

KENYA

Rape – the invisible crime

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KENYA

Rape – the invisible crime

“Violence is encouraged domestically by women due to inferiority complexes over their husbands. I’ve personally been starved emotionally and feel that you women cause domestic violence.”

“For women not to grow horns they must be beaten.”

“Violence is not only physical but psychological and mental. Violence against women can be stopped by tolerance and talking to each other and change [in] our cultures which condone physical violence. Let the public be informed that it is a crime.”¹

1. INTRODUCTION

Violence against women is widespread in Kenya. Every day, women are physically and sexually abused. Rape occurs in all social and ethnic groups. It is a crime that shocks and traumatizes the victim, and undermines the status of women in society. Yet it is largely suffered in silence.

Victims of rape often face insurmountable obstacles in trying to bring the perpetrators to justice. Many women who have suffered rape or other forms of abuse are too intimidated by cultural attitudes and state inaction to seek redress. To do so can lead to hostility from family, the community and the police, with little hope of success. Those who do seek justice are confronted by a system that ignores, denies and even condones violence against women, and protects perpetrators, whether they are state officials or private individuals.

The Attorney General of Kenya acknowledged in 1999 that,

“[v]iolence against women pervades all social and ethnic groups. It is a societal crisis that requires concerted action to stem its scourge... Culture does

¹ Views collected on National AIDS Day, 1 December 1999, in order to show people’s attitudes towards violence against women, by the Coalition on Violence Against Women (COVAW), a Kenyan membership-based network of individuals and organizations who are committed to eradicating violence against women, COVAW, December 1999.

influence the relationship between the various groups in society and...some cultural practices, beliefs and traditions have had the tendency to relegate women to a second class status in society thereby not only violating their rights as human beings [but] leading to discrimination against women. Some...customs and cultural practices have found their way not only into law but...[are used] as justification for violence against women.”²

Yet, despite its moral and legal obligations, the government has not reformed Kenya’s laws to make all acts of violence against women criminal offences, nor has it addressed the discriminatory practices of the police force, prisons services and court system.

Police statistics over the years have shown an increase in the number of reported rapes; 515 in 1990 and 1,675 in 2000.³ These figures are likely to reflect an under-reporting of rape and not its actual incidence. Local women’s groups believe that the true figures are much higher.

This report is the third in a series focusing on torture and impunity in Kenya within Amnesty International’s Campaign against Torture.⁴ It is based on research undertaken by Amnesty International over the years, including a mission in Kenya in August 2001. It is being published on 8 March 2002 to mark International Women’s Day. While women’s achievements are being celebrated all over the world on that day, Amnesty International seeks to ensure that those women who continue to be raped and beaten and denied their basic rights – whether by state officials or family members – are not forgotten.

This report sets out to answer some of the questions put to Amnesty International by women victims of violence. It looks at violence against women, particularly sexual violence, and focuses on rape committed by both security officials and private individuals. It examines why women subjected to violence are not adequately protected by the law and why those who commit violence against women continue to operate with impunity.

Kenya has agreed to be bound by international human rights standards such as the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against

² Statement by the Hon. S Amos Wako, the Attorney General, during the 16 Days of Activism Against Violence Against Women, 10 December 1999.

³ Statistics given by the Kenya Police Headquarters, Nairobi. The Kenya Anti-Rape Organisation also stated that reported rapes range from between 900 and 1,500 a year.

⁴ See also *Kenya: Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*, December 2000 (AI Index: AFR 32/010/2001); *Kenya: Ending the cycle of impunity*, June 2001 (AI Index AFR 32/011/2001).

Women (CEDAW). This report contains recommendations to the Kenyan government for action to ensure that women and men enjoy the right to equal protection under the law, including the right to physical integrity.

2. VIOLENCE AGAINST WOMEN – THE LEGAL FRAMEWORK

Violence against women is prohibited in international human rights instruments and within Kenya's own Constitution and national legislation. The government of President Daniel arap Moi has consistently stated its intention to promote gender equality through national legislation. However, the Kenyan government has failed both to implement constitutional provisions and domesticate international or regional human rights treaties that promote and protect women's rights. Kenyan laws remain in force which discriminate against women, and the government has appeared reluctant to support legislation before Parliament which would address issues of concern to human rights and women's organizations in Kenya.

2.1 International law

The international human rights standards which prohibit violence against women include several treaties which Kenya has ratified - including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, and Convention on the Rights of the Child - and under which it therefore has legal obligations.

International standards recognize that the denial of equal rights to women reinforces violence against them in detention and at home. Although the issue of gender-based violence is not explicitly addressed in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – ratified by the Kenyan government in 1984 – it is fundamental to its most basic provisions. The Committee charged with the responsibility of overseeing the implementation of the CEDAW by states parties affirmed, in its General Recommendation 19, that violence against a woman constitutes a violation of her internationally recognized human rights.⁵ This had been articulated in the Platform for Action of the Fourth World Conference on Women in Beijing, 1995, which stated that

⁵ General Recommendation 19, adopted in 1992, deals entirely with violence against women, and explicitly states that gender-based violence is a form of discrimination which seriously inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men and asks that state parties have regard to this when reviewing their laws and policies.

“violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed.”⁶

In General Recommendation 19, the CEDAW Committee stated that

“the definition of discrimination includes gender-based violence, that is, violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”

The Committee goes on to say that “gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.” In the same General Recommendation, in paragraph 24 (t), the Committee called on states parties to take all measures necessary to prevent gender-based violence. Such measures would include not only legal measures such as penal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and education programmes, and protective measures, including support services for victims of violence.

The Optional Protocol to the CEDAW offers women direct means to seek redress at the international level for violations of their rights under the CEDAW: it opens the door to the UN Committee that monitors implementation of the CEDAW, enabling it to be applied directly to actual situations that women in all parts of the world face in their daily lives and ensuring that it does not remain a distant and abstract set of rules and principles for them.⁷

International standards also recognize that the continuing discrimination that women encounter in their communities, often stemming from poor socio-economic conditions, makes women vulnerable to acts of violence. The UN Economic and Social Council recognized that sexual violence is “pervasive and cuts across lines of income, class and culture... [V]iolence

⁶ UN Doc A/CONF.177/20, para 112.

⁷ See Amnesty International’s report, *Claiming women’s rights: the Optional Protocol to the UN Women’s Convention* (AI Index: IOR 51/001/2001).

against women derives from their unequal status in society.”⁸ Article 3 of the African Charter on Human and Peoples’ Rights, to which Kenya is a party, provides that “each person is equal before the law and must be protected equally by the law.” Article 5 guarantees to every individual “the right to the respect of the dignity inherent in a human being” and prohibits torture, cruel, inhuman or degrading punishment or treatment.

There is no international legal definition of rape which has been universally accepted. The International Criminal Tribunal for Rwanda, in a 1996 judgement, noted the lack of an international legal definition and went on to define rape as: “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”⁹ The finalized draft text of the Elements of Crimes for the Statute of the International Criminal Court offers the following definition of rape:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

Rape is a crime of violence, aggression and domination, which affects women disproportionately. Rape is torture when the state has failed in its responsibilities to protect, investigate and provide redress to women victims. Acts of violence constitute torture for which the state is accountable when they are of the nature and severity envisaged by the concept of torture in international standards and the state has failed to fulfil its obligation to provide effective protection. For example when it is committed by prison, security or military officials, or by private individuals in circumstances where the state has systematically failed to provide protection or redress to the victims. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in article 1 as:

⁸ Economic and Social Council Resolution 1990/15, Recommendations and conclusions arising from the first review and appraisal of the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000, para 23.

⁹ 1996 Akayesu judgement, Case No. ICTR-96-4-T.

