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Domestic accountability through strategic litigation: Towards redress and reparations for Kenya's 2007-2008 post-election sexual and gender-based violence

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Summary: *There are a range of impediments in the pursuit of redress and reparations for sexual violence, more so in conflict and post-conflict situations. Often if accountability is sought through judicial institutions, it is through criminal proceedings. However, another option available is to file, simultaneously or alternatively, a civil and/or constitutional proceeding. In February 2013 six women and two men who were sexual and gender-based violence survivors of Kenya's 2007-8 post-election violence filed a constitutional petition. On 10 December 2020 the Kenyan High Court awarded four survivors Kes 4 million (approximately US \$36 513) as general damages for the violation of their constitutional rights. This article, which is anchored on Kenya's human rights obligations, uses Kenya as a case study to examine the*

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pursuit of domestic accountability through strategic litigation and the contribution made towards redress and reparation for survivors of sexual and gender-based violence from post-election violence. First, the author argues that the transitional justice approach in Kenya provided the foundation for the strategic litigation case. Therefore, the article provides an overview of key aspects of Kenya's transitional justice approach. Second, the author argues that to understand the significance of the strategic litigation, an understanding of the sexual and gender-based violence which necessitated the strategic litigation case is necessary. The article therefore examines Kenya's legacy of historical injustice and gross human rights abuses which played a role in the sexual and gender-based violence during post-election violence. Third, the author analyses the strategic litigation case, considering the key claims by the petitioners and the decision of the Court. Finally, the article discusses the lessons learnt and contribution made by this case. The author submits that, although imperfect, this strategic litigation was a valuable recognition and acknowledgment of sexual and gender-based violence survivors of post-election violence, contributed to reparation access and had an impact on domestic accountability as an option for redress and reparation.

Key words: *Kenya; redress; reparations; sexual and gender-based violence; strategic litigation*

1 Introduction

Criminal prosecution is the most pursued form of accountability in transitional justice. However, civil and constitutional litigation can also contribute to the pursuit of truth and justice and, in some ways, the battle against impunity. Kenya serves as a significant case study in this regard: While almost all scholarly discourse on transitional justice in Kenya focuses on the International Criminal Court (ICC) intervention in the situation in Kenya, this article seeks to contribute to the accountability discourse by considering strategic litigation as an avenue for redress and reparations for gross human rights abuse, specifically, strategic litigation for sexual and gender-based violence in conflict and post-conflict situations. Strategic litigation refers to litigation that is in the interests of the public with the aim of achieving protection and the enjoyment of human rights as well as obtaining justice and redress.¹ Therefore, the article considers the strategic

¹ Office of the High Commissioner for Human Rights (OHCHR) 'Strategic litigation for sexual and gender-based violence: Lessons learned' (2019), <https://www.ohchr.org/en/press-releases/2019/09/strategic-litigation-for-sexual-and-gender-based-violence-lessons-learned>

litigation case filed by sexual and gender-based violence survivors of the 2007-8 post-election violence. The landmark judgment in this case was delivered on 10 December 2020 and is the first civil or constitutional law judgment in relation to post-election violence in Kenya.²

The premise of the article is that Kenya's transitional justice processes prepared the ground for the strategic litigation by sexual and gender-based violence survivors of post-election violence. The first part of the article discusses the significance of the Commission of Inquiry on Post-Election Violence (CIPEV), the Truth, Justice, and Reconciliation Commission (TJRC), constitutional and institutional reform, and ICC intervention, in providing a foundation for the strategic litigation case. The article argues that an understanding of Kenya's history is important to appreciate the systemic recurrence of sexual and gender-based violence, particularly in the context of election-related violence. The second part of the article contextualises the legacy of ethnic, political and election-related violence that fostered the environment in which sexual and gender-based violence occurred during post-election violence. This background is an important framing to understand the post-election violence as more than a singular crisis event in Kenya's history and instead as part of a continuing cycle of widespread sexual and gender-based violence that occurs with impunity during every general election. It also is an important lens through which to consider the contribution of the strategic litigation case. Third, the article discusses key aspects of the case and the decision of the Court. Finally, the article considers the lessons and contribution that the case has made to the pursuit of redress and reparations for sexual and gender-based violence survivors of post-election violence.

The article contends that although imperfect, this strategic litigation case was a valuable acknowledgment of sexual and gender-based violence survivors of post-election violence, impacted perceptions on domestic accountability, and created an option for accessing reparations. In conclusion, the article considers potential areas of research in the pursuit of accountability for sexual and gender-based violence survivors in conflict and post-conflict societies.

ohchr.org/Documents/Issues/Women/WRGS/OHCHR-StrategicLitigationforSV-workshopreport-web.pdf (accessed 29 April 2021).

2 *Coalition on Violence Against Women (COVAW) & 11 Others v Attorney-General of the Republic of Kenya & 5 Others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 Others (Amicus Curiae)* [2020] eKLR.

