

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
AL KEN 2/2018

24 January 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on violence against women, its causes and consequences and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 34/18, 34/19, 32/19 and 15/23.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **instances of sexual and gender-based violence during the election periods**.

According to the information received:

During the campaign and election periods of the 2017 General Election, including the repeat Presidential election, an alarming number of instances of sexual and gender based violence took place throughout the country. The national human rights institution, the Kenya National Commission on Human Rights, received and/or documented 86 cases of sexual and gender based violence in Nairobi City County alone.

Reportedly such violence took the form of rape and other forms of sexual and gender based violence taking place during house raids by police officers or men in uniform; in the family owing to persons being perceived or known to support a different political party; or in connection to election-related protests.

It is reported that several victims were gang raped, along other victims of their communities, while others were also raped, and/or gang raped, in front of their children and partners who were forced to witness the rapes. In other cases, men were also raped. There have been reports that a number of the women raped became pregnant, contracted sexually transmitted diseases, or both. Since, most victims have been unable to work and contend with deep psychological impact such as trauma.

It is also reported that most of these cases of sexual and gender based violence were committed by police or men in uniform who were deployed in areas affected

by the election-related violence, in Nairobi, Kisumu, and other parts of Nyanza and Western Region. Other accounts reported that perpetrators also included members of militia groups and criminal gangs who took advantage of the chaos.

The majority of the victims were unable to access timely medical care, mostly due to the prevailing context of insecurity and the nurses' strike that took place at the time. Some victims sought medical treatment at local clinics within their communities, but most of those facilities reportedly did not provide the required emergency and comprehensive medical and forensic post-rape care. In some cases, victims were asked to pay for the completion of Post-Rape Care and Kenya Police Medical Examination Report commonly referred to as "P3 forms", contrary to existing policies. Reportedly, many victims could not access health facilities because they were afraid of retaliation by the Police or stigma around sexual violence or did not know where to go.

Given that most of the alleged perpetrators were members of the police or men in uniform, many victims were reportedly reluctant to report to the police owing to the fear of reprisals, which is also exacerbated by high level authorities' continuous denial of any case of sexual and gender-based violence.

It appears that to date no investigations into the 2017 election-related sexual violence have been initiated by relevant Kenyan authorities.

Very grave concern is expressed at these allegations of sexual and gender-based violence committed in the context of the electoral process by members of the police or men in uniform and in some instances by members of militia groups and of criminal gangs. We would also like to express grave concerns about the lack of access for survivors to post-rape care and treatments, including in relation to pregnancies resulting from the rapes and to prevent diseases transmission. Further concern is expressed that difficulties in accessing medical treatment impedes the collection of evidence. Serious concerns are also expressed at the absence of independent authorities before whom victims could present a claim, in a safe and conducive environment, and to exercise their right to justice and reparation.

In addition to the serious concerns over the physical and psychological integrity of survivors of sexual violence, concerns are also expressed at the deterrent effect of sexual and gender-based violence on women to exercise their rights to freedom of expression and association and political participation. Sexual violence, and the legitimate fear of any women and girl to be subject to sexual violence, curtail women's participation in the public and political life, including participating in rallies and voicing their opinions, especially in a context of prevalent impunity and stigma over these form of violence against women and girls.

These allegations of sexual violence are also particularly concerning, considering the lack of implementation of recommendations formulated by the Fact-finding Mission to Kenya of the Office of the UN High Commissioner for Human Rights and the

CEDAW in relation to the gender-based violence reported in the context of previous electoral processes of 2007-2008, which would have contributed to ending impunity and preventing the re-occurrence of such violations. In particular, the OHCHR Fact-finding Mission to Kenya recommended “special, highly independent, prosecutorial measures, possibly with international support, to strengthen Kenya’s capacity to bring the perpetrators, including planners and organizers, of post-electoral violence to justice.” Lack of progress has also been observed lately by the CEDAW (CEDAW/C/KEN/CO/8 from 2017), in relation to the prosecution of perpetrators of gender based violence, including sexual violence, that took place during the 2007-2008 elections; the full implementation of the report of the Commission of Inquiry into the 2007-2008 Post-Election Violence; and the provision of adequate reparations and support to women victims of violence committed at that time.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information you may have on the above-mentioned allegations.
2. Please provide information on the number and age of persons who have been, according to your investigation, subject to sexual and gender-based violence in the context of the 2017 General Election.
3. Please provide information on effective measures that your Government has adopted and/or implemented to prevent, investigate, and punish the acts of gender-based violence against women described in the above-mentioned allegations as well as information on the impact of those measures.
4. Please provide information on effective measures that your Government has adopted and/or implemented to protect and assist women complainants and witnesses to the acts of sexual and gender-based violence described in the above-mentioned allegations and to provide effective reparations to and rehabilitate victims/survivors of those acts and protection from retaliation of any kind as well as information on the impact of those measures.
5. Please provide the details of any medical examinations and/or any other forms of assistance provided to the victims, including psychosocial as well as legal support.