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, for such purposes as obtaining... information, or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official...”

Rape causes severe physical or mental suffering, is a deliberate act by the perpetrator and is carried out with the intention to intimidate, degrade or humiliate the victim.

The UN Special Rapporteur on violence against women, in her 1996 report, argued that, “depending on its severity and the circumstances giving rise to State responsibility, domestic violence can constitute torture or cruel, inhuman and degrading treatment or punishment under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This view challenges the assumption that intimate violence is a less severe or terrible form of violence than that perpetrated directly by the State.”¹⁰ The report stated further, in paragraph 44, that domestic violence may constitute torture as it “involves some form of physical and/or psychological suffering, including death in some cases.” It defined violence in the family as “violence perpetrated in the domestic sphere which targets women because of their role within that sphere or as violence which is intended to impact, directly and negatively, on women within the domestic sphere.”¹¹ In her 1999 report the Special Rapporteur stated that “violence within the family comprises, *inter alia*, woman-battering, marital rape...[and] traditional violent practices against women including forced marriage...”¹²

2.2 National law

Section 74(1) of the Kenyan Constitution prohibits torture, inhuman or degrading treatment. Discrimination on grounds of gender was incorporated into the Constitution through a constitutional amendment in 1997. Under amendments in November 1997 to the Police Act, Section 14A(2) and (3) declares torture, cruel, inhuman or degrading treatment committed by a police officer to be a criminal offence.

¹⁰ UN Doc E/CN.4/1996/53, para 42.

¹¹ *Ibid*, para 28.

¹² UN Doc E/ CN.4/1999/68 para 17.

Under Kenyan law, rape is classified under “Offences against Morality”, Chapter XV of the Penal Code. Kenyan law identifies three types of rape – rape, defilement and incest – which are classified according to the age of the victim and the relationship of the perpetrator to the victim. Each type of rape is seen as a separate criminal offence incurring different maximum sentences. Under Section 139 of the Penal Code,

“Any person who has unlawful knowledge of a woman or a girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape.”¹³

Sections 140 and 141 provide a maximum sentence of life imprisonment with hard labour and corporal punishment for those convicted of rape. No minimum sentence is specified. Amnesty International regards hard labour and corporal punishment as cruel, inhuman and degrading treatment. Local human rights organizations have expressed concern that sentences vary wildly and are frequently too lenient. The Kenyan branch of the International Federation of Women Lawyers (FIDA (K)), which works to improve the legal status of Kenyan women through legal aid, education, training and advocacy, has stated,

“[R]ape is universally accepted as one of the worst forms of violence against women... [L]aws provide a maximum of a life sentence with hard labour and corporal punishment for rapists. Yet we hardly ever see rapists sentenced for longer than five years. Because our laws do not provide a minimum sentence, magistrates are not bound to sentence convicted rapists to life imprisonment.

¹³ Defilement is defined in the Penal Code under Section 145 as,

“(1) Any person who unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for fourteen years together with corporal punishment.

(2) Any person who attempts to have unlawful carnal knowledge of a girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for five years, with or without corporal punishment.”

Incest is defined under Section 166 as,

(1) Any male person who has carnal knowledge of a female person who is to his knowledge his granddaughter, daughter, sister or mother is guilty of a felony and is liable to imprisonment for five years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of thirteen years, the offender shall be liable to imprisonment for life.

(2) It is immaterial that the carnal knowledge was had with the consent of the female person.

They can sentence rapists to any amount of time below life. Several organisations have therefore called for a minimum sentence.”¹⁴

The Penal Code does not recognize marital rape as a criminal offence because of the presumption, especially in customary law, that consent to sexual intercourse is given by the act of marriage. No legal challenge to this presumption has been made through the courts in Kenya. The lesser charge of assault is more commonly used in marital rape cases, carrying with it a lower maximum sentence. FIDA (K) reported one case in which a man was convicted of assault causing actual bodily harm to his wife and fined 10,000 shillings (US\$12), or four months’ imprisonment in default, having spent a year in prison on remand. Evidence was introduced in court that he had pushed the broken legs of a stool into her vagina. FIDA (K) later reported that he had again been charged with assault after allegations that he had beaten his wife again and threatened to kill her in reprisal for his imprisonment.

Kenya has not incorporated into domestic law any of the international or regional human rights instruments that it has ratified. The government has consistently stated its intention to promote gender equality through legislation, but has failed to implement constitutional provisions and domesticate international or regional human rights treaties that promote and protect women’s rights. In 1999 the Attorney General promised to establish a National Gender and Development Council, which would work with the Attorney General’s office and the Kenya Law Reform Commission to ensure “the amendment and development of laws and regulations necessary to remove the sources of gender inequality. The Council will not only initiate laws but will also initiate policies and programmes which will lead to gender equality.” To date this Council has not been established, and one Kenyan human rights organization described the statement as “simply rhetoric”.

Although proposed new laws should address some concerns about women’s human rights, they have been delayed in their progress through Parliament by lack of government support. The Criminal Law (Amendment) Bill, published in April 2000, “seeks to amend the penal laws to facilitate expeditious disposal of cases, discourage torture and harmonize penalties relating to sexual offences”, including the offences of rape, defilement and incest.¹⁵ The Bill aims to ensure that there is an element of privacy and confidentiality for a victim giving testimony. The proceedings for trials of certain sexual offences, such as defilement and rape, would be held *in camera* to protect the identity and safeguard the privacy of the victims. While measures to

¹⁴ Interview in *East African Standard*, 18 February, 2001.

¹⁵ If the Bill is enacted the following statutes would be amended: the Penal Code (CAP 63), the Criminal Procedure Code (CAP 75), the Evidence Act (CAP 80) and the Prevention of Corruption Act (CAP 65).

protect victims are in principle welcome they must not compromise the rights of the accused nor the conduct of a fair trial.¹⁶

The Equality Bill, published in 2000, is aimed at eliminating all forms of discrimination and promotes equality of access and opportunity for all persons.¹⁷ The Affirmative Action Bill, published in October 2000, aims to improve and increase representation for marginalized groups in society, particularly women.

The Domestic Violence (Family Protection) Bill of 2001 seeks to allow courts to intervene in cases of domestic violence and “to provide for the grant, enforcement and variation of court orders for protection from such violence.”¹⁸ The Bill would for the first time recognize sexual and psychological as well as physical violence. Yet, while it categorizes rape as a form of violence, the Bill fails to make specific reference to marital rape.

The Domestic Violence Bill has yet to be debated in Parliament and local rights activists fear that the debate will not take place soon. A Marriage and Divorce Bill, to regulate marriage and divorce, has been shelved twice, the last time in 1979. The delay suggests a lack of will on the part of the government to ensure that legislation that would give women an equal basis in society is passed immediately by Parliament. The family is viewed by many as a private domain in which the authorities should not interfere. A human rights lawyer told Amnesty International, “Kenya is a patriarchal society, where Parliament is male-dominated and these are issues that are deemed to be a family matter.”¹⁹

¹⁶ Article 68(1) of the Rome Statute of the International Criminal Court states: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses... These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

¹⁷ The Bill will establish an 11-member Equality Board, which will develop guidelines aimed at eliminating all forms of discrimination, and a five-member Equality Tribunal which will address and recommend remedies for cases of discrimination.

¹⁸ The Domestic Violence (Family Protection) Bill, 2001, No. 20.

¹⁹ Interview by Amnesty International in Kenya, 29 August 2001.