2 Transitional justice in Kenya

The article considers colonialism and the African post-colonial state as an important lens through which to view transitional justice.³ Notably, the varied history of Africa means that the time periods of transition vary from state to state and depend on the 'different political upheavals, struggles for liberation and socio-economic transformations experienced'.⁴ Rather than referencing a particular time period, the article considers transitional justice a journey of societies 'with legacies of violent conflicts, systemic or gross violations of human and peoples' rights towards a state of sustainable peace, justice and democratic order'.⁵

In late 2007 the violent events during post-election violence raised concerns that Kenya, a country that had long been a beacon of stability, was headed for civil war. Between December 2007 and February 2008 it was estimated that at least 1 133 people were killed, thousands sexually assaulted and mutilated, and at least 600 000 displaced.⁶ The violence began when the incumbent, President Mwai Kibaki of the Party for National Unity (PNU), was declared victor and hastily sworn in despite early results showing that the opposition leader, Mr Raila Odinga of the Orange Democratic Movement (ODM), was in the lead. The Panel of Eminent African Personalities of the African Union (AU) (composed of the former UN Secretary-General, Mr Kofi Annan, Mr Benjamin Mkapa, former President of Tanzania, and Mrs Graça Machel of Mozambique) was able to engage the two parties in a mediation process which brought an end to the violence. The two parties committed, in the Kenya National Dialogues and Reconciliation (KNDR) agreement, to end the violence and to address the long-term issues that caused the violence and continued to plague Kenyan politics. The agreement sought to ensure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.⁷ The National Accord and Reconciliation Act⁸ marked the end to the violence,

3 M Mutua 'A critique of rights in transitional justice: The African experience' in GO Aguilar & FG Isa (eds) *Rethinking transitions: Equality and social justice in societies emerging from conflict* (2011) 31.

4 African Union (AU) *Transitional Justice Policy Framework* (2019) vi.

5 AU (n 4) 4.

6 Commission of Inquiry into Post-Election Violence (CIPEV) 'The Commission of Inquiry into Post-Election Violence Report' (2008), <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> (accessed 31 January 2021).

7 Office of the AU Panel of Eminent African Personalities *The 2008 mediation process and reforms in Kenya* (2014).

8 National Accord and Reconciliation Act 4 of 2008.

created a framework for the power-sharing coalition government and a roadmap to address the crisis.⁹

The KNDR agreement provided the means for a multi-faceted transitional justice approach that sought to address the cause of Kenya's recurrent periods of violence. It is the unaddressed long-term issues that were believed to be the root cause of violence that erupted during post-election violence. While there are several processes and mechanisms that played significant roles in Kenya's transitional justice approach, this article will focus on four that had an impact and provided a foundation for the strategic litigation case.

2.1 Commission of Inquiry into post-election violence

The CIPEV began its work on 3 June 2008,¹⁰ chaired by Justice Philip Waki, a judge of Kenya's Court of Appeal.¹¹ The mandate of the CIPEV included the investigation of the facts and surrounding circumstances related to the violence that followed the 2007 presidential election and the making of recommendations for legal, political, and administrative measures considering its findings.¹² It was gazetted to operate for three months and was only able to obtain a 30-day extension to fulfil its mandate. This meant that the CIPEV was unable to conduct public hearings and investigations in all the key regions that were part of the original plan.¹³ Nevertheless, the CIPEV report recorded 3 561 injuries, 1 133 deaths and heard key testimony that there were at least 900 cases of sexual and gender-based violence.¹⁴ The testimony was provided by Dr Sam Thenya, chief executive officer of Nairobi Women's Hospital, during which he noted that the figure was 'just the tip of the iceberg' given that it was based on those who received 72-hour emergency treatment, as many did not get to hospitals for treatment.¹⁵

There are three key outcomes in the CIPEV report relevant to this article. First, the CIPEV provided an indication of the scale of sexual and gender-based violence and the nature of the violence as not only being directed at women and girls but also at men and boys.

9 KG Adar 'The GNU legal framework and the doctrine of the separation of powers: Implications on Kenya's National Legislative Assembly' (2008) 7 *Journal of African Election* 52.

10 CIPEV (n 6).

11 Other commissioners were Gavin McFadyen (New Zealand), Pacal Kambale (Democratic Republic of the Congo), David Majanja (Kenya) and George Kegoro (Kenya).

12 CIPEV (n 6).

13 As above.

14 As above.

15 CIPEV (n 6) 248.

Second, the CIPEV made recommendations regarding institutional and legislative reform. Third, the CIPEV called for the pursuit of accountability. The CIPEV report also added to the calls by Kenya's leadership for the establishment of a commission to examine the negative practices of the past.¹⁶ It became apparent that the country remained deeply divided since independence from British colonial rule which, according to the CIPEV report, contributed significantly to the widespread violence of post-election violence.¹⁷

2.2 Truth, Justice and Reconciliation Commission

Shortly after the report of the CIPEV, Parliament legislated on the establishment of a truth commission.¹⁸ The TJRC operated from 2009 to 2013 with the mandate to inquire into the gross human rights and historical injustices that had occurred since independence (12 December 1963) until the KNDR agreement was signed (28 February 2008). At the end of the process the TJRC produced volumes of detailed reports with recommendations for a reparation framework and for an implementation mechanism for its findings.¹⁹ The TJRC cited the findings of CIPEV but also provided findings on sexual violence in other periods before the post-election violence. The report detailed sexual violence in conflicts and violent episodes in Kenya's history, including the 'struggle for independence, cattle rustling, conflict over resources, ethnic and politically-instigated violence, and conflict arising from militia activities'.²⁰ According to the TJRC report, sexual violence was 'one of the methods employed by the colonial government to not only to discipline and humiliate dissidents, but also to instil fear in would-be dissidents'.²¹ Witnesses testified to a similar pattern in the context of ethnic and political violence where sexual violence was 'used to intimidate, degrade, humiliate, discriminate against and control those belonging to particular ethnic communities perceived to be in support of the "wrong" side of the political divide'.²²

16 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report Volume 1' (2013), <https://digitalcommons.law.seattleu.edu/tjrc-core/7> (accessed 31 January 2021).

