289] African Rights, '*Kenya Shadow Justice*', op. cit., p7.
[290] African Rights, ibid. Women's groups and human rights organisations have been calling for the repeal of the Act, so far to no avail..

VI.5.3 THE SHORTAGE OF LEGAL REPRESENTATION Even if they could afford to get a lawyer and pay for the court fees, people are restricted by the fact that the number of lawyers is small and they are geographically concentrated in urban centres. In 1996, there were 1,501 lawyers registered with the Law Society of Kenya, i.e. a national average of one lawyer for 17,442 people.[291] By comparison, there are currently 180,640 solicitors in England and Wales which gives an average of 1 solicitor per 292 people.[292]

1,083 or 72% of registered lawyers in Kenya were based in Nairobi, giving a concentration of 1,493 people per lawyer in the capital. In the Coastal province, with the next biggest number of registered lawyers in Mombasa (100), the concentration rises to 20,303 people per lawyer. In any other provinces, there are between over 55,000 and 115,000 people per lawyer. Besides the most important provincial urban centres (including Nakuru, Meru, Eldoret, Kisumu and Nyeri) less than five lawyers are registered in 2/3 of the 35 other provincial towns. Yet African Rights reports that "*lawyers rarely travel to towns that are difficult and expensive to reach*", a view corroborated by FIDA according to whom '*the costs of following up a case in the provinces are enormous*'. The result is that "*the administration and security forces take full advantage of the remote location to exercise sweeping powers*".[293]

This is illustrated in regions which have been declared under '*state of emergency*' (like the North and North East of Kenya) and also in places when justice is '*administered*' by the chiefs empowered by the state to run the districts in the rural provinces (see PART VII.2). In both cases women are particularly vulnerable to all sorts of abuse whilst having few avenues to recourse to justice. There are cultural reasons for this, but other reasons too: there may be no courts in the areas they are living in or the chief may have taken matters into his own hands; also there is no legal aid system nor any lawyers to explain their rights to them and how they could seek justice if they have been violated, whether it be related to a violent assault or a problem of inheritance or land rights (see PART VIII.1).

VI.5.4 FAILURE TO EDUCATE PEOPLE ABOUT THEIR HUMAN RIGHTS A fundamental flaw in the system is the lack of political will to educate people about their rights, and this is particularly true for women. In rural Kenya, where two thirds of the country's population live, many people are unaware of such a thing as '*the Law*', let alone Constitutional Rights. Reflecting this lack of knowledge are the comments of a women who said she "*had never encountered the law*"; another woman asked in a para-legal course "*this law that we are hearing about now; is it something that is new, or is it there, or has it been*".[294]

At the launch of a legal educational programme aimed at women in Mombasa, a court of appeal judge admitted that "*most of Kenyans* [were] *ignorant of the law*".[295] Ignorance of the law and the economic obstacles to finding representatives are major impediments to people

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[291] All figures provided by African Rights based on the 1996 registration list of the LSK. See '*Kenya Shadow Justice*', op. cit., p.36 and Table B p.268.

[292] Figures communicated by the Law Society (London) in November 2000. The UK figures relate to solicitors only; if barristers were included, the numbers would be even starker. According to the *Nationa*l Office for Statistics there was an estimated population of 52,689,900 in England of Wales in mid-1999. See http://www.statistics.gov.uk/popest_mid99.asp

[293] African Rights, op. cit., pp36 & 215.

[294] Unless otherwise stated, information and quotes are drawn from African Rights, op. cit.

[295] The 'Christian Legal, Education, Aid and Research' programme was launched by the Women's Network Centre in Mombasa in October 2000. See *Sunday Nation*, 'Now judges lobby for 800% pay rise', 15 October 2000.

seeking and getting justice. As a result, the average Kenyan does not understand legal procedures, or what is happening in court. S/he comes to court "*confused, fearful and open to exploitation*".

Worse, people are intimidated into not seeking legal representation, not only by the police but also by magistrates themselves. A legal practitioner in Meru mentioned in 1996 the case of a magistrate who was "*shout*[ing] *at people in court if they protest*[ed] *that their advocate* [was] *not yet there*". The magistrate was also known to intimidate people by saying: "*Do you think that the advocate will determine this case? I will decide this case*". Unfortunately, this is not a unique case. The lawyer further explained how both the police and the magistrates think that "*if money is going to be paid on* [the] *case*, *it should be paid to them*".

One area where ignorance can have a significant impact on people's cases (and lives) is the fact that many people are not even aware that they can ask for bail. They end up locked up on remand which, given the conditions of detention ("*death chambers*" according to a High Court judge) and the systematic use of torture or degrading treatment, is tantamount to punishment before even having been tried. The situation is made worse by the fact that the backlog of cases is phenomenal, according to recent press reports.

Independent attempts to educate people about their rights and the justice system have been met with hostility in the past especially in the provinces outside of Nairobi or major urban centres.[296] Local chief administrators saw the work of para-legal groups as a way to undermine their (extensive) powers. In 1997, when women's groups were trying to educate rural women about their civil rights, they were met with outright violence (see PART VIII.5).

VI.5.5 CULTURAL PREJUDICES AND MISTRUST OF THE JUSTICE SYSTEM - The factors mentioned above reinforce cultural prejudices *vis-à-vis* the statutory law and public distrust in the justice system. People tend to rely on customary laws and local avenues because they do not know much about the system, but also because they associate the corrupt judiciary with the state. They perceive the system as working against them. Yet recourse to customary laws is often "*particularly unfair*" to groups traditionally suffering discrimination, including women, as the cases of land inheritance or land disputes illustrate (see PART VIII.1).
So low is public confidence in the police and the justice system that mob justice, through lynching and killing, has increased dramatically in the last five years alone, especially in the urban centres, culminating in the last three months of 2000 with a series of mob lynchings and killing of people accused of the abduction and murder of children in Nairobi.[297]

[296] African rights, op. cit.
[297] For more on the emergence of '*mob justice*' see African Rights, op. cit., chapter 13 'Instead of Justice: Mob Violence', pp241 to 260. Incidents of '*mob justice*' were also widely reported in the local press in the last three months of 2000 alone. See also Declan Walsh, 'Great African hope spirals out of control', *The Independent on Sunday*, London, 26 November 2000.

PART VII:
THE KENYAN GOVERNMENT'S COMMITMENT TO HUMAN RIGHTS

VII.1. '*AFRAID OF THE TRUTH*': ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES Kenya is party to a number of international covenants and conventions which, in theory, provide numerous guarantees for the protection of human rights. However, there has never been a genuine commitment from the Kenyan government to implement laws and measures to guarantee the respect of Kenyan citizens' human rights. It was only in February 1997 that the government ratified the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment, and this was only done after mounting criticism and international exposure of the human rights situation in Kenya.[298] In any case human rights abuses did not stop with the ratification of the Convention. Moreover, as we have shown previously, the government is in denial when it comes to recognizing the prevailing abuses of people's rights in police custody, prison detentions and even often also in people's homes by state security forces.

VII.1.1 '*PROPAGANDA PURPOSES*': INVESTIGATING HUMAN RIGHTS ABUSES According to a court of Appeal Judge in Nairobi, commissions and bodies in Kenya are only established by the government "*for propaganda purposes*".[299] In his experience, he said, "*if there is one subject that the government never wants to talk about, it's human rights.* (…) *Human rights and the independence of the judiciary are taboo subjects*".

So far, a review of the role and achievements of commissions set up to investigate human rights abuses and mismanagement of funds would support the judge's statement. Whenever such commissions are established, their terms of reference are always limited and/or the Commission does not have the resources to carry out in-depth investigations. In other cases, the KANU-backed government has attempted to prevent the creation of such commissions or to undermine their work.

The Commission of Inquiry in charge of investigating the murder of Kenya's Minister of Foreign Affairs, Dr John Ouko, was made redundant when President Moi ended its mandate less than a year after its establishment in 1990. In November 1996 the Attorney General announced the creation of a Standing Committee on Human Rights, comprising nine members to be appointed by the President. The Committee's terms of reference included the investigation of all claims of violations of human rights and fundamental freedoms guaranteed in the Constitution, except for matters pending before the courts and others concerning relations with foreign governments or international bodies. However the work of the Committee was circumscribed from the beginning due to shortage of resources and a lack of independence from the Executive. The Standing Committee was to report only to the President, and confidentially; their findings might not be made public. Doubts were expressed by some about the impartiality of the Chairman, Professor Onesmus Mutungi, who was described by one person as being "*a long time defender of the excesses of the Moi government* [who] *has a well known antipathy for human rights activists*".[300]

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[298] KHRC, '*Mission to repress*…', op. cit., p. 4.
[299] African Rights, op. cit., Chapter 12, pp.219-240.
[300] KHRC, '*Mission to repress*…', op. cit., in Chapter One 'Introduction', p.3.

The Motion for the creation of a '*Truth Committee to probe killings*"[301] following the 1998 ethnic clashes (and the politics behind them) was successfully adopted by Parliament in April 1998 despite being opposed by KANU MPs. The government had tried to "*water down*" the motion through an amendment but unexpectedly lost the vote as some KANU MPs voted for the original motion or else walked out of the Chamber. After the vote, a MP for the Democratic Party told the House that "*Kenyans will be counting to see who voted for the Motion and this will tell them who is supporting ethnic clashes (…) it now shows who is afraid of the truth*". He added that "*the cause of ethnic violence was 'primitive politics' and not tribalism*".