3. THE STATE AND THE PRINCIPLE OF ‘DUE DILIGENCE’

Articulated through many international instruments and reports, states now recognize that they have a responsibility towards their citizens, including women, not only to protect them from abuses committed by state officials but also those committed by private individuals. States can be held responsible, in the implementation of their efforts to protect their citizens and to bring perpetrators of abuses to justice, if they do not exercise “due diligence”.

The Special Rapporteur on violence against women in 1996 commented that governments should “ensure that there exists no impunity for the perpetrators of such violence,”²⁰ further adding that “a State can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights.”²¹

The principle of due diligence was re-affirmed by the CEDAW Committee in General Recommendation 19, which emphasized that,

“under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

Paragraph 9 further states that it is also the responsibility of States parties under the Convention to eliminate gender-based discrimination by any person, organization or enterprise. State responsibility may therefore be invoked not only when a government official is involved in an act of gender-based violence, but also when the state fails to act with due diligence to prevent violations of rights committed by private persons or to investigate and punish such acts of violence, or to provide compensation. In accordance with Article 4 of the Declaration on the Elimination of Violence against Women, states must “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”

²⁰ UN Doc. E/CN.4/1996/53, para 29.

²¹ UN Doc. E/CN.4/1996/53, para 32.

Both the Beijing Platform of Action in paragraphs 124-30²² and the Declaration on the Elimination of Violence Against Women in Article 4 include judicial, legislative and administrative steps that states are obligated to take in order to eliminate violence against women. The UN Commission on the Status of Women, established to promote implementation of the principle that men and women shall have equal rights, in its 39th session stated that “women victims of violence should be given comprehensive assistance, with legal measures, national machinery, preventive policies and institutional forms of assistance.”²³ The Commission on the Status of Women further states that, by failing to provide for women “access to legal information, aid or protection; ...laws that effectively prohibit violence against women; ...reform [of] existing laws; ...and other means to address the causes and consequences of violence”, governments exacerbate factors that contribute towards violence against women.²⁴ The lack of enforcement by states of their moral and legal responsibilities in the promotion and protection of women’s rights continues to contribute to the commonly-held perception that domestic violence is acceptable in some communities.

Amnesty International’s view, as expressed in a recent report on torture and ill-treatment of women, is that “due diligence includes taking effective steps to prevent abuses, to investigate them when they occur, to prosecute the alleged perpetrator and bring them to justice in fair proceedings, and to ensure adequate reparation, including compensation and redress. It also means ensuring that justice is dispensed without discrimination of any kind.”²⁵ The report expressed the organization’s concern that “[M]any women victims of violence find access to legal redress and reparations difficult, if not impossible. Impunity and indifference habitually surround many acts of violence against women.”

Amnesty International believes that acts of violence against women constitute torture “for which the state is accountable when they are of the nature and severity envisaged by the concept of torture in international standards and the state has failed to fulfil its obligation to

²² UN Doc. A/CONF.177/20. Kenya has incorporated some elements of the Platform for Action into its Eighth National Development Plan, and its draft policy paper on gender and development articulates the need to achieve gender equity in development.

²³ UN Doc. E/CN.6/1995/3/Add.4, para 1.

²⁴ *Ibid*, para 118.

²⁵ See *Broken bodies, shattered minds*, Amnesty International 2001 (AI Index: ACT 40/001/2001).

provide effective protection.”²⁶ The organization considers that, unless the state actively and generally seeks to prevent rape and violence against women and to bring perpetrators to justice, such torture will persist and perpetrators of these crimes will continue to act with impunity. Thus, the Kenyan government is obliged to ensure that it provides for adequate prevention, investigation and prosecution of acts of sexual violence and redress to their victims.

4. DISCRIMINATION AGAINST WOMEN IN KENYA

The status and role of women in Kenya is that of second class citizens. Discrimination against women is widespread.

Article 1 of the CEDAW defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Kenya is a patriarchal society, where the husband is the head of the household and women often have little influence in decisions affecting their lives. This extends to sexual relations, where women are frequently unable to refuse to have sex with their husbands. Violence pervades the lives of many women.

The Economic and Social Council noted that poverty in general inhibited the full enjoyment of human rights and that the situation where women had unequal access to resources ensured continuing discrimination.²⁷ In Kenya, customarily women do not own property or the land they work, which causes them economic hardship and places them in positions of dependence. Yet Article 15 of the CEDAW requires states parties to give women equal rights to administer property.

In some rural communities attitudes persist that put women at particular risk of violence. The UN Commission on Human Rights, in a resolution on women’s equal ownership of, access to and control over land and equal rights to own property and to adequate housing, stated that “women’s poverty, coupled with a lack of alternative housing options, makes it difficult for women to leave violent family situations.”²⁸ Paragraph 24(o) of General Recommendation 19 of

²⁶ Ibid.

²⁷ UN Doc E/CN.4/1998/22.

²⁸ UN Doc. E/CN.4/RES/2001/34.

the CEDAW Committee imposed an obligation on states to ensure that services for victims of violence were accessible to rural woman.²⁹

Each ethnic group in Kenya has its own identity, realized through its culture and traditions. It is recognized that not all customs discriminate against women's rights and that there are certain practices that contribute towards promoting women's human rights. Amnesty International does not campaign against these cultural values and practices as such, for it is these very values that contribute to distinct and vibrant communities. However, the organization is concerned that violence against women has become entrenched through those elements of culture and tradition that discriminate against women. Violence against women risks becoming widespread when, for example, wife inheritance, bride price, forced marriage and female genital mutilation (FGM) are institutionalized through culture and tradition and when the state does not ensure that women's rights are upheld and protected. As the Special Rapporteur on violence against women stated, "[B]lind adherence to these practices and State inaction with regard to these customs and traditions have made possible large-scale violence against women."³⁰

Amnesty International welcomes the recently passed Children's Bill 2001 which includes provisions that ban children from forced marriage and female genital mutilation. However, the practice amongst adults continues to be condoned by the government. The government therefore continues to act in a manner incompatible with the provisions of Article 5 of the CEDAW, which calls on states to eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women. Article 4 of the Declaration for the Elimination of Violence against Women urges states not to avoid implementing their obligations to eliminate discrimination against women on the grounds of custom, tradition or religious considerations.

Although international human rights standards guarantee equal access of males and females to property, according to customary practices women do not inherit property from their parents or husbands as property ownership generally follows a male lineage.³¹ In some communities, when a man dies, his relatives disinherit his widow and children, leaving them without property or means to sustain themselves. In Kenya, there have been cases brought to

²⁹ UN Doc. A/47/38.

³⁰ UN Doc. E/CN.2/1995/42.

³¹ Kenya does not have local legislation that deals with marital property and has to rely on the English Married Women's Property Act 1882. However, there have been enough cases brought to court to ensure that the law is made relevant to the Kenyan context.

court by widows trying to reclaim property from their husband's family, but in some instances they have been unable to prove that they were legally married and therefore have a legal right to the property. In many cases it is reported that women, and their children, have found themselves homeless.

Forced marriage is customary in some communities, contravening Article 16 of the CEDAW which guarantees, on the basis of equality of men and women, the same right to freely choose a spouse and to enter into marriage only with free and full consent. On the death of her husband, a woman is "inherited" by his brother or close relative. The woman's consent to this new marriage or to sexual relations with her new "husband" is not sought. The community uses the custom to further discriminate against women and entrench their secondary position in society. Amnesty International was told by one human rights lawyer that even the adult sons of a woman, believing that this was a customary requirement, would force their mother to be inherited for fear of terrible consequences. "So, children marry off their mothers, usually to the [dead husband's] elder brother, but the children cannot do any cultivation until the elder brother has had sexual intercourse with his new wife. The children cannot cultivate or build a permanent house, for the elder brother determines everything, otherwise there is *chira* (negative consequences for the family)."³²

One of hundreds of women marching through Nairobi, Kenya, to campaign against violence against women holds a placard reading "Thanks, mum, for not circumcising me". ©AP

In the case of Phelista from Nairobi, who was married in 1965, her husband died in 1983 and, according to her community's customs, she was "inherited" by her husband's brother. He reportedly verbally abused, beat and raped her repeatedly. She told Amnesty International that she did not report the abuse to the police as she thought that they would demand money but in 1992 she reported it to the village chief's office. The Chief's advice was that, if she could not stay with her new husband, she should leave him. When she told her husband that she was leaving him, he allegedly beat her and forced her to have sex with him.