17 As above.

18 Truth, Justice and Reconciliation (TJR) Act 6 of 2008.

19 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report Volume 4' (2013), <https://digitalcommons.law.seattleu.edu/tjrc-core/2> (accessed 31 January 2021).

20 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report Volume 2A' (2013) 707, <https://digitalcommons.law.seattleu.edu/tjrc-core/6> (accessed 31 January 2021).

21 TJRC (n 20) 721.

22 TJRC (n 20) 736.

In addition to the periods in which sexual violence occurred, the TJRC report also analysed the impact of sexual violence on survivors and their families. The issues covered included the psycho-social impact, social stigma, mental and physical scars. Notably, the TJRC report included recommendations such as the need for the government to establish a reparations fund for victims of gross human rights violations and historical injustice. Furthermore, a reparations framework and implementation matrix were developed to operationalise the fund.²³ On 21 May 2013 the TJRC presented its report to President Uhuru Kenyatta²⁴ and was immediately required to publish the report in the Kenya Government Gazette.²⁵ However, the publication of the TJRC report in the Gazette omitted volumes IIA and IIC that provided details on sexual violence incidents.²⁶ According to the TJRC Act the implementation of the report should have commenced within six months after the National Assembly considered the report.²⁷ After six months this did not take place.

On 26 March 2015 during the state of the nation address President Uhuru Kenyatta issued a public apology for past wrongs in which he recognised other violence that occurred during post-election violence but did not mention the occurrence of sexual violence.²⁸ In the address President Kenyatta announced the establishment of a Kes 10 billion (approximately US \$30 million) Restorative Justice Fund. Later in 2017 the Kenya National Commission on Human Rights (KNCHR) together with the office of the Attorney-General and the Department of Justice led a multi-sectoral consultation to develop a framework for reparations through the Restorative Justice Fund. Two documents were developed following the consultations, namely, the Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017 which is anchored to the Public Finance Management Act,²⁹ and the Reparations for Historical Injustices Fund Policy. Despite several calls to make the Restorative Justice Fund

23 TJRC (n 19).

24 P Seils 'Integrity of Kenya's Truth Commission Report must be restored' 9 June 2013, <https://www.aljazeera.com/opinions/2013/6/9/integrity-of-kenyas-truth-commission-report-must-be-restored> (accessed 12 June 2021).

25 Sec 48(3) TJRC Act.

26 OHCHR et al 'Breaking cycles of violence: Gaps in prevention of and response to electoral-related sexual violence', <https://phr.org/wp-content/uploads/2019/12/OHCHR-PHR-UN-WOMEN-Kenya-Gap-Analysis-Dec-2019-1.pdf> (accessed 31 March 2021).

27 Sec 49(3) TJRC Act.

28 Office of the President of the Republic of Kenya 'Speech by His Excellency Hon Uhuru Kenyatta, CGH, President and Commander in Chief of the Forces of the Republic of Kenya during the State of the Nation Address at Parliament' 26 March 2015, <https://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/> (accessed 1 June 2021).

29 Public Finance Management (PFM) Act 18 of 2012.

operational, including by the United Nations (UN) Human Rights Committee in 2021, the documents developed to operationalise the Restorative Justice Fund remain at the consultative stage.³⁰ Notably, President Kenyatta highlighted in the state of the nation address that the TJRC report was before Parliament and urged that it be processed without delay. Among other calls, civil society actors and survivors have petitioned the National Assembly³¹ and Senate³² to process the TJRC report, but at the time of writing in 2021 the TJRC had not been debated.

2.3 Constitutional and institutional reform

Agenda item 4 of the KNDR agreement was an undertaking to address long-term issues, including a commitment to constitutional, legal, and institutional reforms.³³ The new Constitution of the Republic of Kenya³⁴ was passed through a peaceful referendum, marking an important milestone for the political history of Kenya. Two important aspects are relevant to the sexual and gender-based violence case. First, under the old Constitution Kenyan courts relied on a rule of standing or *locus standi* that 'barred private individuals from litigating the rights of the public in courts'.³⁵ However, this did not mean that cases involving human rights and constitutional issues did not find their way into Kenyan courts. Rather, it meant that where there were cases in the public interest, a technicality such as *locus standi* was one of the methods used to frustrate litigation of constitutional and human rights issues.³⁶ For example, in the case of *Wangaari Mathai v Kenya Times Media Trust Ltd*³⁷ the plaintiff sought to protect Uhuru Park which had been identified as the site for the

30 Human Rights Committee 'Concluding Observations on the fourth periodic report of Kenya' 11 May 2021 UN Doc CCPR/C/KEN/CO/4.

31 Journalists for Justice 'Parliament to debate the TJRC report after petition from victims is tabled' 4 December 2015, <https://jffjustice.net/parliament-to-debate-the-tjrc-report-after-petition-from-victims-is-tabled/> (accessed 16 May 2021).

32 National Victims and Survivors Network (NVSN) 'NVSN public petition to establish measures towards rehabilitation services to victims of past gross human rights violations as identified through the TJRC process', <http://parliament.go.ke/sites/default/files/2020-10/Petition%20concerning%20establishing%20measures%20towards%20rehabilitation%20services%20to%20victims%20of%20past%20HR%20violations%20as%20identified%20through%20TJRC.pdf> (accessed 15 June 2021).