6. In the event that alleged perpetrators were identified, please provide the full details of any prosecutions which have been undertaken, in particular those committed by state agents, as well as by organised crime groups, and the outcome of those prosecutions. Have sanctions, including criminal, disciplinary and administrative, been imposed on the alleged perpetrators? Are there also any insitutional accountability mechanisms in place?
7. In light of the repeated incidence of sexual and gender-based violence against women and men during elections time, including the General Election of 2007, please provide detailed information on the efforts made by the State to prevent the re-occurrence of sexual and gender-based violence, particularly by the police and security forces. Were there any specific legislation in place but not adequately enforced during the 2017 General Election? Was there any early warning mechanism in place?

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Dubravka Šimonović

Special Rapporteur on violence against women, its causes and consequences

Alda Facio

Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to recall relevant international human rights law and standards that apply in this context.

Gender-based violence against women constitutes discrimination against women under article 1 of the Convention on the elimination of all forms of discrimination against women to which Kenya acceded on 9 March 1984.

Gender-based violence against women may also amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape. In this respect, we would like to recall the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment and punishment as codified in articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Kenya acceded on 21 February 1997, and in article 4(2) read in conjunction with article 7 of the International Covenant on civil and political rights (ICCPR), which was acceded by Kenya on 1 May 1972. We highlight that article 2 of the CAT specifically provides for the obligation of States parties to prevent acts of torture.

We would like to bring to the attention of your Excellency's Government, the right to freedom of expression, as guaranteed by article 19 of the ICCPR. As emphasized by the Human Rights Committee in General Comment 34 and by the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, this right is most essential at times of elections in order to ensure that a well-informed and empowered public is free to exercise their civil and political rights. States have an obligation to provide conditions for free and open political communication as an essential element of ensuring fair and democratic electoral processes (CCPR/C/GC34) and (A/HRC/26/30).

With respect to the alleged involvement of police officers and other state agents in the acts of gender-based violence against women described in the above-mentioned allegations, we wish to recall General recommendation No. 35 on violence against women of the Committee on the Elimination of All forms of Discrimination Against Women, in which the Committee stresses that "Under the Convention and general international law, a State party is responsible for acts or omissions of its organs and agents that constitute gender-based violence against women, which include the acts or omissions of officials in its executive, legislative and judicial branches" (General Recommendation no 35, paragraph 22). The Committee adds that "States parties are responsible for preventing such acts or omissions by their own organs and agents, including through training and the adoption, implementation and monitoring of legal provisions, administrative regulations and codes of conduct, and for investigating, prosecuting and applying appropriate legal or disciplinary sanctions, as well as providing reparation, in all cases of gender-based violence against women, including those

constituting international crimes, and in cases of failure, negligence or omission on the part of public authorities” (General Recommendation no 35, paragraph 23).

Regarding the alleged involvement of militia groups and criminal gangs as well as other non-state actors in the acts of gender-based violence against women described in the above-mentioned allegations, we would like to emphasize that in its General recommendation No. 35, the Committee on the Elimination of All forms of Discrimination Against Women recalls State obligation of due diligence under Article 2 (e) of the Convention, which includes the obligation to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women and girls[General Recommendation no 35, paragraph 24(2)]. In this recommendation, the Committee sets out specific punitive, rehabilitative, preventive and protective measures States should introduce to fulfil this obligation.

We would like to also recall that article 3(4) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) ratified by Kenya on 06 October 2010 requires States Parties to “adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence...” The Maputo Protocol also requires States Parties to, inter alia, “enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public” [article 4(2) (a)]; “punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims” [article 4(2)(e)] and “establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women” [article 4(2)(f)]. With respect to reports indicating that a number of the women raped became pregnant as a result of the acts of gender-based violence described in the paragraph above, we would like to recall that Article 14 (2) (c) of Maputo Protocol requires States Parties to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”. We call on Your Excellency’s Government to lift its reservations to Article 14 (2) (c) of the Maputo Protocol.

We further recall the African Union Guidelines on Combating Sexual Violence and its Consequences in Africa adopted by the African Commission on Human and Peoples’ Rights during its 60th Ordinary Session held in Niamey, Niger from 8 to 22 May 2017 that calls for investigation into and, prosecution of alleged perpetrators of sexual and gender-based violence as well as, access to justice, and psycho-social and medical assistance to the victims of sexual and gender-based violence. In the context of these Guidelines that calls for the reparations of sexual and gender-based violence in form of compensation, rehabilitation, satisfaction and guarantee of non-repetition of sexual violence, we call on Your Excellency’s Government to provide reparations for victims of sexual and gender-based violence during the electioneering period of 2017.

In cognisant of the intent by your Excellency's Government to embark on establishing a Reparation Framework for the victims of post-elections violence of 2007/08, we call on your Government to provide reparations to the victims of sexual and gender-based violence during the post-election violence of 2007/2008 on an urgent basis.