For many women who are forced into a new marriage there is the added worry of the health risks associated with the marriage. "Inherited" women may become infected with HIV and eventually die of AIDS, leaving children orphaned. As a Kenyan social worker remarked

³² Interview with Hezekiah Abuya, lawyer and human rights activist, 28 August 2001.

in an interview with the media, “People have not yet accepted the fact of AIDS, even though people are dying. If a woman refuses to be inherited, nobody will shake her hand.”³³

Gender-based violence not only exposes women to sexually transmitted diseases, but also to the risk of acquiring HIV/AIDS. The high levels of HIV in the population mean that sexual violence against women and children carries a significant risk of transmission of the virus and of subsequent illness and death.³⁴ As the Women’s Rights Awareness Programme (WRAP), a Kenyan women’s human rights organization, told Amnesty International,

“Women have forced sex, and are scared of catching something. They say that they are scared because the husband...also comes to have forced sex with her. These women...[are] especially from the slum areas where husbands are sick and they insist on having sex, and the women can tell there is a possibility of contracting HIV/AIDS.”

Women who have been infected with HIV find it difficult to share this important information with their partner because of fear of aggression. According to a survey conducted by the Kenyan Population Council in 2001, more than half of the women surveyed who knew they had acquired HIV said they had not disclosed their HIV status to their partners because they feared it would expose them to violence or abandonment.³⁵ There is also a reported pattern of abuse by men who target minors for sex in the belief that they are less likely to be infected with the HIV/AIDS virus. Men infected with HIV/AIDS have reportedly raped young girls under the illusion that they will be “cleansed” by having sex with a virgin.

³³ Interview with Anne Wanalo, *IRIN*, 12 May 2001.

³⁴ As elsewhere in sub-Saharan Africa, in Kenya the scale of HIV infection and AIDS-related illness and death is extremely high. At the end of 2001, approximately 14% of all Kenyans aged 15-49 were infected with HIV and 220,000 adults and children died of AIDS-related illnesses during 2000. Since the beginning of the epidemic more than 850,000 children have been orphaned by AIDS. In the last decade, life expectancy in Kenya has fallen by ten years. UNAIDS, *Kenya: Epidemiological fact sheets on HIV/AIDS and sexually transmitted diseases, 2000 Update (revised)*, Geneva; CDC - National Center for HIV, STD and TB Prevention, *Global AIDS Program: Countries – Kenya*. See <http://www.cdc.gov/nchstp/od/gap/countries/kenya.htm> (accessed 1 December 2001).

³⁵ UNAIDS, *AIDS epidemic update, December 2001*, Geneva.

5. WOMEN'S LACK OF ACCESS TO POLICE AND LEGAL PROTECTION

The lack of an effective system to investigate allegations of sexual violence and rape in Kenya is reflected in the procedure that a woman victim must go through in order to bring her case to court. Women victims face obstructions in the criminal justice system and in the lack of facilities for gathering essential medical evidence, and most cases are never heard in court.

5.1 Reporting to the police

The statistics published by the Kenyan police show the extent to which rape is reported, but do not show how many cases were investigated and prosecuted. The percentage of cases in which there is a prosecution is widely believed to be very low.

For an investigation to be initiated, a woman victim has to report the crime to the police. Her statement regarding the alleged abuse should be recorded in the Occurrence Book held in each police station. However, the majority of police officers are not trained in gender issues or how to handle cases of domestic violence, especially marital rape. Most police officers regard violence within the home as a domestic matter, and enforce and uphold discriminatory attitudes against women. In August 2001 the Kiambu Divisional Police Chief, Mr Njue Ngagi, reportedly freed a church leader, arrested on suspicion of the crime of defilement of a six-year-old girl, because he was a “married man with children and, therefore, incapable of committing such an offence.”

Special provisions for women have not been established in any police station or police post in Kenya, despite commitments made by both the Attorney General and the Police Commissioner in August 2000 to introduce “rape desks” at police stations to make the police more responsive to gender-based crimes. These desks would be separate from the main police desk, to enable victims of rape and sexual violence to report the offence in more privacy and to police officers trained to interview victims and investigate the offence in a sympathetic and sensitive manner.

Women who seek police intervention are often embarrassed, ridiculed, verbally abused and made to feel as if they are wasting police time. In many of the interviews carried out by Amnesty International, women said that they were reluctant to approach the police and had only reported their case when the violence had become so extreme that they needed intervention to protect their lives.

There are fears among local women's activists and victims that the offence of rape is subject to less vigorous police investigation than other crimes and, therefore, that victims are less inclined to report such crimes to the police. As the police are both investigator and prosecutor in the Kenyan legal system, Amnesty International has concerns about whether police

investigations are fair, transparent, impartial and independent. There is no independent police unit to investigate allegations of rape against a police officer. If a woman complains of rape by a police officer, it is extremely rare for an investigation or prosecution to be initiated. The offence has to be reported to the local police station and, where police officers are implicated, the immediate colleagues of the accused may be the investigators. It is likely that victims will not report such allegations to the police for fear of reprisal or inaction. In cases where the only other witnesses are other police officers, they are often unwilling to testify against a colleague. In many cases police officers suspected of or accused of rape are transferred to other units instead of being investigated and brought to justice. Local human rights organizations have accused the police of using delaying tactics to postpone court hearings in cases which do come to court, such as by losing evidence or transferring the case to another court.

5.2 Gathering medical evidence

As well as reporting the offence to the police, the woman victim must obtain a Medical Examination Report - otherwise known as a P3 form - from the police station before she can be examined by a doctor. The P3 form is a document that is used by victims to detail acts of torture and ill-treatment committed against them. The form is divided into two sections, to be filled in by the police and a doctor. The police complete the first section of the form, which requires them to ask a doctor to examine the victim for evidence of a crime, and then escort the victim to the doctor to be examined. The second section of the form is used by the doctor to record any injuries. This may require a number of trips to the doctor if the victim cannot be examined straight away.

However, there can be unsurmountable difficulties just to procure a form. It should cost nothing. Yet, Western Kenya Human Rights Watch, a Kenyan human rights organization, told Amnesty International, “[T]o get a P3 form you have to bribe the police. This [form] is meant to be free, but they usually sell them for 100 shillings.” The organization therefore usually accompanied the person they were assisting to the police station to ensure they received the form and did not have to pay for it. Also, the P3 forms are only to be obtained in police stations as they are used by the police as part of their criminal investigation. This has actively discouraged many victims of torture and ill-treatment from requesting a form and few have come forward to have their injuries recorded for the purposes of a prosecution. In cases in which abuses have been committed by the police themselves, women have feared trying to obtain a form, especially if the abuse took place at the station where they had to apply. In other cases, victims of police torture have been threatened by police officers when they tried to make a statement.