33 South Consulting 'The Kenya national dialogue and reconciliation: Building a progressive Kenya' (2011), <https://reliefweb.int/sites/reliefweb.int/files/resources/Background-Note.pdf> (accessed 22 April 2021).

34 Constitution of Kenya 2010.

35 Kenyans for Peace with Truth and Justice (KPTJ) et al 'A guide to public interest litigation in Kenya' (2010), <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf> (accessed 26 April 2021).

36 J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *George Washington International Law Review* 763.

37 (1989) Civ Case 5403.

construction of a multi-story building. In the ruling it was held by the judge that matters of public interest could only be litigated by the Attorney-General.³⁸ Later, some judges attempted to establish the 'minimal personal interest' to allow for a more relaxed rule of standing.³⁹ After the promulgation of the Constitution the issue was settled, allowing for standing on matters related to human rights⁴⁰ and other violations of the Constitution.⁴¹ These provisions in the Constitution allowed for the survivors of sexual and gender-based violence during post-election violence and civil society organisations (CSOs) to institute proceedings on their behalf, on behalf of other survivors and in the public interest.

The second important aspect introduced by the Constitution is the reform of the judiciary. Public confidence in the judiciary was marred by corruption, a lack of transparency in the recruitment process and independence from other branches of government. With the new Constitution the judiciary made progress towards transformative reforms that helped to increase public confidence in the growing independence of the judiciary.⁴² Whereas in the past the appointment of judges was entirely within the purview of the President, the Constitution limited the appointments to the recommendations by the Judicial Service Committee.⁴³ The implications of a growing independent judiciary opened the possibility of strategic litigation to advance the cause of justice, such as in the case of sexual and gender-based violence.⁴⁴ This is particularly important given who were the accused at the ICC.

2.4 International Criminal Court

The ICC Prosecutor opened a *proprio motu*⁴⁵ investigation on Kenya focusing on 'alleged crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008'.⁴⁶

38 Oloka-Onyango (n 36).

39 KPTJ (n 35).

40 Art 22 Constitution.

41 Art 258 Constitution.

42 M Gainer 'Transforming the courts: Judicial sector reforms in Kenya, 2011-2015', https://successfultsocieties.princeton.edu/sites/successfultsocieties/files/MG_OGP_Kenya.pdf (accessed 17 July 2021).

43 W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 6.

44 Arts 22 & 258 Constitution.

45 Latin for 'on one's own initiative'. See the Rome Statute of the International Criminal Court adopted 17 July 1998, entered into force 1 July 2002 2187 UNTS 3 art 15(1).

46 International Criminal Court (ICC) 'ICC judges grant the prosecutor's request to launch an investigation on crimes against humanity with regard to the situation in Kenya' (2010), <https://www.icc-cpi.int/news/icc-judges-grant-prosecutors->

Thereafter, on 23 January 2012, charges were confirmed against Uhuru Muigai Kenyatta (President of Kenya since 2013), William Samoei Ruto (Deputy President of Kenya since 2013) and Joshua Arap Sang (radio presenter). Noteworthy, the Kenyatta case was the only one that included charges of rape and other forms of sexual violence, such as forcible circumcision and penile amputation in the acts constituting crimes against humanity.⁴⁷ On 5 December 2014 the Prosecutor withdrew the charges against Kenyatta, citing witness interference and state obstruction to access to evidence.⁴⁸ On 5 April 2016 the charges against Ruto and Sang were vacated, also without prejudice to a fresh prosecution in the future.⁴⁹ It was believed that the Kenyatta case was the 'only credible effort to provide justice to the survivors of rape and sexual violence during the [post-election violence]'.⁵⁰ Nevertheless, the ICC process had a positive impact, encouraging strategic litigation cases against the Kenyan government regarding post-election violence.⁵¹ Victims who had been used to being unheard and silenced felt empowered by the Legal Representative for Victims countering arguments put forward by Mr Kenyatta and his government.⁵² The victims' participation in the ICC case 'allowed survivors to find their voices and to demand truth and accountability'.⁵³

In sum, this article argues that the CIPEV, TJRC, constitutional and institutional reform and ICC intervention provided a foundation for the strategic litigation case. Furthermore, were it not for some of these processes, the strategic litigation would not have been possible, nor would it have provided an avenue for redress and reparations. It is important to understand the circumstances that necessitated Kenya's transitional justice process and its significance in cases of

request-launch-investigation-crimes-against-humanity-regard (accessed 12 March 2021).

- 47 ICC 'Decision of the confirmation of charges pursuant to article 61(7)(a) and (b) of the Rome Statute in the case of *The Prosecutor v Uhuru Muigai Kenyatta*' (2012), https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF (accessed 14 April 2021).
- 48 ICC 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta' (2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2> (accessed 9 March 2021).
- 49 ICC 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future' (2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406> (accessed 10 March 2021).
- 50 ICC 'Victims' response to the prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta' (2014), https://www.icc-cpi.int/CourtRecords/CR2014_09983.PDF (accessed 26 April 2021).
- 51 A Sehmi 'Now that we have no voice, what will happen to us?' (2018) 16 *Journal of International Criminal Justice* 571.
- 52 Sehmi (n 51).
- 53 Sehmi (n 51) 590.

sexual and gender-based violence that occurred during post-election violence. Therefore, the next part provides a historical context.