The Akiwumi Commission, which was subsequently created by President Moi, was seen as an attempt by the government to "*fend off independent investigations into alleged state involvement in the violence*". The Commission finally reported to the President who has not agreed to its publication. Several court actions failed to get it published.[302] The criticism was also confirmed by the way the commission completed its task after victims had said that it had neglected crucial video evidence implicating members of the government, including senior cabinet ministers, inciting the killings. When representatives of the victims took the commission to a Kenyan court (in order to get their evidence fully heard), the judge rejected their case. The commission was closed down in 1999 with all hopes of the perpetrators being brought to justice vanished.[303] However 231 victims of the 1991-1992 ethnic clashes took further steps to sue the government when their lawyer issued a notice of intention to sue the Attorney-General for the state's failure to provide protection. They sought damages for the deaths of their relatives and for the destruction of millions of Kenyan shillings' worth of property.[304]

In October 2000 the Attorney General, Amos Wako, published a National Commission on Human Rights Bill which, if approved by Parliament, might become law.[305] The commission, which would be created by Parliament and would replace the four-year-old government-dominated Standing Committee on Human Rights, would have powers to visit remand homes, prisons and other detention facilities. It would also have powers to investigate human rights abuses, release prisoners and set compensation for victims. Individuals would be able to lodge complaints either verbally or in writing about treatment by public officials and the Commission would have the authority to interview people on human rights abuses. It would also play a role in educating the Kenyan people on their rights by giving public lectures and carrying out research, and would ensure that the government respects its international human rights obligations.

However it is feared that the President would have the power to appoint the commissioners, who will have the status of High Court judges but whose loyalty would be compromised (the chairman of the commission would have the status of a judge of appeal). In addition, several lawyers have expressed doubts about the government's intention to open up the prisons to an independent commission, and one lawyer stressed

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[301] *Daily Nation*, 'Kanu loses in key Motions', Nairobi, 30 April 1998.
[302] Dr Louise Pirouet, Personal correspondence.
[303] See Michael Njuguna & Mark Agutu, 'Compensate clash victims, Kiliku urges government', *in Daily Nation*, Nairobi, 27 March 1999.
[304] *BBC News*, 'Ethnic violence tribunal under fire', 30 June 1999 and 'Kenya violence victims 'to sue government", 29 July 2000.
[305] *Daily Nation*, 'Prison secrecy to end', Nairobi, 17 October 2000.

that it was just a strategy to "*cheat the donors over its intention of improving its human rights record*" which has been widely exposed internationally.[306] Also, the commission would not be able to investigate cases that are pending before the courts or those involving the President's right to free suspects.

VII.1.2 COMPLIANCE WITH NATIONAL AND INTERNATIONAL OBLIGATIONS As the evidence we gathered in this report demonstrates, being a party to human rights conventions does not suffice to guarantee freedom from human rights violations. In Kenya, violations of such rights by law-enforcement agents and supporters of the current regime are rife and are systematically perpetrated in breach of both national and international laws.

Currently Kenyans' political and civil rights are enshrined domestically in the Bill of Rights Chapter V of the Constitution, sections 70 to 82 and section 84.[307] They include: section 70 (on fundamental rights and freedom generally), section 71 (protection of right to life), section 74 (protection from inhuman treatment) and sections 78 to 81 (protection of freedom of conscience, expression, assembly and association and movement respectively). In theory, section 84 provides for enforcement of protective provisions.

However, a number of amendments and '*claw-back*' clauses have been adopted that directly infringe on constitutionally recognized civic and politic rights. For instance, organizers of meetings are required by the Public Order Act to notify the Police in advance (until November 1997, they were requested to obtain a permit from the police or local authorities). A number of laws drastically restrict people's freedom of expression, such as Section 66 of the Penal code, the Defamation Act and the Official Secrets Act.[308] On the other hand, the use of the law of incitement to violence is used both too broadly and with a evident lack of even-handedness, directly targeting political opponents. The law of sedition has also been widely used to imprison government critics.

There is also a lack of ant institutional framework for protection and enforcement of constitutional rights, as reflected in the absence of a truly independent judiciary or any other independent human rights commission or ombudsman system.

In addition to national provisions, Kenya has ratified the International Covenant on Civil and Political Rights (in 1984) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in 1997). Kenya is also a signatory of the African Charter on People's and Human Rights.

Like article 74(1) of the Kenyan Constitution, Article 7 of the ICCPR provides that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". The right to be free from torture and degrading treatment at the hands of the police is enshrined in article 14 (A) (2) of the Police Act (amended in 1997) and in article 10 of the ICCPR: "*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the*

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[306] *Daily Nation*, 'Prison secrecy to end', op. cit.
[307] For full details see 'Sowing the Constitutional Seed in Kenya', Nairobi, 1996, p. 210 and http://www.richmond.edu/~jpjones/confinder/Kenya.htm .
[308] For full details, see Article 19, '*Kenya: Post-Election Political Violence*', op. cit., p.12-13.

human person". Current documentation on the occurrence of torture and inhuman treatment in Kenya shows clearly that these provisions are consistently violated. And it is also the case that, as we mentioned previously in this report, there are no provisions relating to torture in either the Penal Code or the Code of Criminal Procedure.[309]

This means that in theory, there are legal instruments, to which the government is bound in law, to pursue perpetrators of torture and inhuman treatment on Kenyan citizens, whether they are state agents or not. Yet the above mentioned UN Convention Against Torture also provides that any state party to it is obligated "*to ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction*". In Kenyan domestic law, Section 14 (A) (3) of the Police Act also states that "*Any police officer who contravenes the provisions of this section shall be guilty of felony*". However there is ample evidence that prosecutions of police officers guilty of such acts are extremely rare.

The example of the legal issue around torture demonstrates that not all regional and international provisions for the protection of human rights have been integrated into Kenyan domestic law (it is the same with the provisions of CEDAW). An official signature on an international convention for the protection of human rights is unfortunately not tantamount to an unconditional commitment to respect these rights.

VII.2 REFUGEE WOMEN IN KENYA

Refugee women in Kenya are no better protected than Kenyan women when it comes to abuses against them.

VII.2.1 PREVALENCE OF VIOLENCE IN REFUGEE CAMPS There have been numerous reports, especially since 1993, giving accounts of violence suffered by women in Kenya's refugee camps located in the North East and North West.[310]

A researcher for a US human rights group recently revealed that banditry and paramilitary activity in the camps were rife and that Dadaab was a "*nerve centre for arms trafficking*" affecting the whole of Kenya and East Africa.[311] She described an "*appalling level of violence*" as well as the "*rampant corruption among local officials*" that have been siphoning off international and national funds channelled in the area and how the police "*are part of the problem*".

She contended that the government had neglected the region because of its mostly ethnic-Somali population. According to the testimonies she gathered, a similar situation is to be

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[309] UN Report of the Special Rapporteur, op. cit., p.14. See also KHRC, '*Mission to Repress…*', op. cit.

[310] See Human Rights Watch, '*Seeking refuge, finding terror: the widespread rape of Somali women refugees in North Eastern Kenya*', 1993; African Rights, '*The nightmare continues… abuses against Somali refugees in Kenya*', London, 1993 and Lawyers Committee for Human Rights, '*African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*', New York, 1995. More recently, Binaifer Nowrojee, '*Target for retribution*', Human Rights Watch, New York, 1997; Mary Ann Fitzgerald and Shep Lowman, '*Gender violence and kidnapping of women and children at Kakuma Refugee Camp*', Refugees, vol. 2, no. 115, 1999; and the Kenyan Human Rights Commission, '*Haven of fear: the plight of women refugees in Kenya*', Nairobi, 1999.

[311] Kevin J. Kelley *in Daily Nation*, 'Dadaab an "arms centre" ', Nairobi, 18 November 2000.

found in the Hagadera camp where gangs are reported to "*prey on minorities living there*". Few weeks only after the research was revealed, 12 people were killed in an attack carried out by Ethiopian militiamen in Wajir. A four year-old girl was also abducted and ten houses were burnt down (some of which were reported to be very close to the police station). The local population accused the government of failing to protect them.[312]

Indeed, the reports published in the last few years on the issue of safety in the camps describe a situation where women's safety and integrity are systematically violated, resonant with the brutality they had to suffer in the their countries of origin, and where people "*have been brought up without justice and under the rule of the gun*".[313] The violence is not confined to women, but reflects the level of insecurity and lawlessness in the region. According to Jeff Crisp of UNHCR, people living in the camps (about 200,000 refugees mainly from Somalia and Sudan but also Ethiopia and Eritrea) are living in a climate where '*security incidents involving death and serious injury take place on a daily basis*'.[314] Despite the fact that additional security measures were implemented by the UN, the security situation has deteriorated, with the number and the gravity of incidents being on the rise.[315] Like men, women have to live with the fear and consequences of armed robbery and banditry, violence between national refugee groups and violence between refugees and local populations. The situation is so critical that international and local agencies travel from one camp to another and within the camps under police escort and only at certain hours of the day.

Women also suffer, on a daily basis, gender-specific violence such as domestic violence and sexual assaults, both within and outside the camps' boundaries.

VII.2.2 GENDER VIOLENCE IN REFUGEE CAMPS The UNHCR report reads that "*much of the violence experienced by refugees in Kenya is inflicted upon them by members of their own family and community. According to aid agency staff, domestic violence (…) is a regular occurrence within the camps*". One staff member reported that "*housewives are harassed and at times beaten by their husbands. This, unfortunately, has been accepted as normal by the majority of Somali refugees. Such incidents are hardly ever reported to the police or to UNHCR*".[316] Another female member of staff pointed that "*Sudanese refugee women are subject to significantly more domestic abuse in the camps than is normally the case within southern Sudan".* Whilst some tried to explain the phenomenon within the new context of women's empowerment by refugee agencies and the lack of opportunity for men to fulfil their traditional functions, Sudanese men have apparently legitimised their violent behaviour in the camps by referring[317] to a number of cultural traditions.

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[312] Sunday Nation, '12 killed in Wajir attack', Nairobi, 3 December 2000.
[313] Jeff Crisp, 'A state of insecurity: the political economy of violence in refugee-populated areas of Kenya', in *Refworld*, December 1999, at http://www.unhcr.ch/refworld/pub/wpapers/wpno16.htm 25p (p.16). An edited version of this paper can also be found in *Refugee Survey Quarterly*, 'Forms and sources of violence in Kenya's Refugee Camps', Vol.19, N.1, 2000, pp54-70.
[314] Jeff Crisp, op. cit., p.1.
[315] The UNHCR paper refers in particular to the camps in Kakuma and near Dadaab (Ifo, Dagahaley and Hagadera) in north west Kenya. In one security report dated of March 1998, 2 people were reported dead and 184 seriously injured within two weeks.
[316] Jeff Crisp, 'A state of insecurity…', op. cit., p.3 of 25.
[317] The term used by UNHCR is 'inventing'. Op. cit., p.17 of 25.