Organizations that support and offer legal advice to victims require the P3 form to show evidence of torture in civil or criminal legal actions. Professional organizations told Amnesty International that the present P3 form is inadequate to show the extent of injuries sustained by

the victim in cases of torture and ill-treatment and provides no opportunity to record a detailed examination of a rape victim. An amended P3 form, which would standardize medico-legal examination, was presented to the Attorney General by the Kenyan Independent Medico-Legal Unit (IMLU), the Kenyan Medical Association (KMA) and other organizations in August 2001. The amended form consists of about a dozen pages, which allows for the reporting of a more detailed examination of the rape victim, including provision for the examination of the whole body for cuts and bruises and not only of the genitals.

Police who are responsible for registering these complaints rarely carry out the correct procedure. Louise, aged 33, from Nairobi, Langata went to the police in May 2001 after reportedly suffering abuse from her husband, a hotel employee. Although she gave her husband a letter from the village chief in March 2001, urging reconciliation, the beatings reportedly worsened. She told Amnesty International, “I went to the police in May and told them about the beatings and how I left... The police told me that they would arrest my husband, but they never did because [he] bribed the police.” She was not offered a P3 form by the police even though the beatings had left her with bruised eyes. Although by July 2001 she had left her husband, she reportedly continued to be beaten, and raped, by him. She decided not to go to the police as they had previously not helped her and instead sought sanctuary with a women’s organization in Nairobi that runs a shelter and counselling programme.

Doctors interviewed by Amnesty International argued that, although the police still need to request a medical examination, the P3 form should be placed in their surgeries to make it readily accessible and available to the public. Better access to a P3 form would enable the doctor to see the victim and record the medical evidence as soon as possible, regardless of when the crime is reported. Professional associations such as the KMA told Amnesty International that a “one-stop” rape crisis centre would be able to provide a service to women victims who fear the police or who are ashamed of what they have been through, which would include reporting the crime, accessing P3 forms, and obtaining medical and counselling services.

Victims of rape have an enormous problem to persuade the police and prosecuting authorities that they were raped. Police are prosecutors in rape cases. A person accused of rape will only be convicted if the victim can prove that she did not consent to the sexual act or that her agreement was obtained through threats or intimidation. The onus is on the women to prove non-consent and makes “rape the only crime in the statute books in which the victim is also on trial and is required to have resisted the attack in order to prove her innocence.”³⁶

³⁶ “Burden of proof in sexual offence”, Gender violence workshop, FIDA (K), 18-19 April 1994.

It is up to the state to prove that the victim has been raped. However, although the onus of proof that rape has been committed is on the state, the victim is still required to supply information in order to support her allegation of rape. Courts in Kenya demand proof beyond reasonable doubt in order to secure conviction. To obtain this proof, the state is responsible for ensuring that it has the resources to gather medical evidence correctly. The state must start the process of investigation immediately after the initial allegation by means of a thorough medico-legal examination and proper preservation of evidence, so that all necessary evidence is obtained and available to the courts when the case is heard. The state will fail in its responsibility if it does not establish a criminal justice infrastructure which will ensure that justice is done. Any investigation and conviction of perpetrators of sexual offences requires forensic and witness evidence. As marital rape is not recognized in law, proof of an assault requires expert medical forensic evidence.

For victims this process can be harrowing and traumatic. One rape victim described her ordeal of reporting the rape to the police and having a medical examination by a doctor:

“After I had been taken to a private doctor, he told me not to wash as I would have to report to the police doctor. Since it was 2am. this meant that my report would have to be filed on the next day. I could not believe that I would have to sleep with the smell of those men on me... When I went to report to the police doctor, I found a long line with all sorts of people. The nurse assisting him gave me two glass slides and told me to stick my fingers up myself and wipe the semen onto the glass slide. I could not believe what she was saying to me, they were asking me to re-enact the rape.”³⁷

Evidence of rape under Kenyan law can only be obtained by examination of semen deposits, bruises and laceration. Absence of this kind of evidence renders the prosecution’s case more difficult to prove. However, any forensic evidence has to be taken by a government doctor. Doctors lacking experience with rape victims often do not know how to take specimens. If there is a suspect, police often do not ensure that a doctor examines him for corroboratory evidence, such as a sexually transmitted disease, which is acceptable to the court as evidence. Many cases get dismissed because of lack of corroboration. The lack of skilled support and adequate resources for health professionals, especially in documenting rape cases, means that the few cases that do go to trial are often dismissed for lack of adequate medical evidence.

Any forensic evidence admissible in court has to be presented by a government doctor. There have been cases where private doctors have submitted medical evidence on

³⁷ *Second Class Citizenship*, FIDA (K), Annual Report for 1996-1997

injuries sustained by women victims to the court, but this is rare and most courts prefer documentation, specifically the P3 form signed by a government doctor. When the police escort a woman complainant to a government doctor, for medical examination and completion of the P3 form, the woman often cannot be seen straight away and must wait a number of days before being examined because the doctor is too busy. Women victims have sometimes been told by the police to wash themselves after their ordeal, thus losing vital evidence. With delays in reporting and in being examined by a doctor, vital evidence can be lost. The lack of care and assistance for the victim at this time can exacerbate the post-traumatic shock that the woman may be experiencing.

Many doctors are said to be reluctant to examine women victims or fill in a P3 form, especially when a police officer is the perpetrator. Doctors regularly examine torture victims but few are called to court to give evidence. P3 forms completed by doctors are often 'lost' by the police and not produced in court. Government doctors are not allowed to keep a copy of the completed P3 form for their records. They are rarely notified about impending court cases and, without copies of the P3 form, cannot recall the case for the purposes of giving evidence.

The UN Commission on Human Rights, in its resolution on the elimination of violence against women, calls for the state to provide "access to just and effective remedies and specialized, including medical, assistance to victims."³⁸ Yet, the cost of a medical consultation with a doctor, plus the lack of adequate health care facilities, denies many women victims in Kenya recourse to appropriate medical care. The inaccessibility to medical services also makes it extremely hard to ensure that vital evidence is preserved. Hospitals may be far from the victim's home, and many do not have adequate facilities or skilled staff to ensure proper treatment and medical examination of women victims. The IMLU told Amnesty International that storing medical evidence is difficult as many hospitals and medical centres do not have adequate refrigeration facilities.

5.3 Taking legal action

Women needing legal advice about concerns such as maintenance, other matrimonial issues and inheritance usually go to non-governmental human rights or women's organizations, such as FIDA (K). In the majority of cases, domestic and sexual violence plays a major part in the women's request for action from such groups. However, local organizations report that few women victims of such violence leave their husbands or pursue a legal case against them. This is mainly because of economic dependence on their husband, high legal costs, fear of losing custody of the children and of being ostracized by family and community, and a lack of

³⁸ UN Doc. E/CN.4/RES/2001/49, April 2001, para 2.

confidence in the police and judicial system to protect them and ensure adequate means of redress.

As women in Kenya constitute the majority of the poor, many cannot pay to bring a case to court; the cost of hiring an advocate is prohibitively high for them. If women do seek help from a local organization or report the incident to the police, one Kenyan women's organization told Amnesty International, they "will receive threats from [their husband's] family in order to drop the case. However, many women would rather protect the family so will suffer long term abuse and will only come...when they fear for the children."³⁹ Many women told Amnesty International that their husband had given money to the police to have the case dropped. A human rights activist in Kitale told the organization's delegates, "The main problem is the machinery which is meant to act on these cases. The village elder in the provincial administration is the first one the woman goes to, but he sends her back after a bribe. It is the same with the chief, police, etc. The man is not arrested even though the woman has done all the necessary."

Some courts, especially in the rural areas of the Eastern and North Eastern Provinces, view any form of domestic violence as a private affair which should be settled only by village elders. Mary, 36, from Nairobi, filed a case in court against her husband because of the beatings she said she received over a four-year period. However, in December 1997 the judge threw out the case stating that it was a "home affair" and that he wanted her to be reconciled with her husband. She told Amnesty International that she would like to pursue the case.