3 Legacy of historical injustice and gross human rights abuse

The premise of this article is that a historical context is an important framework to understand post-election violence, not as an event, but due to long-term historical injustices and human rights abuses that went unaddressed. This lens is also important for an understanding of the sexual and gender-based violence during post-election violence as part of a recurrent cycle of violence. First, this part provides an overview of Kenya's legacy of ethnic, political and election-related violence. With an understanding of the cycles of violence, this part next considers the nature and scope of sexual and gender-based violence that occurred during post-election violence.

3.1 Ethnic, political and election-related violence

On 12 December 1963, after 68 years of anti-colonial struggles against domination, oppression and exploitation, British colonial rule in Kenya came to an end.⁵⁴ However, colonial practices had already become institutionalised, and independence merely changed who the perpetrators of systemic violations of human rights were.⁵⁵ The colonial era fostered inequality and ethnic conflict through the practices of the administrative system. Specifically, the distribution of wealth, representation in local administration and choice of labourers, among other policies, were decided along ethnic lines. Land was central to fostering ethnic conflict, as there was bitterness on the part of those displaced from their land and superiority among those allowed to live on fertile land, within proximity to new infrastructure and opportunities. Post-independent Kenya maintained the *status quo* of privilege along ethnic lines, and political leadership instrumentalised this colonial practice and used the state to amass wealth and institutionalise ethnic politics.⁵⁶

The Kenyan government did very little after independence to confront the wrongdoings and rehabilitate the nation after generations of atrocities that had occurred during colonisation.

54 TJRC (n 20).

55 As above.

56 KG Adar 'Ethnicity and ethnic kings: The enduring dual constraints in Kenya's multi-ethnic democratic electoral experiment' (1998) 5 *Journal of the Third World Spectrum* 71.

When Kenya's first head of state, Jomo Kenyatta, came into power, his independence speech did not suggest any substantial change to colonial structures and, further, asked the people to 'forgive and forget' the atrocities of the past.⁵⁷ Furthermore, Kenyatta introduced the land policy of 'willing seller, willing buyer' which required people to buy back their land.⁵⁸ The result was that only those 'who had worked closely with the British and earned an income had the necessary resources to buy land or secure bank loans'.⁵⁹ Kenyatta ruled Kenya as a *de facto* one-party state for 15 years (1963 to 1978) during which there was land grabbing, political patronage, ethnic violence and marginalisation at various economic and social levels.⁶⁰

After the death of Kenyatta, Daniel Arap Moi, who had served as his Vice-President from 1966-1978, succeeded as President in 1978. It was hoped that Moi would 'steer the country towards a more accommodating human rights era, without ethnic dominance'.⁶¹ Instead, out of his 24-year rule, 13 were under *de facto* and *de jure* one-party systems. The 'detentions and political trials, torture, arbitrary arrests and police brutality reminiscent of the colonial era' became a common feature of Moi's reign.⁶² In 1991, after significant local and international pressure, Moi's government finally allowed the establishment of a multi-party system, with elections held in December 1992.⁶³ Moi won the election in 1992 and 1997, but 'before and after the elections, there was widespread politically-motivated ethnic violence'.⁶⁴ When President Moi finally stepped down, he gave way to Mwai Kibaki in 2002, his former Vice-President. There was far less violence in 2002 than there had been in 1992 and 1997.⁶⁵

In sum, since 1963 Kenya experienced episodes of ethnic, political and election-related violence. The root causes of the violence include unresolved grievances over land, corruption, internal regional inequality, and inequitable distribution of resources along ethnic lines. These features were identified as some of the underlying issues

57 TJRC (n 20) 17.

58 TJRC (n 20) 19.

59 KM Clarke 'Refiguring the perpetrator: Culpability, history and international criminal law's impunity gap' (2015) 19 *International Journal of Human Rights* 597.

60 KG Adar & IM Munyae 'Human rights abuse in Kenya under Daniel Arap Moi, 1978-2001' (2001) 5 *African Studies Quarterly* 1.

61 Adar & Munyae (n 60) 2.

62 KG Adar 'The internal and external contexts of human rights practice in Kenya: Daniel Arap Moi's operational code' (2000) 4 *African Sociological Review* 74 76.

63 Africa Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1993).

64 Human Rights Watch (HRW) 'Kenya's unfinished democracy: A human rights agenda for the new government' (2002), <http://hrw.org/reports/2002/kenya2/kenya1202.pdf> (accessed 20 April 2021).

65 As above.

that led to the widespread post-election violence. Noteworthy, the pattern of election-related violence continues to be a feature of every Kenyan election cycle to date, with varying degrees of severity. This pattern was documented in the CIPEV and TJRC reports. Also noteworthy, the violence is accompanied with a pattern of widespread sexual violence, which was documented as recently as during the 2017 election.⁶⁶

3.2 Sexual and gender-based violence during post-election violence

While CIPEV estimated 900 cases of sexual and gender-based violence during post-election violence, some estimates are as high as 40 000 incidents of sexual and gender-based violence.⁶⁷ The CIPEV reported that during post-election violence the nature of sexual violence included 'rape, defilement, sodomy, gang rape, sexual mutilation (including forced circumcision and genital violence) and loss of body parts'.⁶⁸ There were reports of traumatic incidents such as being forced to watch or take part in sexual violence against family members.⁶⁹ The TJRC acknowledged in its report that 'due to shame and stigma associated with sexual violence, many victims of sexual violence did not report sexual violence to the Commission'.⁷⁰ Also noted in the report of the TJRC was that, contrary to the traditional belief that women and girls were the sole victims of sexual violence, men and boys were also targeted.