It had also been reported that domestic violence is triggered by arguments over the selling off of basic food rations in order to pay for men's narcotic needs.

Although largely underreported, it is also known that rape has been prevalent in the camps ("*daily and nightly occurrences*" according to the Lawyers Committee for Human Rights[318]) almost from the time they set up in the early 1990s and the phenomenon has been continuously highlighted ever since.[319] In August 1998, Mary Anne Fitzgerald wrote that "*Seven years after escaping the chaos and violence of Somalia's clan warfare, thousands of Somali women continue to encounter rape and assault on a daily basis in their place of refuge*".[320] For March 1998 alone she reported 24 incidents of sexual assaults in which women aged from 10 to 50 were also "*shot, knifed, severely beaten and robbed*". She further reports that victims are often gang-raped by groups of armed men when they go out in the bush to collect firewood (or building materials). In such a semi-arid environment, they often have to walk up to 10km or even more to find it.

Rape is also occasionally used as a weapon of war or revenge attack within the context of clan-based violence which is widespread amongst Somali groups. A Somali student who lived in one of the camps wrote that "*it is not uncommon for a woman to be singled out from a group of women and raped if she was not from the clan of the attackers*".[321]

Exposure to rape can be compounded by other forms of violence when huts or houses are burnt down as a result, for instance, of inter-clan clashes or fighting between different national refugee groups. The women have to pick up the pieces and look for more building materials to rebuild their houses. The perpetrators ('*bandits*') are also involved in other criminal activities and are believed to be "*a mixture of local Kenyans, Somali refugees and, less frequently, Somalia-based militia members engaged in cross-border raids.*"[322] It has also been reported that local security forces have been involved.[323]

Women are also threatened with abduction at night within the camps.[324] Abductions of women, mainly for forced marriage back in Sudan (even if the woman is already married), are believed to represent the majority of cases of gender violence in Kakuma refugee camp. Forced marriage is a common custom in Dinka and Nuer communities and also affects

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[318] Quoted in Jeff Crisp, op. cit., p5 of 25.
[319] See reports mentioned in footnote 59. Figures for rape crimes are difficult to establish with certainty.
[320] Mary Anne Fitzgerald, 'Firewood, Violence Agianst Women, and Hard Choices in Kenya', Refugees International, August 1998, at http://www.refintl.org/ . Other papers from the same author on the situation of gender violence in Kenya's refugee camps include: 'Protect Refugee Women as They Gather Firewood' (written with Shep Lowman), *The International Herald* Tribune, Paris, 27 August 1998; 'Gender Violence and Kidnapping of Women and Children at Kakuma Refugee Camp', 26 March 1999; 'Safe Haven for Women Opened at Kakuma Refugee Camp', 26 April 2000.
[321] The UNHCR report, op. cit., makes reference to Alfred Orono, '*Analysis of 1993-1998 rape statistics for Dadaab refugee camps and suggestions for prevention of sexual violence in an overall crime prevention initiative*', BA dissertation, Univ.of Alberta, March 1999.
[322] They are actually wearing masks to avoid being identified. See Jeff Crisp, op. cit., p5 of 25.
[323] See http://www.anaserve.com/~mbali/ourbacks.htm. 'Thousands of Somali women who fled to Kenya to escape war and famine face rape in this country', November 1993 and *Associated Press*, 'Reports Cite Brutalization of Women", the Fargo Forum, 7 March 1994.
[324] Mary Anne Fitzgerald and Shep Lowman, 'Gender Violence and Kidnapping of Women and children at Kakuma Refugee Camp', op. cit.

widows who may be forced to marry a surviving brother. An aid worker testifies that the practise is "*a constant torture for [the women]. What these men are doing is slow terrorism*".[325]

Other forms of sexual violence in the camps include FGM, practised by more than 90% of Somali communities,[326] abduction of Sudanese girls or women who are forced into marriages in Sudan, and sexual abuse amongst Sudanese boys or teenagers. Deep infibulation procedure, which involves cutting off the clitoris and the vulva and sewing together the girl's genital labia, has been traditionally practiced in Somalia for more than 30 years.[327] In addition to the traditional health risks associated with FGM, refugee women who are living in such a threatening environment can suffer additional trauma and contract life-threatening diseases. Referring to the case of Somali women in Kenya, Kristin Trangsrud of the School of Public Health, University of North Carolina, writes that "*it is difficult to comprehend the trauma endured by infibulated women and girls who have been raped or have become sex workers. Because of the tight, inelastic opening left from FGM, sexual intercourse often causes vaginal fistulae and bleeding in women (…). It seems logical, therefore, that they would be highly susceptible to contracting and spreading HIV as well as other sexually transmitted diseases*".[328]

VII.2.3 CONSEQUENCES FOR VICTIMS OF SEXUAL VIOLENCE The consequence of sexual violence against women, in particular rape, is impossible to describe in any normal circumstances. In Somali society, the trauma is extreme for both cultural and physical reasons. The rape of a woman "*confers the loss of a woman's sexual purity*" and victims "*bear the stigma of adulterers*".[329] Increasingly, young girls have their legs bound together for days as it is believed that this will restore their virginity. Others will be seen as outcasts. Fitzgerald and Lowman mention the case of a girl of 12 who, after being raped by five men on her way to school, had been confined to her hut as people were throwing stones at her.[330] Women are often divorced by their husbands, expelled from the family and ostracised by their community. They find themselves deprived of both traditional social and economic support and some resort to prostitution to provide for themselves (with all the psychological implications). Also, because the great majority of Somali women (up to 97%) are subjected to infibulation,[331] their attackers use knives to slit open the women's vaginal openings.[332] The attack leaves them with agonizing pain and long-term medical and psychological problems, including feelings of shame and guilt.

The situation is particularly grave for Somali refugee women as, unlike in other communities where men have taken to collecting firewood or to escorting and protecting the women, Somali men have refused to do so as they say they would be attacked and murdered (in the context of clan-based violence) and that the women would still be raped.[333]

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[325] Ibid.
[326] See ReligiousTolerance.org, at http://www.religioustolerance.org/fem_cirm.htm , p. 3 of 10.
[327] See UNHCR, 'Video versus tradition', 1996, at http://www.unhcr.ch/issues/women/rm10507.htm . Women circumcisors earn vast sums of money even in the refugee camps.
[328] Kristin Trangsrud, 'Female Genital Mutilation: Recommendations for Education and Policy', Univ. of North Carolina at http://www.unc.edu/depts/ucis/aboutucis/carolina/FGM/FGM.html
[329] Mary Anne Fitzgerald, '*Firewood, Violence Agianst Women, and Hard Choices in Kenya*', op. cit.
[330] Mary Anne Fitzgerald and Shep Lowman, 'Protect Refugee Women as They Gather Firewood', op. cit.
[331] The aim is to preserve the woman's sexual purity mentioned above.
[332] Mary Anne Fitzegarld, '*Firewood, Violence Against Women, and Hard Choices in Kenya*', op. cit.
[333] Jeff Crisp, op. cit., p.19.

VII.2.4 JUSTICE FOR REFUGEE WOMEN Perpetrators of violence against refugee women in Kenya benefit from impunity for several reasons. There are cultural and social reasons. The feelings of shame and guilt are compounded by a society where the victims are seen as being responsible and are branded '*adulterers*'. According to Alfred Orono "*the civil war in Somalia led to the breakdown of the traditional institution of crime control. The protection normally accorded by the parameters of one's village and kin was destroyed. (…) The population has lost confidence in their leadership and views them with suspicion; after all, they were not able to halt the killings and rapes back in Somalia*".[334]

There are also institutional reasons that relate to the Kenyan judicial system and law-enforcement bodies (see PART VI). The police are known for the laxity of their work – rarely do they undertake any investigations, let alone arrest a suspect.[335] Clansmen have also used violence or threats to intimidate witnesses and families of victims, whose security is permanently at risk with no effective witness protection measures. Refugees have said that they have lost confidence in the police. The judicial system in the region is also very weak; there are no courts near the camps themselves and people have to travel to Garissa (110 kilometres away).[336] In addition, refugee women have to face the same shortcomings as Kenyan women when it comes to seeking and getting justice. The northern region of Kenya is notorious for its deprivation; it is sparsely populated by poor nomadic pastoralists (ethnic Somali) and access to any form of services is extremely limited.[337] The police force in the region is often young and inexperienced and there are no female police officers. As in other parts of the country, there have been allegations from human rights groups that the police are also involved in violence against refugees.

As a result, women refugees in Kenya have to live in constant fear of being sexually assaulted with the knowledge that even if they report the attack (and many don't), they will not be given reparation for the trauma they would have suffered, neither under international laws (Kenyan refugee policy confers responsibility for the refugees to the UNHCR and other international actors) or national ones.