One of the key criteria for a functioning state is a fair, impartial, independent and functioning justice system, which is capable of protecting the rights and integrity of the individual. The failure to bring to justice those responsible for crimes of sexual violence, as defined in the Penal Code, undermines the rule of law and indicates a weak and inadequate judicial system that fails to take appropriate action with regard to these crimes. However, it is the failure of the law that ensures marital rape is being committed with impunity, for it fails to comprehensively articulate marital rape as a criminal offence and afford women victims the legal opportunity to bring to justice those who commit rape in the home.

The judicial system is perceived to be inefficient, expensive, inaccessible and discriminatory towards women. Female judges constitute only around 18% of the judiciary, and training on gender issues and international standards in relation to women's rights is limited in scope and not as readily available to judges in rural areas as those based in major urban areas.

³⁹ COVAW interview, Kenya, 28 August 2001.

Access to justice for women victims of marital rape is extremely difficult. It is rare for a case of marital rape to reach the courts, and the perpetrator is more commonly charged with assault than rape. Often courts take the view that there was some provocation by the woman and treat cases of domestic violence lightly. In August 2000 a High Court, under Justice Vitalis Juma, set free Dickson Chege Mwangi, who had admitted stabbing to death his wife, Regina Wawira, because of her alleged infidelity. The court reasoned that the accused had been highly provoked by his wife's infidelity.⁴⁰

5.4 Women's shelters from violence

There are very few avenues which offer redress for women victims. The government is ill-equipped to provide services to these women when they are most urgently needed. For women who have been victims of sexual violence, there is no governmental housing to ensure their safety. Once a complaint is filed, there are few opportunities open to women who do not want to return to an abusive household or places that provide protection to women and children who have suffered domestic violence.

A small number of women's organizations have established centres which provide counselling or therapy, but they have resources only to offer temporary protection. A few shelters are now being established. For example, the Nairobi's Women Hospital offers psychological services for victims of rape and domestic violence, and the shelter established by the Women's Rights Awareness Programme (WRAP) now accommodates approximately 60 women and children. This shelter provides counselling, medical and psychiatric services, legal aid and assistance, though women can only stay there on a short-term basis.

However, the biggest problem observed by organizations that run shelters and women's organizations is that, because of women's economic disempowerment, many victims of abuse still return to their husbands. As WRAP told Amnesty International, "The silence has been broken to a degree. The women come here for refuge but still negotiate to return home."

6. SEXUAL VIOLENCE BY LAW ENFORCEMENT OFFICIALS

On 2 December 1999 it was reported in the media that a senior police officer had raped a woman after giving her a lift in his vehicle in Kakamega. Another police officer was also reported to have raped a mentally disturbed woman at Kabrasi town on 6 December 1999.⁴¹

⁴⁰ *Quarterly Human Rights Report*, Kenya Human Rights Commission (KHRC), Vol. 2, No. 3, 2000.

⁴¹ *Quarterly Human Rights Report*, KHRC, Vol. 1, No. 4, 1999.

A bar worker was allegedly raped at gunpoint by a police officer in Sagana town, Kirinyaga District in January 2000.⁴²

In August 2000 it was reported that the Bungoma District Commissioner had been urged by councillors in the area to take disciplinary action against police officers attached to the Chief of the Bokoli location, an area within Bungoma District. They said that the officers were torturing suspects and raping women detainees in unauthorized cells in the Chief's camp. A woman detained at the camp was alleged to have been gang-raped by the officers.⁴³

These are just some of the allegations reported in the Kenyan media of rape by police officers. The torture, including rape, of women by police, prison and other officials is reportedly widespread. It usually occurs because officers are not well trained in methods of investigation and interrogation, and employ torture to extract information. Amnesty International believes that rape and sexual abuse of women in custody always constitutes torture and ill-treatment.

The Special Rapporteur on torture, in his 1999 report on Kenya, chronicled at least 33 cases of torture committed against women by law enforcement officials, which included at least 23 women subjected to rape or sexual assault. His report documented the case of a woman who was allegedly raped at gunpoint by a police officer in Karura Forest in May 1997 and had hot pepper forced into her vagina.⁴⁴

Torture is prohibited under Kenyan law and senior government officials have condemned its use by the police. On 27 November 1999 Police Commissioner Philemon Abong'o warned police officers against torturing suspects or using crude methods to extract information. Yet the practice continues and officers are not usually held to account for these violations, in contravention of national legislation and international human rights standards.

There have been cases in which local human rights or women's organizations have pursued legal remedies, campaigned on behalf of the victim and applied pressure on the relevant authorities. However, police officers continue to act with impunity in the majority of cases. Margaret Njeri was reportedly tortured by police officers at the Kasarani Police Station in 2000. She was allegedly whipped, beaten with a *rungu* (knobbed stick), stripped naked in front of male officers and had chilli peppers inserted in her genitals. She sustained serious injuries, including to her spine, teeth, back and thigh. In a letter to the Attorney General, dated 2 May 2000, a

⁴² *East African Standard*, 22 January 2000.

⁴³ *Quarterly Human Rights Report*, KHRC, Vol. 2, No. 3, 2000.

⁴⁴ UN Doc. E/CN.4/2000/9/Add.4.



Hadaja Choro and her son

Kenyan human rights group, People Against Torture, demanded that the Attorney General and the Police Commissioner ensure that the police officers who tortured her were arrested and prosecuted. To date, no action is known to have been taken against those responsible.

Women who are imprisoned and who suffer abuses committed by law enforcement officials often lack adequate health facilities at their places of detention and are denied medical care for their injuries. Several victims of police and prison brutality told Amnesty International that they were given aspirin for all injuries, even those that required hospital treatment. Hadaja Choro, aged 30, from Teso District, told Amnesty International that she was raped and beaten while serving a two-and-a-half year prison sentence for manslaughter. She said that female prison warders at GK Prison in Kakanuga regularly beat her, usually on the soles of her feet with sticks, and only gave her paracetamol for her injuries.



Mary Muragwa

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She also told Amnesty International that she was raped by an *askari* (a security guard) on 8 March 1999, after being sent outside the prison with two other women prisoners to fetch water. “When [we] reached the gate of the Water Department [we] saw the *askari* give the woman prison warder some money.” The three women were told to follow the *askari* and were threatened that if they asked questions they would be “beaten and left to die.” Hadaja Choro was then allegedly raped by the *askari*. When she realized that she was pregnant,

she informed the officer in charge at the prison, who told her not to tell anyone. She was not allowed outside the prison again and was kept away from the other prisoners. She explained, “If I was found with others then I would be beaten, but if I stayed alone then I was not beaten.” She bore a son as a result of the rape and was released on 12 December 2000 under a general presidential pardon. Her husband divorced her because of her child and she is forced to do menial work in order to survive. Although she reported the incident to Kakamega police station she was not asked to make a formal statement. To her knowledge has there not been any investigation by the police.

One woman told Muslims for Human Rights, a Kenyan human rights organization, that officers from the General Service Unit and Administration Police had entered her house 2000 searching for guns and had put their fingers and hands in her vagina, all the while asking her

where she had hidden the guns. The Special Rapporteur on torture documented similar allegations in his 1999 report on Kenya. In one case cited in his report, a group of nine women and children from Ngare Mara and Daaba, Isiolo district, ranging in age from 11 to 75 years, were allegedly assaulted on 8 August 1998 by security forces looking for stolen guns and livestock. The group were allegedly all severely beaten and some raped in an attempt to make them produce the stolen weapons.⁴⁵ Women have been raped or otherwise sexually abused by police officers in order to gain information about their husbands' activities or about suspected criminal offences.