In the report from the Office of the High Commissioner for Human Rights (OHCHR) which deployed a fact-finding mission in February 2008, it was reported that sexual and gender-based violence was 'opportunistic' with groups taking advantage of the chaotic and violent situation to target ethnic groups.⁷¹ Furthermore, the OHCHR reported that there was little evidence that sexual and gender-based violence had been widespread and systemic or used as a tool of intimidation against ethnic groups.⁷² This assessment was called

66 OHCHR (n 26).

67 Amnesty International *Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya* (2014).

68 CIPEV (n 6) 237.

69 CIPEV (n 6).

70 Truth, Justice, and Reconciliation Commission (TJRC) 'Final Report – TJRC Report (Newspaper Supplement)' (2013), <https://digitalcommons.law.seattleu.edu/tjrc-core/1> (accessed 31 January 2021).

71 OHCHR 'Report from OHCHR fact-finding mission to Kenya, 6-28 February 2008' (2008), https://reliefweb.int/sites/reliefweb.int/files/resources/DC21F9DFDB550A45C1257411003A9006-Full_Report.pdf (accessed 20 March 2021).

72 As above.

into question by other reports, for example, the International Centre for Transitional Justice (ICTJ) which reported that the incidents of sexual and gender-based violence were widespread and severe, and particularly prevalent in Nairobi, Nyanza, Rift Valley, Coast and Western provinces.⁷³ The Kenya National Commission on Human Rights (KNCHR) reported that women and children were specifically targeted for rape on account of their ethnicity and political affiliation.⁷⁴ Men and boys were similarly targeted. For example, the Luo community were forcibly circumcised by Mungiki⁷⁵ members with some victims reported to have bled to death.⁷⁶ Human Rights Watch reported that several survivors and witnesses described perpetrators inserting 'guns, sticks, bottles and other objects into women's vaginas' or beating their genitals with objects.⁷⁷ Notably, the widespread and systemic nature of the sexual violence was cited in the ICC confirmation of charges.⁷⁸

It was concluded that the patterns of sexual violence during post-election violence, particularly gang rape, were consistent with patterns of mass rape documented in conflict settings elsewhere in the world.⁷⁹ This is an important conclusion as in recent years the international community has been increasing efforts to address conflict-related sexual violence.⁸⁰ In June 2008 the UN Security Council (UNSC) recognised for the first time that conflict-related sexual violence is 'used or commissioned as a tactic of war to target civilians or as part of widespread or systemic attack against civilian populations'.⁸¹ Conflict-related sexual violence refers to 'incidents or patterns of sexual violence against women, men, girls, or boys occurring in a conflict or post-conflict setting that have direct or indirect links with the conflict itself or that occur in other situations of concern such as in the context of political repression'.⁸²

73 International Centre for Transitional Justice (ICTJ) 'The accountability gap on sexual violence in Kenya: Reforms and initiatives since the post-election crisis' (2014), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-SGBVAccountability-2014.pdf> (accessed 20 February 2021).

74 Kenya National Commission on Human Rights (KNCHR) *On the brink of the precipice: A human rights account of Kenya's post-2007 election violence* (2008).

75 Mungiki is a movement of mostly Kikuyu men that has been variously defined as a cultural-religious group, a political movement and criminal organisation; see KNCHR (n 74).

76 KNCHR (n 74) 128.

77 Human Rights Watch (HRW) *I just sit and wait to die: Reparations for survivors of Kenya's 2007-2008 post-election sexual violence* (2016).

78 ICC (n 46).

79 HRW (n 77).

80 Conflict-related sexual violence report 2020, UN Secretary-General 20 March 2021 UN Doc S/2021/312 (2021).

81 Resolution 1820, UN Security Council 19 June 2008 UN Doc S/RES/1820 (2008) para 1.

82 UN 'Guidance note of the secretary-general on reparations for conflict-related sexual violence' (2014), <https://www.unwomen.org/-/media/headquarters/>

With the above context of the sexual and gender-based violence that occurred during post-election violence, an analysis of the strategic litigation case can be better understood.

4 Strategic litigation by the sexual and gender-based violence survivors during post-election violence

Sexual violence, including in conflict-related situations, is prohibited in international law. The prohibition can be found in customary international law as well as several instruments in international humanitarian law, human rights law and criminal law. Similarly, the obligation to prosecute perpetrators and provide reparation to survivors of sexual violence can be found in international law. The options for redress and reparations for sexual violence depend, in part, on the legal framework applicable at the domestic level. According to the Kenyan Constitution the general rules of international law and any treaty or convention ratified by Kenya form part of the laws of Kenya.⁸³ Some of the international instruments that are relevant to sexual violence, which create obligations that bind Kenya, include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); the Rome Statute of the International Criminal Court (Rome Statute); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the African Charter on Human and Peoples' Rights (African Commission); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The strategic litigation case by the sexual and gender-based violence survivors during post-election violence was based on these obligations that bind Kenya.

4.1 The parties in the case

In February 2013 six women and two men who were survivors of sexual and gender-based violence during post-election violence filed a constitutional petition at the High Court of Kenya, Constitutional and Human Rights Division. The eight survivor-petitioners were representative of different types of sexual violence that occurred

attachments/sections/docs/2014/unsg-guidance-note-reparations-for-conflictrelated-sexual-violence-2014-en.pdf (accessed 2 May 2021).