VII.2.5 TRADITIONAL JUSTICE Tradition in the camps is tightly administered by male elders who also ensure the administration of traditional justice.[338] Therefore although justice is administered by the refugees' own indigenous institutions or customary laws, women rarely benefit from it. Within the Sudanese community, these institutions, embodied in 'traditional judges' and 'bench courts', have "*powers of arrest, adjudication and punishment*". They also have their own prison facility (built with the help of an international NGO).[339]

The administration of justice in the Somali community is based to a large extent on the payment of compensation to the aggrieved person or family for the crime committed (also

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[334] Jeff Crisp, op, cit. pp16-17.
[335] Unless otherwise stated, all information in this paragraph from Jeff Crisp, op. cit., pp. 14-17.
[336] See also African Rights, '*Kenya Shadow Justice*', op. cit., pp. 23 to 24.
[337] For background information and human rights abuses in the North East, see J. Caneiro, '*The Forgotten People*…', op. cit.
[338] Mary Anne Fitzgerald and Shep Lowman, 'Gender Violence and Kidnapping of Women and children at Kakuma Refugee Camp', op. cit.
[339] Jeff Crisp, op. cit., p. 4.

known as 'blood money' or *mashalah*). As put by the UNHCR, "*the settlements reached (…) seldom, if ever, benefit the survivor of sexual assault*". A woman victim of rape would be either forced to 'marry' her aggressor or a payment would be paid to the male members of her clan or her family. Under Somali customary law, she would not be permitted access to it.[340]

VII.2.6 REFUGEE WOMEN'S SAFETY UNDER INTERNATIONAL LAW Even if UNHCR has been widely criticised for being partly responsible for the lack of refugee protection in the area, the responsibility for the physical protection of refugees lies with the host state, whilst security within the camps is at the very least a joint responsibility.[341] There is currently no provision by the Kenyan government to protect refugee women living in the camps. Measures of protection are usually initiated by the agencies themselves: for instance the police forces stationed within the camps are paid by UNHCR, who also give them bonuses, whilst community groups such as anti-rape and women's committees have been set up with the help of the agency. However, as UNHCR stresses, these measures remain insufficient and, given the increase in violent incidence, have failed to provide adequate protection. UNHCR actually introduced a Women Victims of Violence program in 1993 and took a number of supportive measures (including asking FIDA to help victims of sexual assault to seek legal redress) which were successful in decreasing the incidents. Ever since the project was closed down under financial constraints, the number of rapes is said to have risen dramatically.

According to the UN agency, the root of the problem of violence in and around the camps lies partly with Kenyan refugee policy and the country's political economy. The country did not particularly welcome the influx of over 400,000 in the early 1990s when the overall situation in the region deteriorated badly with the resurgence of conflicts in neighbouring countries. It has also continuously requested refugees to repatriate, and since 1997 has ensured that most of the refugee population remains confined to the northern part of the country, at a great distance from the main towns and therefore from access to basic services (as opposed to the camps which had been set up in the coastal areas, and where refugee communities had been able to establish businesses free of taxation – following local pressure, these camps were closed down). For women, for instance, this means that alternative fuels are difficult and expensive, if not impossible, to obtain. Moreover, the country has no specific refugee legislation, and as a result refugees in Kenya do not have a clear legal status.[342]

As a result, refugee women in Kenya enjoy very little real protection, whether they are living in refugee camps or in Nairobi. If Kenyan women find it extremely difficult to seek justice in their own country, how can a refugee woman with often very few resources and no sources of income be expected to be able to find redress in the Kenyan courts? What protection is there for her?

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[340] Ibid., quoted on p. 4 with reference to Courtney O'Connor's paper, '*A review of UNHCR's women victims of violence project in Kenya*', UNHCR, Geneva, 1996.
[341] Jeff Crisp, op. cit., p. 9 (as all information in this paragraph). Kenya is a signatory of both the UN and the OAU conventions.
[342] Ibid., p.12. See also Jennifer Hyndman and Bo Viktor Nylund, 'UNHCR and the status of *prima facie* refugees in Kenya', *International Journal of Refugee Law*, Vol.10, no.1/2, 1998.

PART VIII: '*BIAS AGAINST THE FEMALE GENDER*': LEGAL, CONSTITUTIONAL AND POLITICAL IMPEDIMENTS TO WOMEN'S RIGHTS

VIII.1. LEGAL DISCRIMINATION AGAINST WOMEN

VIII.1.1 WOMEN'S RIGHTS IN THE LAW As the review of Kenyan law with respect to violence against women has demonstrated, there are a number of discriminatory laws in the Constitution that are working against the interests of women's human rights. Until November 1997, the definition of discrimination under the Constitution did not include the concept of discrimination on the basis of sex. Under Section 82(3), discrimination was defined as:

> "*Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description*".[343]

Section 82 has been changed to outlaw gender discrimination, but gender discrimination on the account of customary law is still currently legally recognized. Customary and statutory laws are both recognized in Kenya, even when the latter contains provisions contradicting the former. Thus, in many rural areas, customary laws take precedence over statutory laws unless a case is brought to court.

Women's lobbying groups have also been advocating the repeal of sub-paragraphs (b) & (c) of Section 82 (4), which allow discrimination against women in matters relating to "*adoption, marriage, divorce, burial, devolution of property (inheritance), customary and personal law*".[344] The provisions in these sections contravene Article 2(f) of CEDAW, according to which state parties commit "*To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practises which constitute discrimination against women*".

Women are discriminated against if they want to travel with their children abroad (they are requested by the Immigration Department to obtain their husbands' permission)[345] and in terms of the right to pass on their nationality to their children. Whilst a child born to a Kenyan man and a non-Kenyan woman benefits from full Kenyan citizenship, a child born from a Kenyan woman and a non-Kenyan man is not recognised as a Kenyan.[346]

VIII.1.2 TRAFFICKING OF WOMEN Women's groups have been campaigning for the adoption of legislation on trafficking of women and girls, a phenomenon on the increase in Kenya.[347] By ratifying CEDAW, Kenya is in theory obliged to take appropriate measures to protect women from trafficking, but there are currently no domestic laws that address this issue. In addition, the government is not party to other international Conventions

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[343] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., p. 23.
[344] Ibid, p.24.
[345] US Department of State, Human Rights Reports for 1999, op. cit., p.18 of Kenya Report.
[346] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., p.64.
[347] 1998 FIDA Annual Report, '*Institutional Gains Private Losses…*', op. cit., pp. 20 to 27.

such as the Trafficking Convention (1949) or the Supplementary Slavery Convention (1956).

VIII.1.3 WOMEN'S INHERITANCE AND PROPERTY RIGHTS In theory, women now have the right to inherit property (since the mid-1990s). Married women had already gained the right to inherit their deceased husband's property in 1981 with the introduction of the *Law of Succession Act* (Cap.160 Laws of Kenya).[348] In practice, however, the rights of women (married or not) to inherit property have been continuously undermined by traditional practices, sexist interpretations of the law and politically motivated violence. As a result, despite representing over 50% of the population, women own only 1% of the land in Kenya.[349]

A statutory law giving women land and property rights was introduced in the mid-1990s but in many places, customary laws prevail and nowhere more so than in issues around land inheritance and rights.

Although there are no legal obstacles to it, daughters are much less likely to inherit their fathers' land: "*Occasionally a father will give his daughter a plot of land, though he is reluctant to do so because it means in the future there will be less land for his sons*".[350] There are currently no '*positive*' laws that would systematically confer women the same inheritance rights as their male siblings whilst African culture that "*denies daughters the right to inherit their father's property*" takes precedence.[351]

Land is rarely registered under the names of women, in particular when they are married. Even when women contribute to the acquisition of familial properties, their names rarely appear on the title deeds (a major shortfall if the case is taken to a formal court). Divorced women are often denied access to their ex-husband's property rights, and as they rarely receive land from their own family, they are likely to have no assets in their own names. Unmarried or separated women without children must return to their parents' homes and either work on their land or sell off their labour. If they have children, their situation is potentially more precarious as they would have to look for work, especially since the government abolished the *Affiliation Act,* which held men responsible for the upbringing of children conceived outside marriage. A widow has also very few rights if the marriage was contracted under customary laws. She traditionally enjoys no inheritance rights because, in order to preserve the patriarchal line of inheritance, her sons would inherit the land or she would be '*married*' to her husband's brother.

Likewise, rarely would a married woman own the house in which she lives, and if the property is rented, the lease would be in her husband's name even if the rent is shared.[352]

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[348] Ibid., pp. 54 to 57.
[349] 1997 FIDA Annual Report, '*Bado Mapambano*', op. cit., p.50.
[350] Davidson (1988) cited by Lastarria-Cornhiel, '*Impact of Privatization on Gender and Property Rights in Africa*', paper presented at the International Conference on Land, Tenure and Administration, Orlando, Florida, 12-14 November 1996.
[351] *Daily Nation*, 'Outlaw practice, MP says', Nairobi, 2 November 1998.
[352] *Daily Nation*, 'Taming the monster of domestic violence', Nairobi, 7 November 2000.

Also, despite the existence of the *Law of Succession Act* (Cap.160 of the Laws of Kenya), which came into effect in July 1981 and states that "*a surviving spouse in a monogamous union* [is] *the most suitable person to take charge of a deceased's property*", this right is limited to a life interest in the property (women are not allowed to sell or dispose of the inherited property) and this right is terminated upon remarriage.[353]

Rights to inherit their husbands' property (and therefore their economic status) can also be curtailed in the case of women who have married according to Section 37 of the *Marriage Act*. Although it provides that any individual married under this law is incapable of contracting a subsequent customary marriage, the rights in terms of succession guaranteed under a monogamous union have been considerably eroded by a legislative amendment under Section 3(5) of the Law of Succession (Cap.160) which states that: "*Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act*".[354]

FIDA calls for a repeal of this Section as, in their view, even if the provisions seek "*to support women and children of customary law marriages where a monogamous marriage exists,* [they] *nevertheless seriously infringe on the rights of women and children of the monogamous marriage*".[355] FIDA also calls for the amendment of Section 25 to allow women "*unfettered interest in the matrimonial property upon the death of the other spouse*" and give them the right to retain the property inherited upon the death of their spouses even when they choose to re-marry.

VIII.1.4 CUSTOMARY LAWS, LAND RIGHTS AND VIOLENCE AGAINST WOMEN Female inheritance has become a major source of conflict between customary and statutory laws in Kenya.[356] Customary laws can affect women's rights to equality but also safety and security, as the example provided in this report (under PART I.4 'WIFE INHERITANCE') illustrate. The woman received threats of rape and threats to her life from her in-laws because she refused to abide by customary laws that would have married her to one of her husband's brothers. The family wanted to reclaim back the land she had jointly acquired with her husband.