Mary Muragwa, aged 45, from Bungoma District told Amnesty International that she was raped by police officers who were looking for her husband, David Muragwa, a former teacher. On 27 March 1995 police officers from the Special Branch, the security police, and the Criminal Investigations Department in Bungoma, came to her house looking for her husband, she said, apparently because of his involvement in local politics. She reported that they hit her and broke her arm, then carried her into the house where two of the officers raped her. She and her one-month-old baby were then taken to a riverbank where the officers reportedly threatened that, if her husband were not found, she would be killed. She was subsequently detained without charge or trial at Bungoma police station for four months. During two months of her detention she was interrogated, and allegedly beaten and denied hospital treatment although she was in pain and bleeding. On 30 July 1995 she was released but was reportedly put under house arrest for a year. Her husband returned on 14 June 1997. Doctors have since told her that she will not be able to have more children because of the injuries sustained as a result of torture. She has not lodged any complaint with the police.

7. SEXUAL VIOLENCE BY PRIVATE INDIVIDUALS

Although newspapers, magazines and public debates focus on domestic violence and its effects, and agree that it is the main form of violence against women in Kenya, sexual violence in the home remains largely unreported. As marital rape is not an offence, and as many women are reluctant to approach the police in cases of domestic violence, still less marital rape, it is difficult to obtain accurate statistics on sexual violence against women in the home. Although more women are now talking about their experiences to local women's rights organizations, there are still very few who will report an incident to the police. So while awareness about rape is increasing, this is not reflected in statistics published by the police. Many local organizations told Amnesty International that there is no discernible trend in reports of this particular type of crime and that an incident, if reported to the police, is likely to be categorized as the lesser offence of assault rather than rape. The lack of distinction between assault and rape therefore clouds the

⁴⁵ UN Doc. E/CN.4/2000/9/Add.4.

true extent of marital rape reported to the police. However, as FIDA (K) told Amnesty International, “The women with whom FIDA (K) has interacted this year, from clients at the legal aid clinic to members of the public at debates, agree that sexual and domestic violence exists. However, positions vary as to what should be done - that is, should it be reported to authorities such as the police or should it be dealt with otherwise, for example through members of the family, the Church, elders in the community or the Chief?”⁴⁶

Women’s organizations in Kenya agree that “domestic violence is the most commonly hidden form of violence, and wife beating is considered a private affair of the home.”⁴⁷ Many of the women’s organizations, and some of the victims, told Amnesty International that some forms of domestic violence are perceived as a form of discipline or as, one women’s organization put it, “a routine chastisement”. As one local human rights organization told Amnesty International, many women do not perceive being slapped as an assault. Many of the women interviewed by Amnesty International, although disturbed by the physical and psychological abuse they suffered from their husbands, did not consider sexual violence in the home a crime. It was not until the violence had become extreme that many sought outside intervention. When questioned as to why they had not sought help sooner, some of the women victims said they considered the abuse as part of a normal way of life and even as a sign of love. Women interviewed by Amnesty International gave a myriad of reasons for the abuse, ranging from their husband being drunk to accusations they were having an affair.

Annette, aged 25, was married in 1996 as the second wife of a farm manager and pastor in Misikhu, Bungoma District. In 1998 he had allegedly started mistreating her. He would come home late and quarrel with her over unsubstantiated allegations that she had a boyfriend. “He used to shout at me and wanted me to admit that I had boyfriends - he would beat me to get a confession with a cane. He also demanded to have sex with me.” She told Amnesty International that, between 1998 and 2000, she was repeatedly raped by her husband but had never told anyone. Her last two children, born in 1999 and 2001, resulted from these rapes. However, her husband denied that the children were his and continues to refuse to recognize them as his own. In 2000 she was allegedly beaten so badly that she needed hospital treatment but could not afford it. In January 2001, after she was away from the house attending her sister’s funeral, her husband reportedly refused to let her back. She told Amnesty International how she first turned to her brothers who convened a meeting with her husband, and when this did not work to the village elders and later the Chief of their village. The Chief gave her husband five months to think about what he would like to do, but the period expired and she has still not

⁴⁶ FIDA (K), 3 October 2001.

⁴⁷ *Violence Against Women*, Eastern and Central Africa–Women In Development Network, Trainers Manual, 1997.

received any communication from him. She has not approached the police as she did not think that they could help her.

Many women are subjected to horrific abuse in the home. They are traumatized and isolated, and in some cases reportedly die due to the injuries they sustain. The majority, however, are not aware that forced sex in the home is rape and many will not mention it even when seeking medical attention for other injuries. Alice, 38, from near Eldoret town, told Amnesty International that she was repeatedly raped by her husband, a primary school teacher. At first she said that he did not rape her but only beat her, and it was only after further discussion that she admitted to “body interference” by her husband. In 1988 her husband took a second wife and she was left to bring up the children alone. She said that, whenever she asked for money, he would beat her and, between August 1994 and August 2000, there were also times when he raped her. On occasions she went to the hospital to get treatment because of the beatings but, although the police and doctor had completed a P3 form about the beatings, she did not report the rapes either to the doctor or to the police for fear of provoking further abuse from her husband. She complained to the Chief in the village in October 1998 and in August 2000 about the beatings. He wrote a letter to a senior official in the Eldoret administration who summoned her husband and told him to stop beating her. Yet she continued to be beaten and raped by her husband. She told Amnesty International that, until 1999, she had not told anyone about the rape as she was too ashamed and did not believe that the police would improve her situation. She said that her “culture [did] not agree with sharing secrets between husband and wife” and that “people would have heard of it and would have said I’ve cursed my husband and family.” However, in 1999 she told the elder women of the community that they had to do something or she would go to the police. In August 2000, the women “told the elders, men, who summoned the man. He denied rape. But they said that he had to tell the truth or drink the blood of a goat, so he agreed to stop.” In July 2001 she left her husband and returned to live with her parents.

Gina, aged 45, from Nairobi, was married for a second time, after leaving her first husband because of abuse in 1982. When her second husband started to repeatedly abuse her and threaten the children, she reported him to Kilamani Police Station in August 1994. At that time the police took no further action. She reported him again in September of that year and was told by the police that she should go to the village chief who deals with cases of a domestic nature. The Chief gave her a letter to give to her husband, but she was beaten by her husband for making a complaint. She went back to the Chief who told her to report to the village elders. The village elders asked her husband why he had not reported to the Chief and he replied that, since she was his wife, he saw no need to go to the Chief. The Chief fined her husband 500 Kenyan shillings (US\$8.00). However, the beatings got worse after this and, between 1996 and 1999, he also raped her. She has not reported the rapes to any authorities.

Peres, aged 34, from Nairobi, was reportedly beaten and raped by her husband in 1989 when he wanted to marry a second wife. She reported the beatings to the police but her husband

allegedly paid the police to withdraw the case. She told Amnesty International, “I reported to the police station, but the police have not taken action and will do [so] only for money. When my husband comes home after I have been to the police, he beats me because I have been to the police and [he] forces me into sex, even if the children are there. Sometimes I sleep outside.” After visiting the police station over three days, she was able to obtain a P3 form, which the police filled in and which was then given to the doctor in order for him to examine her. However, the case was reported to have been dropped after her husband subsequently went to see the doctor.

Women have not been to the police because they fear that their husbands can bribe them to withdraw the case. Agnes, aged 36, from Nairobi, was married in 1982 to a government employee. The violence started in 1999 when her husband married another wife. He reportedly beat her and eventually left her that same year. She did not report the beatings to the police. In 2000 her husband started providing food for the family and paying school fees for the children. However, as she told Amnesty International, “He now always demands to have sex with me about once a month, which started this year [2001]. My husband did not want me to report this to the police. He has verbally threatened me - he thinks that the police are my boyfriends. He does not hit me but continues to have forced sex with me.”