83 Arts 2(5) & 6 Constitution.

during post-election violence. They identified a variety of perpetrators, some police officers, and others private citizens. Given the nature of the case, and the potential danger and stigma the survivors could face, their identities were not made public. However, the four CSOs that joined the case as co-petitioners were known: the Coalition on Violence against Women (COVAW); Physicians for Human Rights (PHR); the International Commission of Jurists-Kenya (ICJ-Kenya Section); and the Independent Medico-Legal Unit (IMLU). These CSOs joined the case to represent the interests of other sexual and gender-based violence survivors not represented in the case, as well as the interests of the public. As discussed in part 2.3, the provisions of the new Constitution helped settle the issue of *locus standi* of the co-petitioners.

There were six respondents in this case. The first respondent was the Attorney-General who has the constitutional duty to represent the national government.⁸⁴ The second respondent was the Director of Public Prosecutions with the constitutional authority to direct the Inspector-General of the National Police Service to investigate allegations of criminal conduct.⁸⁵ The third respondent was the Independent Policing Oversight Authority established with the objective of holding the police accountable to the public and giving effect to the Constitution.⁸⁶ The Inspector-General of the National Police Service was the fourth respondent with the duty to investigate offences and enforce the law.⁸⁷ The fifth respondent, the Minister for Medical Services and sixth, the Minister for Public Health and Sanitation were merged but at the time of the petition were mandated to provide health services.⁸⁸

After the petition was filed, the Court granted leave for other parties to join the petition. The Kenya Human Rights Commission joined as an interested party and the Kenya National Commission on Human Rights, Katiba Institute, Constitution and Reform Education Consortium and Redress Trust were each admitted as *amicus curiae* or 'friend of the court'.

84 Art 156(4) Constitution.

85 Art 157(4) Constitution.

86 Art 244 Constitution.

87 Art 245(1) Constitution.

88 COVAW (n 2).

4.2 Petitioners' claims

The survivor-petitioners claimed that during the post-election violence, the forms of violence committed against them included 'rape, attempted rape, defilement, attempted defilement, gang rape, forced pregnancy, deliberate transmission of HIV or any other life threatening sexually transmitted diseases, sexual assault, indecent acts, and other gender-based physical violence'.⁸⁹ The sexual and gender-based violence strategic litigation sought, among other issues, to hold the Kenyan government accountable for its failure to

prevent the violence and resulting [sexual and gender-based violence]; protect the general population, including the survivors from sexual assault; investigate and prosecute perpetrators of [sexual and gender-based violence]; and provide prompt, adequate, appropriate, and effective reparations to survivors.⁹⁰

The petitioners claimed that the respondents caused or contributed to the sexual and gender-based violence violations suffered due to numerous failures. Some of these failures included a failure to train and control police in lawful methods of law enforcement operations during civil unrest to prevent sexual crimes; a failure to plan, prepare and take adequate measures for proper policing and protection of citizens; and a failure to intervene to protect victims when the police were aware of the threat or commission of crimes involving sexual and gender-based violence.

Moreover, the petitioners claimed that the respondents were liable for the failure to investigate and prosecute those responsible for the violations against the survivor-petitioners and other sexual and gender-based violence survivors during the post-election violence. The petitioners also claimed that 'the government denied emergency medical services to victims and failed to provide the necessary care and compensation to address their suffering' and, therefore, that the respondents were liable.⁹¹ Notably, the petitioners claimed that the respondents were liable for sexual and gender-based violence committed by both state actors and non-state actors. In the case of liability for the sexual and gender-based violence committed by non-state actors, the petitioners argued, for example, that the first and fourth respondents failed to protect victims of sexual and gender-

89 Physicians for Human Rights (PHR) 'Constitutional petition 122 of 2013', <https://phr.org/wp-content/uploads/2019/09/petition-122of2013.pdf> (accessed 12 December 2020).

90 Physicians for Human Rights (PHR) 'Public interest litigation fact sheet' (2019), <https://phr.org/wp-content/uploads/2019/11/PHR-PIL-Advocacy-Factsheet-2019.pdf> (accessed 29 April 2021).

91 As above.

based violence when they were aware of the commission or threats of this type of violence against victims. Therefore, through their acts and/or omissions, they caused the sexual and gender-based violence violations against the survivor-petitioners and other sexual and gender-based violence survivors during the post-election violence.⁹²

The petitioners also claimed that various constitutional and international law rights had been violated. The rights alleged to have been violated included the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality before the law and freedom from discrimination; the right to information; and the right to a remedy.⁹³

4.3 Relief sought by petitioners

The relief sought in this strategic litigation petition was extensive with the petitioners asking the Court to decide on 22 requests or prayers. Four of these are noteworthy in the context of redress and reparations. First, the petitioners sought a declaratory order to the effect that the constitutional and international law rights they alleged to have been violated were violated during post-election violence due to the failure of the government of Kenya to protect those rights. Second, the petitioners sought a declaratory order to the effect that Kenya has a 'positive obligation to investigate and prosecute violations of the right to life, prohibition from torture, inhuman and degrading treatment; and the security of the person'.⁹⁴ Third, the petitioners sought an order compelling the respondents to 'collaborate to create a database of victims to ensure that all such victims are provided with appropriate, ongoing medical and psychosocial care, legal and social services'.⁹⁵ Fourth, the petitioners sought various forms of damages, including punitive damages for the failure to provide emergency medical services and documentation to victims, exemplary damages to acknowledge the involvement of the police as perpetrators and general damages.