Customary laws are also used to '*disinherit*' women in a polygamous marriage even though they have married under statutory law. One lawyer explained how "*with land dispute, it is normal for the in-laws to claim that the woman is not 'really married' under customary law. They call in witnesses from the community to disinherit her. There are also big problems over custody of children. You will typically have a common law wife – which is recognized under statutory law (…) but those in-laws will abuse and manipulate everything in court in order to get the land*".[357]

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[353] 1998 FIDA Annual Report, '*Institutional Gains, Private Losses…*', op. cit., p. 54.
[354] Article cited by FIDA, op. cit., p.55. See also Patricia Kameri-Mbote (ed.), '*The Law of Succession in Kenya: Gender Perpectives in Property Management and Control*', Women and Law in East Africa, Nairobi, 1995 and KHRC, '*Women and Land Rights in Kenya*', Nairobi, 1998.
[355] 1998 FIDA Annual Report, '*Institutional Gains, Private Losses…*', op. cit., p.57.
[356] African Rights, op. cit., p.39.
[357] Ibid., p.77.

VIII.1.5 LAND AND PROPERTY RIGHTS IN THE COURTS Land issues are said to be the most common sources of legal conflicts in Kenya. Such conflicts are likely to increase for women who would have to resort to the courts if their rights are to be upheld. However as African Rights points out "*it would take an extraordinary amount of determination for a woman (…) to take on the police and the courts, knowing the prejudices that exist, not only in these institutions, but in the community at large*"[358] (see above PART VI).

Section 17 of the *Married Women's Property Act 1882* provides that married women can "*apply for the division of property held by themselves and their spouses*"[359] but the courts are often reluctant to interpret the law in their favour, using the provisions of Section 3(5) of the *Law of Succession Act*.

This is particularly true for the courts in the provinces who are, according to a lawyer "*often very biased over these issues, and rely heavily on the word of the community elders.* [This approach] *flies in the face of a woman's rights under statutory law*".[360] In urban centres such as Nairobi, the situation is hardly better. As the two examples below demonstrate, judges use all sorts of arguments to deny women their equal share, whilst most women have nothing to prove what they are entitled to. Women who can afford it – and very few can – have to fight their cases right up to the High Court for any chance to enforce their rights.

When one woman, Beatrice Kimani, took her case to court in 1995, she faced outright gender discrimination in the judgement pronounced.[361] She had been married for 14 years and claimed half of the properties registered in the name of her husband, which had been "*acquired by the joint funds and efforts of the couple*". The judge (Justice Kuloba) decided against her, taking, as he did so, the opportunity to express his feelings towards women. Disregarding the evidence in the case (she was suffering domestic violence and had been '*compelled*' by her husband to use her salary as a teacher to pay for the purchase of properties), he refused to grant Beatrice Kimani her application, stating that:

> "*We should not be forgetful of the historical truths that the action of woman on our destiny has been, and is, unceasing; and that since the Great Fall in the Garden woman has continued to baffle. We recall that through woman's incitement mankind was banished and is doomed to die, for which the Son of Mary upon the cross was rent (…). If you do not stay away from them, you fall into their snares*".

The judge also found it appropriate to quote in his judgment Jose Saramago – "*In truth, in truth (…) the malice of women knows no limits, especially when they feign innocence*" – and to frown on the women's movement by proclaiming that "*many a married woman goes out to work. (…) She has a high career. She is in big business. She travels to Beijing in search of ideology and a basis for rebellion against her own culture. (…) Her business interests, her property and whatever is hers is everywhere in Kenya and abroad (…)*".

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[358] Ibid., p.39.
[359] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit.., p.50.
[360] African Rights, '*Kenya Shadow Justice*', op. cit., p.77.
[361] Information and quotes for the two subsequent cases taken from the 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., pp.50 to 51. Similar judgments relating to inheritance rights are quoted by FIDA in their 1998 report '*Institutional Gains Private Losses…*', pp.54 to 57.

Beatrice Kimani appealed against the decision and won her appeal case in 1997, i.e. two years later. Commenting on the judge's decision, the Court of Appeal stated that: "*the learned trial judge (…) took an off-course discourse on woman bordering on bias against the female gender*".

In another case, a woman was only granted 30% of the family business because the judge stated that, although there was evidence that the wife had been contributing in many ways to the family business and had been paying her children's educational fees, there was "*however also evidence that Caesarean deliveries reduced for those periods she was delivering her capacity to exert herself in gainful activities*". In other words, because she had to give birth by Caesarean, her contribution to the family income must have been reduced.

She also won her case in the Court of Appeal in 1997 and was awarded half of the couple's wholesale business when the Judge stated that: "*The view* [of the trial judge] *is not based on any medical evidence (…). But even if that was the case (…), the wife was putting her life at risk to augment the numerical strength of the family, and I cannot think of a greater contribution than bearing children*".

The two women were '*lucky*' in that they could afford to take their case to appeal. In any other circumstances, and for the great majority of women in Kenya, they would have had to live with the consequences of an unfair and sometimes biased judgement of a court which would have drastically put their economic welfare at risk.

As a signatory of CEDAW, the government has committed to take measures to ensure that Kenyan women enjoy the "*same rights (…) in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration*" (Article 16). The reality indicates that Kenya has noticeably failed women in their claims for land and property rights.

FIDA has recently expressed concerns about the lack of an integrated approach to law reform in Kenya, as it has excluded a number of traditional practices that hinder women's rights and status and maintained the gap in gender equality.[362] The organisation calls for changes in all family laws to enable women's empowerment as well as their effective participation in the country's economic and political developments. But changes are slow to come about.

VIII.2 SLOW PROGRESS ON GENDER-BASED VIOLENCE

VIII.2.1 NEW DEVELOPMENTS FOR DOMESTIC VIOLENCE FIDA reported in 1997 that attempts to criminalize spousal abuse as a specific category of crime have met with strong resistance in the Kenyan Parliament and were rejected three times through the Marriage and Divorce Bill.[363]

[362] *Daily Nation*, 'Report calls for gender equality', Nairobi, 21 September 2000.
[363] See 1996 FIDA Annual Report, 'Second Class Citizenship', Nairobi, 1997.

In November 2000, the press reported the publication of a Domestic Violence Bill[364] which for the first time provides a definition that covers physical, sexual and mental abuse or harassment. It recognizes that children are victims by seeing or hearing violence at home and that abused spouses and children have the right to seek state protection (media reporting would be banned to protect their identity) and justice in private courts. The Bill plans the introduction of a compensation scheme (wife, husband or children beaters would be liable to a year in jail and/or a Sh.100,000 fine)[365] and the provision of counselling and medical treatment. It would also "*empower courts to order violent spouses or other family members out of the home*".[366] In addition, the Bill proposes the creation of a Domestic Violence (Family Protection) Fund in order to support financially the victims.

Seen as "*the most significant statement so far by the government on domestic violence*", the Bill is the result of years of lobbying from human and women's rights organisations in Kenya. In its current form, however, it contains major flaws that are unlikely to help reverse the current approach and culture around domestic violence in the country.[367]

For instance, there is currently no provision for shelters, and, given the economic vulnerability of women in Kenya, many would have to stay at home if they want to file a complaint against their husbands. Victims of domestic violence will not be assured that justice will be done without fear of further persecution. Furthermore, the Bill describes domestic violence as "*unacceptable behaviour*": it thus does not recognise that it constitutes an assault and therefore a criminal act which is other circumstances would carry a sentence of between one year and life imprisonment (according to the nature of the assault and the identity of the perpetrator).[368] The '*offenders*' are referred to as '*respondents*' and not suspects. There is also no specific amounts set by the Bill for compensation, and magistrates and judges are left to decide on individual cases. Given the current trend in the courts (see PART II), it is not likely to fare too well for women.

Another major flaw is that the Bill "*fails to make it mandatory for police to investigate and prosecute all cases of domestic violence*" and unlike in other countries, the victim will not be able to take the police to court for failing to prosecute the case.[369] As for the fund set up to provide for legal compensation, one lawyer and university lecturer commented that he had "*serious doubts that the funds will be used as expected*".[370]

In addition, as the *Daily Nation* writes, there are already existing laws that are not being fully used and there is no guarantee that the Bill, if passed into law, will be more effective in changing the current situation if "*there are no supporting structures to nurture a culture of respect for the human rights of spouses, children and other family member (…) The war is not yet won*".[371] The

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[364] The Bill was published by Attorney-General Amos Wako on 2nd November 2000.
[365] *Daily Nation*, 'New law to target domestic brutes', Nairobi, 3 November 2000.
[366] *Daily Nation*, 'Domestic violence law a step forward', Nairobi, 3 November 2000.
[367] Unless otherwise stated, all information in the following paragraph drawn from the *Daily Nation*, 'Taming the monster of domestic violence', 7 November 2000.
[368] See also PART I.2 on FGM referring to Sections 4, 234, 250 and 251 of the Penal Code on '*Assault*' and '*Grievous Harm*'. If the perpetrator is a family member, the sentence would be considerably reduced according to current legal provisions.
[369] *Daily Nation*, ibid.
[370] *Daily Nation,* 'Mixed reactions to Bill', Nairobi, 4 November 2000.
[371] *Daily Nation*, ibid.

process can also take months before being fully implemented and years before enforcement of the law – a key issue in terms of respect for human rights in Kenya – is guaranteed.

VIII.2.2 RAPE LAWS UNDER REVIEW In August 2000, it was reported that rape laws were under review as well as plans to set up a family court. It is not clear however how long this process of revision will take, given the lack of political will to recognize issues of violence against women being as worthy as any other political issue (see also below on issues around the Gender Equality Bill).

VIII.2.3 PROTECTION FROM ABUSES BY STATE AGENTS Prospects for change in this area are grim. Kenyan women can find themselves '*doubly*' victims and have very little prospect of finding protection. Their human rights as individuals are violated by state agents in the same manner as the rights of Kenyan men, but in addition they almost always suffer forms of violence related to their gender. We have provided in this report many accounts of women who were raped, sexually tortured or, in the case of pregnant women, so badly beaten that they subsequently suffered a miscarriage. The examples of cases reported by Kenyan human rights organisations in recent years and months are shocking. Yet the full picture is still not clear.

These abuses of women's rights are committed in breach of the Kenyan constitution as well as international law. However, as previously noted, "*the Kenyan judiciary has completely refused to embrace and develop human rights jurisprudence. The most glaring omission is the failure to enforce the fundamental rights entrenched in the national constitution*".[372] And as long as "*the High Court* [decides] *that it has no jurisdiction to enforce the human rights provisions in Chapter V of the Constitution*",[373] Kenyan women will have to bear the terrible consequences of a judicial system unwilling to commit to its fundamental principle: upholding justice.