Mary, aged 42, from Nairobi, has never been to the police, even though she has reportedly been beaten and raped continuously by her husband. She was “inherited” by her husband’s brother in 1993, and told Amnesty International that, “He beats me and forces me to have sex and, if I refuse, he beats me again. Many times he forces me, and uses force against me.” He reportedly started to rape her in 1998. She told Amnesty International that she did not go to the police as she felt they would not take any action because it was “a home affair”. She said she regularly had a swollen face from the beatings.

8. CONCLUSION

The Kenya government is failing in its human rights obligations towards half its citizens. It should reform both its law and practices to end impunity for violence against women. As a general election draws near, women’s rights should be a top priority on the election agenda.

It is the failure of the state to take action against such abuses, whether they are committed by state officials or private individuals, that allows them to continue. The state has a responsibility to take action in order to protect women from continuing violence. Under international human rights law the state has a responsibility to ensure adequate protection for its citizens’ human rights. By enacting national legislation and ratifying international and regional human rights instruments, particularly the CEDAW, and the African Charter on Human and Peoples’ Rights, the Kenyan government is obliged to ensure that the rights of both men and women are protected, respected and fulfilled. However, violence against women continues while

the Kenyan government consistently fails to ensure that perpetrators of these abuses are brought to justice.

Activities, reports and statistics compiled by Kenyan human rights and women's organizations over the years only serves to highlight the government's lack of action in tackling violence against women. Civil society in Kenya is actively engaged on these issues, and without their support and effort in seeking to bring to attention crimes committed against women, many women victims would be left stranded without avenues in which to seek protection and redress. This report does not seek to demonstrate why or how women become victims, but to show that violence against women, especially rape, continues in Kenya while the state fails in its responsibility to hold accountable those - whether state officials or private individuals - who carry out such acts.

The year 2002 will see both presidential and legislative elections in Kenya, with the possibility of a new government and head of state. Amnesty International takes this opportunity to seek to make women's rights a top priority on the election agenda. On International Women's Day Amnesty International reminds the Kenyan government of its responsibilities and duties towards one half of its population, that at the present time is still subjected to antiquated laws and discriminatory attitudes perpetuated by the authorities' own behaviour and response to violence against women. The organization appeals to members of parliament, voters and the women in Kenya to do everything in their power to ensure that candidates are gender-sensitive in both their policies and attitudes. Although women constitute 54% of the voting population the gender-bias of the present government continues to be reflected in its composition. Currently, the 25-member cabinet is made up entirely of men and only eight out of 224 members of parliament in the country are women.

In its recommendations below, Amnesty International calls on the government to take effective action to comply with its international obligations to protect girls and women from rape and other serious forms of violence against women.

9. AMNESTY INTERNATIONAL'S RECOMMENDATIONS

Amnesty International calls on the government of Kenya, in light of both its constitutional and international obligations, to implement the following recommendations in order to protect women from rape by both state officials and private individuals, to ensure adherence to principles of due diligence, and to end the climate of impunity that perpetrators of sexual violence continue to enjoy. The organization also calls on the international community to support programs in Kenya working towards these objectives. The government of Kenya should take the following urgent steps:

Legislative safeguards to protect women from violence

review, evaluate and revise laws, codes and procedures to ensure that they do not discriminate against women and to enhance their effectiveness in eliminating discrimination against women. The government should remove provisions that allow for or condone discrimination against women

- S** review existing laws and/or introduce new ones to prohibit all acts of violence against women, whether committed by state officials or private individuals, and to establish adequate legal protection against such acts. These prohibited acts should include acts that take place within the community or within the family, such as marital rape. The government should not invoke any custom, tradition or religious consideration as a justification for laws, procedures or policies that fail to protect women from violence

respect and promote the provisions of international and regional human rights instruments already ratified that prohibit torture and other cruel, inhuman and degrading treatment and all forms of discrimination on grounds of gender. Such instruments include: the African Charter on Human and Peoples' Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the International Covenant on Economic, Social and Cultural Rights

ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and comply with its reporting requirements

Investigation of allegations of violence against women and prosecution

ensure that prompt, thorough and impartial investigations are conducted into all reports of violence against women, whether perpetrated by law enforcement officials or private individuals. Those responsible should be brought to justice

issue clear guidelines to law enforcement agencies stating that deterring women from reporting acts of violence will not be tolerated and insisting on the duties of law enforcement officials to investigate acts of violence against women, whether perpetrated within their family or community or in custody

further build on the capacity of the police to handle cases of violence against women effectively and sensitively. Measures to strengthen such capacity should include:

the provision of training on responding to reports of violence against women. This should include training on handling cases of sexual violence; the use of medical and forensic evidence; and international human rights standards

the recruitment of women police officers in sufficient numbers both to counter a culture of discrimination in police stations and to allow specialization on cases of violence against women

the establishment of mechanisms such as “rape desks” or “gender desks” and appropriate interviewing facilities in police stations in order to facilitate sensitive and effective handling of such cases

Medical evidence

ensure the prompt examination by a specialist medico-legal practitioner, female wherever possible, of all women who allege that they have been sexually assaulted, including those who report their allegations to police, those who chose not to report to the police as well as women who allege sexual assault in police or prison custody. Such an examination should conform to the Istanbul Protocol’s Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

ensure that hospitals or medical clinics provide to women victims of sexual violence appropriate and sensitive medical care and counselling, including advice, prophylactic care and counselling on HIV/AIDS, other sexually transmitted diseases and risk of pregnancy

ensure that standardized forms, such as the medical examination (P3) forms for the documentation of reports of violence against women, should allow for adequate documentation of medical evidence. Mechanisms should be in place to ensure that victims are able to obtain such forms easily and have them completed by the necessary parties without undue hindrance

The judiciary

provide specific training to all judges and lawyers in relevant areas of international human rights law to enhance the understanding of violence against women from a

human rights perspective, and to ensure its effectiveness in the prosecution of acts of violence against women

take steps, including education and training initiatives and the elimination of any discriminatory procedures, to ensure that women are adequately represented within the judiciary

educate and train judicial officers about gender-based crimes so that they are sensitive to the needs of women victims of violence, especially women victims of sexual violence

establish effective programs for the protection of victims and witnesses called to give testimony or evidence during the judicial process; take effective measures to ensure that women are able to participate actively in such processes without shame or fear of retribution. Such measures should not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial

Adequate remedies and reparations

ensure that hospitals or medical clinics provide special units or procedures to help identify women victims of violence and provide them with medical care and counselling

provide emergency services to women victims of violence, including providing well-funded shelters for women victims of violence; immediate medical attention; emergency legal advice and referral; crisis counselling; financial assistance; childcare support

ensure that victims of violence and their dependents obtain prompt reparation, including compensation, medical care and rehabilitation

Education and awareness raising

develop policies and disseminate materials to promote women's safety in the home, in society and in custody, and to raise awareness about violence against women. The government should promote the equality of women and men

undertake legal literacy and other educational campaigns to inform men and women of women's legal and other rights and to educate them specifically about domestic violence, in accordance with Article 25 of the African Charter on Human and Peoples' Rights and other relevant international standards

Recommendations to the international community and donor countries

Governments and inter-governmental organizations, in support of programs in Kenya working towards these objectives, should:

apply pressure on the government to fulfil its international human rights obligations to women in Kenya in line with the above recommendations

devise assistance programs with the government of Kenya that will help the government introduce targeted reforms, such as police training programs and women's rights education