VIII.3 KENYA'S INTERNATIONAL COMMITMENTS TO GENDER EQUALITY

We have already shown how Kenya has failed to commit to international conventions in terms of protection and provision of justice for women. But Kenya has also failed to commit to basic provisions in terms of gender equality and empowerment of women.

VIII.3.1 THE BEIJING PLATFORM OF ACTION When Parliament passed a private member's motion on the Beijing Platform of Action in November 1996, there was no follow-up in terms of a draft policy or legislation produced by the government in order to make sure that its provisions would be implemented.[374] The private member's motion would have requested the government to commit itself to, amongst other things, ensure the dissemination of the resolutions adopted in the Platform of Action to grassroots women

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[372] Quoted by Evelyn A. Ankumah and Edward K. Kwakwa, ed., '*The Legal Profession and the Protection of Human Rights in Africa*', op. cit.
[373] Ibid.
[374] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., p. 24. FIDA also reports in 1999 that since 1996 "*none of the successful women friendly motions that have been introduced in Parliament have ever been adopted, drafted and tabled as a Bill*". The organisation further comments "*Members of Parliament support the Motions primarily because they are of no consequence*". See 1998 FIDA Annual Report, '*Institutional Gains, Private Losses…*', op. cit., p.47.

and "*to allocate budgetary provisions for the enhancement of the welfare of women, implement and continuously monitor the progress of the programme*".[375] However, if the government is not bound by private members' motions, it has "*the primary responsibility for implementing the platform*".

The Platform of Action also states that "*Commitment at the highest political level is essential to its implementation, and Governments should take a leading role in coordinating, monitoring and assessing progress in the advancement of women*".

Although a Plan of Action was produced in August 1997 by the Women's Bureau in the Ministry of Home Affairs, National Heritage, Culture and Social Services,[376], little has been achieved by the government to ensure gender equality. To start with, there is no national gender policy (see also below) and the Women's Bureau is a sub-division of the Ministry of Cultural and Social Services which itself is not bound by any of the decisions taken by the Bureau.[377] FIDA reports that a Ministry of Women and Youth Affairs was set up in January 1998 only to be abolished a month later. Incidentally, the Minister in charge had declared that he believed a woman should be holding the post.

VIII.3.2 COMMITMENTS TO CEDAW Kenya is legally bound to put CEDAW's provisions into practice and under Article 18(1) of CEDAW, state parties are "*committed to submit national reports at least every four years on measures they have taken to comply with their treaty obligations*".[378] Kenya should have submitted in July 1998 a report on the "*legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the (…) Convention and on the progress made in this respect*". As per November 2000, it had been ten years since the government last produced a report to CEDAW (on 4th December 1990).

Moreover, the government representatives undertook very little consultation with women's NGOs during the 43rd Session of the UN Commission on the status of Women held in March 1999, despite the fact that the session revolved around issues of women's health (including FGM, early marriage and wife inheritance) and institutional mechanisms for the advancement of women.[379] The government did not consult with women's groups prior to the meeting and it prepared its submission without their input. Not surprisingly, it failed to mention in its submission that Kenya had not passed legislation against any of the traditional practices recognised as forms of violence against women with a detrimental effect on their health.

The official position taken recently with regard to the Affirmative Action and Equality Bills reflects the stance adopted so far with regard to promoting women's rights and advancement.

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[375] See also CEDAW at http://www.un.org/womenwatch/daw/cedaw/reports.htm .
[376] The detailed plan of action produced by Kenya is available at www.un.org/womenwatch/followup/national .
[377] 1997 FIDA Annual Report, '*Bado Mapambano…*', op. cit., p. 60.
[378] See CEDAW at http://www.un.org/womenwatch/daw/cedaw/reports.htm .
[379] 1998 FIDA Annual Report, '*Institutional gains Private losses…*', pp42-43 (Please note that the report covers the period September 1998 to August 1999).

VIII.4 THE AFFIRMATIVE ACTION AND EQUALITY BILLS

There have been recently some positive developments in favour of women's rights thanks to the perseverance of a number of women's rights groups. However governmental initiative in this field has been nil even when it has not actually opposed to such developments (see also below President Moi's statement about women's political education) and the latest progressive initiatives have faced a wall of criticism.

VIII.4.1 PROVISIONS UNDER PROPOSITION In April 2000 the Affirmative Action Motion was passed by Parliament and was expected to be translated into a Bill in November 2000. The Bill which "*seeks to provide for a representation of 33 per cent for women and other marginalized groups such as the disabled and pastoralist communities, in political institutions such as Parliament and local authorities* ", aims to increase the number of women MPs to at least 72 (instead of 9 currently).[380]

Also an Equality Bill, which aims to "*prohibit any conduct, condition, requirement, policy, situation, rule or practices having or likely to have the direct or the indirect effect of unjustly or unfairly disadvantaging persons of a particular status*" was also introduced for debate in Parliament earlier this autumn. The status of a person includes "*his or her race, ethnicity, place of origin or residence, political opinions, colour, creed, sex, marital status, pregnancy or any disability of that person*".[381]

An Equality Board and an Equality Tribunal would be established in order to settle discrimination claims in employment, education, services and facilities but also in respect of associations and appointment to the public office.

VIII.4.2 OPPOSITION TO THE BILLS Amongst opponents of both Bills were some Muslim women's groups (although not all). They said that they were opposed to the Affirmative Action Motion as they were neither oppressed nor denied opportunities. A group of about 100 Muslim women also demonstrated against the Equality Bill, arguing that it would make them renounce their religious beliefs.[382] In terms of inheritance, for instance, Islam provides that daughters and wife cannot be disinherited by their father or husband and they have the right to keep the property and goods they acquire both previous and during their marriage. Muslim groups are also against the concept of discrimination against sex, as it would in their eyes legalize homosexuality and lesbianism which are outlawed in Islam.

President Arap Moi joined the opponents of the Bill, claiming that it will divide women. He indicated he was opposed to "*affirmative action for women because he stands for equality for all*".[383] Another government official, the Rural Development Minister, said that the Bill was "*un-called-for*". KANU and National Development Party MPs have indicated that they will vote against it when tabled in Parliament.

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[380] For more details, see http://allafrica.com/stories and search for "*Affirmative Action*". Articles include 'Committee on Affirmative Action Formed', at allafrica.com/stories.200009070086.html and 'House to Debate Bill on Affirmative Action', ibid., ref 200009050161.html.

[381] Part I of the Draft, see Clay Muganda, 'It's religion versus equality', *in Daily Nation*, Nairobi, 14 October 2000.

[382] These Muslim groups expressed their opposition through male spokesmen (Muslim women have been traditionally absent from public debates) despite the fact that FIDA who coordinated the consultation process had consulted the women of the Islamic faith as well as other religions before the Bill was drafted. Some people consequently expressed their surprise to the reactions of some Muslim groups whom they accused of not having read its content.

[383] *Daily Nation*, 'Moi opposes women's Bill', Nairobi, 13 October 2000.

Yet, there is nothing in the Equality Bill that is not already enshrined in various international treaties to which Kenya is a party such as CEDAW and the Beijing Platform of Action. As FIDA pointed out, "*it is apparent that there has been an attempt by critics to divide popular support for both Bills through a campaign of disinformation*".

VIII.5 POLITICAL ADVANCEMENT OF WOMEN

Few women are in a position, either in the cabinet or in the judiciary, to influence major changes to the current situation. It is the prerogative of the government to remove legal barriers to fair and equal treatment of women in all fields of society and empower them to participate in these fields with equal power to that of men and to receive equal support. In Kenya, the position of women in decision-making processes and institutions are drastically limited.

Women were not elected to Parliament before 1969, whilst for the period 1969 to 1974, they represented up to 8% of elected members. In 1991, there were only two women MPs whilst currently there are nine women MPs, including five nominated by the President. In 1998, there were no female ministers in the government and only 8.8% of sub-ministerial posts were occupied by women.[384] The judiciary is also overwhelmingly male. There are currently six female High Court judges in Kenya with the latest being promoted in June 2000. The first woman judge was only appointed in 1982, the second in 1986 and the third in 1991.[385] It was only in July 1998 that the first Kenyan woman was appointed to the Court of Appeal.[386] In addition, there are currently no obligations to ensure gender parity in constitutional offices (i.e. Attorney General, Chairman of the Electoral Commission, Auditor General and Chief Justice).[387]

Yet when women want to run for election to secure positions at decision-making level, when women voters are encouraged to participate in elections to get their voices heard, or when women are actively participating in popular movements to review the constitution and repressive laws, they are faced with threats, violence and physical assault. Their rights to freedom of expression and to vote are blatantly violated.

VIII.6 BREACHING THE PEACE: VIOLENCE AGAINST WOMEN CALLING FOR INSTITUTIONAL REFORMS

VIII.6.1 THE CONSTITUTIONAL REVISION PROCESS In 1997, following the suspension of international aid to Kenya and sustained pressure from national groups, the government conceded to a constitutional revision process. Whilst President Moi had declared in 1995 that there would be a thorough review of the Constitution with the help of external expertise, a few months later Kenyans were told that such a revision was not necessary any

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[384] UNDP 2000 Report at http://www.undp.org
[385] Women in Kenya: 03/09/97, http://women3rdworld.about.com/newsissues/women3rdworld/library
[386] Maguta Kimewia, 'Four new Judges and one promotion', *Daily Nation*, Nairobi, 8 July 1998.
[387] 1997 FIDA Annual Report, '*Bado Mapambano*…', op. cit., p24.

more. The Attorney General further announced that "*there would be 'no time' to initiate reforms and have them in place in time for the next General Election*".[388]

By 1997, however, the issue of the reform of the Constitution was put at the forefront of the public debate in Kenya as civil society stepped up the pressure. It started with the formation of the National Convention Executive Council (NCEC), representing a wide range of Kenyan civil society, including women's lobbying groups,[389] with the aim of pressurising the government for constitutional and legal reforms before the December elections.[390]

VIII.6.2 WOMEN'S PARTICIPATION UNDER ATTACK Women's groups which have been campaigning for the repeal of discriminatory laws against women, as well as the *Public Order Act*[391] and the *Preservation of Public Security Act*[392], have been violently attacked by the police for taking part in the process.

In May 1997 the NCEC started a number of meetings and public demonstrations in all parts of the country with the aim of raising public awareness about the unconstitutionality of the *Public Order Act* and the *Preservation of Public Security Act*, the *Chief's Authority Act* and other Acts such as the *Vagrancy Act*.[393]

Two women recount how the police broke up the rally they were participating in and how many people were killed. They escaped on a boat on Lake Victoria but were arrested and beaten when they came out (one of them was pregnant at the time). They were then taken to a prison where they were beaten for three hours. They were subsequently taken to court with another seven women and charged with creating a disturbance in accordance with Section 95.1.b of the Penal Code which states that "*Any person who (…) brawls or in any manner creates a disturbance in such a manner as is likely to cause a breach of the peace is guilty of a misdemeanour and is liable to imprisonment for six months*".

However FIDA points out that "*nowhere in the Penal Code is the phrase 'a manner likely to cause a breach of the peace'* defined". Also, Section 8 of the *Public Act* allows any "*regulating officer (…) to stop or prevent the holding of (…) any public gathering or other meeting or procession which having regard to the rights and interests of the persons participating in such gathering, meeting or procession, there is clear, present or imminent danger of a breach of the peace or public order*".[394] Three of the nine women arrested were sent to prison as they could not afford to pay the fine required by the sentence. As with many other Kenyans, they had merely wanted to campaign for their rights to be upheld.

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[388] African Rights, '*Kenya Shadow Justice*', op. cit., pp.220-221.
[389] Including opposition party parliamentarians, church leaders, trade unions representatives, women's groups, etc. See 1997 FIDA Annual Report '*Bapo Mapambano…*', op. cit., pp.21-32.
[390] The Constitution of Kenya Review Commission Act 1998 was enacted in December 1998 which provided for the set up of a 25-member commission including members for both the civil society and political parties. In May 1999, President Moi suggested that the process be transferred to Parliament, which is currently dominated by KANU, saying that it was the only competent body to review the Constitution.
[391] The *Public Order Act* restricts Kenyan people's rights to freedom of association and assembly.
[392] The *Preservation of Public Security Act* facilitates the detention without trial of Kenyans for their political beliefs. This is in contravention of the freedom of conscience enshrined in Section 78 of the Constitution.
[393] For a full list, see 1997 FIDA Annual Report, '*Bapo Mapambano…*', op. cit., p.21.
[394] 1998 FIDA Annual Report, '*Institutional Gains, Private losses…*', ibid., p.28.

VIII.6.3 FIGHT AGAINST EXCLUSION FROM THE PUBLIC DEBATE Women's political participation in the constitutional review process was also impeded by the fact that the debate was shifted from civil society to Parliament. In September 1997, a number of opposition leaders broke ranks with the NCEC to engage in an inter-party parliamentary dialogue and soon the Inter Parties Parliamentary Group (IPPG) was formed. Women found themselves disadvantaged as "*to have a say in the IPPG forum you had to be a Parliamentarian*".[395] Women are notoriously under-represented both in Parliament (1.9%) and political parties, whilst they represent over 51% of the population.

The Kenyan Women's Political Caucus (including a wide range of women from politicians to gender activists) campaigned for the inclusion of women at all levels of the Constitutional review process and for equal representation of women on the Constitution of Kenya Review Commission (hereafter Commission). They obtained 8 out of 25 seats but had to fight on to ensure that the Caucus nominated 5 women to the Commission (before that all but one nomination had been allocated to political parties, religious leaders and NGOs).[396]

This '*victory*' was shortly followed by attempts to undermine the validity of the Caucus: the nominations by the Caucus led to a major controversy over regional and social representation of Kenyan women (which was resolved in the High Court). The Caucus was accused for excluding rural women from the process and favouring female urban elites. The President declared that rural women "*had been belittled*" and confused about the Constitutional Review Process. As the Coordinator of the Kenyan Women's Political Caucus pointed out, this criticism could hardly be justified, given the composition of Parliament, and can only be seen as an attempt to weaken women's representation in politics. Parliamentarians "*represent constituencies which three quarters of them are according to my definition in the rural areas. (…) Most of MPs are men, politics is dominated by men, and so why is it that they all live in Nairobi? Why is it that when it is men then the definition of rural or otherwise is different, and the definition of elites is different, but when it comes to women's issues they define these things in the way that suits them? (…) Our male counterparts are all elites. So we cannot bring in women from rural areas to come and make the Constitution with men who are elites. (…)* [They] *won't even know what's going on* ".[397]

In any case, President Moi was accused of trying to undermine the whole democratic process when he suggested in May 1999 that the funds allocated to the revision process should be used to alleviate poverty. He also declared that the constitutional review should be carried out by the KANU-led Parliament. As a result, the process suffered severe drawbacks throughout 1999 and 2000 as the debate on how nominations should be made and who should be nominated to carry out the review remained unresolved. In addition, various rallies led by the opposition and the civil societies led to confrontations with the police. In January 2000 violence broke out in the streets of Nairobi in which rival groups in the debate confronted each other.[398]

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[395] Ibid., p.28.
[396] Ibid., p.32.
[397] Interview with FIDA, 1998 FIDA Annual Report, '*Institutional Gains, Private Losses…*', op. cit., pp34-35.
[398] See *Daily Nation*, 15 & 16 January 2000. In particular 'Mayhem as reform rivals clash' and 'Outrage over reform attacks'.

Throughout 2000 the Constitutional Review suffered a number of setbacks.[399] At the beginning of 2001, there was still debate about who should participate in the Constitutional revision process.[400]

VIII.7 WOMEN VOTERS UNDER FIRE

Not only is it the responsibility of the government to ensure that rural women are involved in the political process (see CEDAW, Article 14), but when women's groups take on the task of politically educating women, they are systematically denigrated by both the President and members of his office when they are not being harassed by security forces.

VIII.7.1 SPEAKING OUT ABOUT WOMEN'S RIGHTS Since the introduction of a multi-party political system in Kenya, there has been a significant increase in human and women's rights groups and non-governmental organisations, partly due to international donors' financial priorities ('*democracy and governance*').[401] Women's groups in particular have intensified their activities in terms of speaking out about women's rights and against gender inequalities. They have also significantly pushed the political agenda and played a major role in getting Kenyan women to participate in politics.

Given the current debates on domestic violence, violence against women and gender equality, they have made considerable achievements. But the results have not been conclusive and this is to some extent reflected by the number of obstacles they have had and continue to have to fight against, whether as women, as citizens, or as representatives of the Kenyan people.[402]

VIII.7.2 *'A WASTE OF MONEY'* When the League of Kenyan Women Voters (LKWV hereafter) went on a campaign of civic education in preparation for the 1997 elections with the aim of sensitising women to their rights, President Moi said the programme was "*a waste of money*".[403] In another statement, he declared "[*we*] *have a lot of money and we should use it to educate the street boys*".[404] Yet LKWV reports that many women – included educated ones – did not know how to vote. Furthermore, in particular in rural areas, women needed to understand the election procedures, the concept of Parliamentary representation and how the results of the elections would have a direct impact on their lives. The civic education campaign is all the more important given that the majority of Kenyan women live in rural areas and are largely illiterate.[405] The LKWV's programme was merely helping women to be aware of their rights as enshrined in CEDAW.

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[399] For more on this subject, see http://allafrica.com/stories and search for 'Constitutional Revision Kenya'.
[400] Jacinta Sekoh-Ochieng & Muriithi Muriuki, 'Deadline on review "to be met"', *in Daily Nation*, Nairobi, 18 January 2001.
[401] African Rights, '*Kenya Shadow Justice*', op. cit., p.1.
[402] The following information is extensively drawn from the 1997 FIDA Annual Report, '*Bado Mapambano*…', op. cit..
[403] Ibid, p.8.
[404] Interview with Beatrice Konya, Programme Officer for LKWV, FIDA, ibid., p.9.
[405] Almost 69% of the population lives in rural areas, 57.4% of female secondary age group enrolled in schools (1998 figures). Although 73.5% of women are said to be literate, the level of literacy remains basic. See UNDP Report, 2000 at http://www.undp.org

The President's comments have had a major impact on the implementation of civic education activities, which were disrupted or had to be cancelled in various parts of the country. Senior women in the organisation were afraid to conduct the work whilst the Chiefs Administrator (*de facto* the President's arm in the country outside of Nairobi) constantly interfered in the peaceful organisations of such activities by intercepting correspondence between women's groups (with the help of the Special Branch of the Police[406]) and subsequently cancelling meetings without giving explanations. Women who had come to the meetings were told that if they assembled they would be beaten, and hid in the bushes.[407] In fact it was discovered that, in May 1997, the Office of the President had issued a circular to "*all senior district level administrators directing them to ensure that all peace, legal and human rights workshops were licensed before allowing them to take place*". The LKWV wrote officially to the President in order to explain its work but received no reply.

VIII.7.3 INTIMIDATION AND DISCRIMINATION DURING THE ELECTIONS Women voters were both discriminated against and intimidated during the elections. In Kenya voters need an identity card or a passport to obtain a voter registration card. However married women are required to be accompanied by their husbands to obtain a national identity card (Section 91 of the Constitution: "*A woman who has been married to a citizen of Kenya shall be entitled, upon making application in such a manner as may be prescribed under an Act of Parliament, to be registered as a citizen of Kenya*".[408]) FIDA reports that many women were held back in their attempts to obtain a voter registration card.

When it came to voting, some parties used the queuing system where voters have to line up behind posters of candidates for nominations.[409] The LKWV received numerous complaints from women who had been whipped and forced by KANU or the National Democratic Party agents to queue behind their husbands. Women were also beaten if they were lining up behind women candidates[410] and many voters did not know that they had a right to privacy.

VIII.8 '*THE POLITICS OF VIOLENCE*': OBSTACLES TO WOMEN CANDIDATES

Women candidates, including members of KANU, the official ruling party, have to face major obstacles in their campaign to election. Dr Julia Ojiambo, a KANU supporter since 1961 (also former Head of the Departments of Youth and Women Affairs for over five years) declared how the male-dominated KANU leadership decided to favour a male candidate over her candidature in the December 1997 elections. She described how the local KANU leadership was not pleased when she led a programme of civic education in a rural area of Western Kenya and how the KANU nomination process was "*full of heavily orchestrated violence and corruption*" by her opponent.[411] She won the election by a margin of 7,000 votes but the next day her opponent was officially declared elected by KANU

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[406] The Special Branch of the Police is administered through the Office of the President. See 1997 FIDA Annual Report, '*Bado Mapambano*…', op. cit., p.11.
[407] Interview with Beatrice Konya, ibid., pp8-10.
[408] Ibid., p22.
[409] Also known as the '*mlolongwe*' system.
[410] Interview with Beatrice Konya, 1997 FIDA Annual Report, '*Bado Mapambano*…', op. cit., pp8-10.
[411] Interview with Dr Julia Ojiambo, ibid., p.12.

Headquarters in Nairobi. When she tried to find an explanation, she was informed that the KANU Secretary General had announced that the candidates had to go back to the constituency for a repeat of the nomination exercise. When she asked further information on how to repeat the exercise, she faced hostility and a wall of silence.

She further discovered that the original (47) polling units had been replaced by 29 Assistant Chiefs Centres which belong to the provincial administration (i.e. Government Offices). The Assistant Chiefs had also been instructed to threaten women voters whilst her opponent "*had prepared Jeshi La Mzee* (a youth branch of KANU supporters) *with pangas, whips, swords, daggers, stones and goods to come and fight voters*". Her opponent went on to win the election. In her interview with FIDA, Dr Julia Ojiambo questioned "*Why should the Government fight women voters and why should KANU be anti-women leadership (…)?*". In a comment summing up the nature of the elections process in Kenya and the way women are discriminated against, she further added, "*The corruption we saw was beyond belief. KANU (…) used money to corrupt the administration, it used that money to corrupt young people to fight their mothers and brothers. (…) These are the KANU tactics (…), the politics of violence, of corruption and gender insensitivity*".[412]

Another female candidate, also running for the KANU party in the 1997 elections, and who had served as a nominated member of Parliament for two years, revealed to FIDA her experience as a politician.[413] She described how she had had to step down despite her victory in the 1992 elections as a Democratic Party candidate. As a result of the elections, her husband, who had been a civil servant in the Office of the President for 28 years, was made to retire and lost all his retirement benefits. Following her nomination as a MP by the President in 1995, she was able to run for the 1997 elections as one of five KANU candidates in her constituency. She described how she found "*well orchestrated violence against women*" with "*drunks and hooligans beating up women as they stood in line. Women standing in line with babies on their backs would be beaten*". She also said that the beating would target mainly women because the men *"would resist*" and that "*the lack of a secret ballot facilitated the violence*" against women. A man whose wife had refused to line up behind the same candidate told her how she had "*caused a lot of* conflict" in his family. She discovered that women leaders had been bribed the previous day and did not turn up to support her. Furthermore, the results from the 15 polling stations that constituted her political stronghold had *"allegedly been stolen*". She lost the election, and despite manifest irregularities, a repeat of the nomination exercise was not granted.

Adelina Mwau, a prominent women's rights activist, gives a similar story as an opposition female candidate running for Kaiti, a rural constituency in the Eastern Province, in the December 1997 elections.[414] She found very little support within her own party, the Social Democratic Party, whose leadership is male dominated (there are no women represented in its Political Bureau, responsible ultimately for the nomination of candidates). Despite having paid the requested amount as a candidate for party nomination, she did not receive any money back that could have helped her run the campaign (another male candidate who

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[412] Talking about this particular constituency, she also described how during the previous elections in 1992 the FORD-Asili (Forum for the Restoration of Democracy - Asili) candidate had been kidnapped and that the people were 'given' a leader (for five years) without any election taking place. See FIDA, ibid., p.13.
[413] Ibid., pp.14-15.
[414] Interview with Adelina Mwau, 1997 FIDA Annual Report, '*Bado Mapambano*…', op. cit., pp-17-18.

wanted to stand in Kaiti had offered 50 times the amount requested). Despite the fact that she had been actively involved in the party (she had been the Vice-President), she found that she still faced discrimination. During the elections, all the polling stations where she had strong support received their ballot boxes very late in the day (not before 6.00pm) and as a result many voters, especially women, did not turn up. She also noticed that the symbol of the party on the ballot papers had been printed very lightly as opposed to the prominent KANU symbol. In addition, the KANU candidate was found "*directing the distribution of ballot boxes on polling day*" usurping the role of the Electoral Commission. Despite a formal complaint to the police, he was not disqualified.

These electoral experiences reveal the nature of the pressures, obstacles and even violence which women have to face, both as voters and as candidates. As FIDA remarks, "*a woman exercising her right to vote for the candidate of her choice not only faces violence within the community but also at home. (…) Can women who must line up behind their husbands or face being whipped by party agents really be said to have a right to vote?*"[415] In fact, the right to a secret ballot is contained in Article 25 of the International Covenant on Civil and Political Rights which states that "*every citizen shall have the right and the opportunity (…) without unreasonable restrictions (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors*". Kenya ratified the ICCPR in 1976 when it came into force.

VIII.9 INFRINGEMENT OF WOMEN'S POLITICAL AND CIVIL RIGHTS

VIII.9.1 NATIONAL PROVISIONS The interference in women's civic education and the intimidation they suffered during the election process represent a violation of a number of articles in the Constitution of Kenya (Sections 70, 78, 79 and 80 in Chapter V of the Constitution that includes "*fundamental rights*") and the ICCPR (Articles 18, 19 and 25) that guarantee rights to freedom of expression, association and assembly, and the right to vote by secret ballot. In particular, Section 79(1) of the Constitution provides that:

> "*Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence*".

VIII.9.2 INTERNATIONAL COMMITMENTS The same rights are enshrined in Article 18 and 19 of the ICCPR. These rights can only be "*subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals"*.[416] Section 79(2) of the Constitution makes provision for similar restrictions.

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[415] Ibid., p.16.
[416] Article 19(3) of the ICCPR.

The obstruction of women's civic education is also a failure by the state to fulfil its obligations as a signatory of CEDAW (Articles 3, 7 and 14) by ensuring "*the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men*".[417] In particular, Kenya is bound by Article 7 of CEDAW (which it ratified in 1984) to commit itself to "*eliminate discrimination against women in the political and public life of the country and (…) ensure to women, on equal terms with men, the right (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country*".

As FIDA points out, CEDAW also provides specifically for the rights of rural women by requesting state parties to "*take into account the particular problems faced by rural women and the significant roles which* [they] *play (…) and take all appropriate measures to ensure the application of the (…) Convention to women in rural areas*".[418]

The responsibility of the state for the promotion and respect of women's rights is particularly crucial in a country like Kenya where men feel threatened by women's advancement and feel that if women get to know about their rights and start to claim them, women "*will take over*". Yet the President's declarations (see PART VIII.7.2) were "*clearly anti-women*" and constituted what the Chairman of LKWV described as "*unwarranted intimidation by the Head of State*".[419]

Educating and informing women about politics, including their rights to vote and to be represented, is another fundamental human right. Unfortunately, it is not enough for Kenya to be party to a number of International treaties, covenants and conventions on human rights as these treaties are not incorporated into domestic law (thus not enforceable), not respected or even contravened by Kenyan domestic legal provisions.

If prominent women's activists are denied access to positions in decision-making bodies or have to face greater obstacles in attaining these positions, and if the Law that is governing their rights remains either inefficient, inadequate, discriminatory or clearly against them, how can the average Kenyan woman expect to be given due respect when it comes to the violation of her human rights?

Where can she turn for protection?

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[417] 1997 FIDA Annual Report, '*Bapo Mapambano*…', op. cit., p.8. .
[418] Ibid., p.12. The full text of CEDAW is available at www.un.org/womenwatch/daw/cedaw/reports.htm
[419] Declaration from the Chairperson of LKWV, Hon. Martha Karua in FIDA, op. cit., p.11.

CONCLUSION

This review of the situation in Kenya shows a country where human rights abuses and women's rights abuses in particular are continually violated. Despite the fact that these abuses have been consistently and openly reported in the last ten years alone, the situation is not improving. In the year 2000 at least 10 prisoners are reported to have died of torture in Kenya.[420] The country's current march towards a free democracy is also still marred by ethnic violence[421] and the prospect of further violence is looming close, with the next General Election scheduled for next year.[422]

John Githongo, of the international corruption watchdog Transparency International recently described the current climate: "*We are closer to collapse than any time in our independent history. The level of anger is very high. It is dawning on people that this bunch running the country don't actually know what they are doing*".[423] His description was mirrored by that of Professor Njuguna Ng'ethe, a research professor at the United Nations Institute for Development Studies: "*If Moi is still around* [in 2002][424] *I can see a* [popular] *uprising*".[425]

President Moi himself recently declared that "*he doubted that* [Kenyans] *held at a refugee camp in Tanzania were genuine refugees*" and expressed his "*surprise at reports that the Kenyans had fled persecution*".[426] The Kenyan government, it seems, remains in denial as far as its record on human rights is concerned.

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[420] Amnesty International, '*Kenya Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*', AI, London, December 2000, 7 p.
[421] See in particular events reported in the *Daily Nation* in November and December 2000.
[422] See Dr Louise Pirouet comments' on the nature of elections in Kenya, in *'Only Crooked Words'*.
[423] Testimony collected by Declan Walsh, '*Great African hope spirals out of control*', *The Independent on Sunday*, 26 November 2000.
[424] Date of the next General Elections.
[425] Declan Walsh, op. cit.
[426] *Daily Nation*, 'Moi: Refugees not genuine', Nairobi, 27 December 2000.

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