4.4 Decision of the Court

In a landmark judgment, on 10 December 2020 the High Court ruled in favour of four of the eight survivor-petitioners. The Court awarded

92 As above.

93 COVAW (n 2).

94 PHR (n 90) 12.

95 PHR 14.

each of the four survivor-petitioners Kes 4 million (approximately US \$36 513) as general damages for the violation of their constitutional rights.⁹⁶ Of the four successful survivor-petitioners, three were attacked by police officers (the fifth, sixth and ninth petitioners) and one was attacked by private citizens (the eighth petitioner). The unsuccessful four survivor-petitioners (seventh, tenth, eleventh and twelfth) were attacked by private individuals. Korir J, the High Court judge before whom this case was heard, held that there was no evidence to show that the crimes against the unsuccessful four took place at the 'instigation, consent or acquiescence of a public official or other person acting in an official capacity'.⁹⁷ Furthermore, Korir J did not consider it a failure of the respondents and, by extension, the Kenyan government, to investigate and prosecute these cases since they were not initially reported by the survivor-petitioners.

Korir J only granted two of the eight declaratory orders. The Court declared that Kenya indeed had a positive obligation to investigate and prosecute sexual and gender-based violence-related crimes in relation to the post-election violence. According to Korir J, the state owed a duty to refrain from causing harm and to pursue those whose acts caused harm to the three survivor-petitioners attacked by police officers. Although the eighth survivor-petitioner was attacked by private actors, the state did not investigate or follow up with arrest of the perpetrators despite the survivor-petitioner naming the attackers and providing information as to where they could be found.⁹⁸ Consequently, declaratory orders were issued that the right to life, prohibition from torture, inhuman and degrading treatment, and security of the person of the fifth, sixth, eighth and ninth survivor-petitioners had been violated.⁹⁹

The second declaratory order that was granted was to the effect that the right to life, security, remedy, equality and freedom from discrimination as well as the prohibition of torture, inhuman and degrading treatment had been violated, as a result of the failure of the state to protect the rights of the fifth, sixth, eighth and ninth survivor-petitioners.¹⁰⁰ These declaratory orders reflect an important recognition that sexual violence, including rape and forced circumcision, constitutes forms of torture.¹⁰¹ Noteworthy, both the declaratory orders issued were only in respect of the four survivor-

96 COVAW (n 2) para 172(c).

97 COVAW para 119.

98 COVAW para 120.

99 COVAW para 172(a).

100 COVAW para 172(b).

101 Telephone interview with L Muthiani on 5 May 2021.

petitioners and not broadly of other sexual and gender-based violence survivors of the post-election violence.¹⁰²

The Court granted no orders compelling the state to act in any way by reasoning in a variety of ways. For example, Korir J held that the petitioners failed to prove that the sexual and gender-based violence survivor-petitioners had been denied or precluded from accessing medical and psychological rehabilitative services provided by the state.¹⁰³ In the analysis and determination, Korir J referenced a survivor-petitioner who was denied treatment in one public hospital finding treatment in another public hospital. Korir J concluded that 'I am therefore unconvinced that the Government failed to provide the appropriate medical and psychological services to the petitioners'.¹⁰⁴ However, the question has been raised as to whether Korir J conflated the services that the survivor-petitioners received from CSOs and international partners, who happened to be providing care to victims at public health facilities, with government-provided services.¹⁰⁵

5 Contributions and lessons learnt

This article proposes that this strategic litigation by sexual and gender-based violence survivors of post-election violence is a significant contribution not only to Kenya's pursuit of domestic accountability, but potentially towards the pursuit of domestic accountability for conflict-related sexual violence in jurisdictions outside of Kenya. Bearing this in mind, three aspects are of importance, namely, the recognition and acknowledgment of sexual and gender-based violence survivors of post-election violence; reparation access for sexual and gender-based violence survivors; and impact on the option of domestic accountability.

5.1 Recognition and acknowledgment of sexual and gender-based violence survivors of post-election violence

Strategic litigation provides an opportunity to raise community consciousness and promote dialogue on human rights issues. One of the issues raised by sexual and gender-based violence survivors of post-election violence is that they have gone unrecognised by the

102 COVAW (n 2) para 165.

103 COVAW para 131.

104 COVAW (n 2).

105 Interview (n 101).

government and by society at large.¹⁰⁶ The former head of office for Physicians for Human Rights stated that the government has yet to acknowledge the violations and take any responsibility for the harm suffered by sexual and gender-based violence survivors of post-election violence.¹⁰⁷ Furthermore, when the government was giving monetary compensation to survivors of the post-election violence, sexual and gender-based violence survivors were not included.¹⁰⁸

There are two key events that were a missed opportunity by the government to counter the perception held by sexual and gender-based violence survivors of post-election violence, in that the government neither recognises nor acknowledges them. First, after the TJRC completed its mandate, the government gazetted the TJRC report. However, the TJRC report excluded volumes IIA and IIC which provide lists and details of incidents of sexual violence as gross human rights violations.¹⁰⁹ Second, when President Uhuru Kenya apologised for historical injustices, the apology rightly referenced post-election violence. However, President Kenyatta recalled the 1 300 dead and more than 650 000 displaced by post-election violence but there was no mention of sexual and gender-based violence survivors of the post-election violence. Beyond missed opportunities, these events fall short of the principles of effective reparation for gross human rights violations, which include 'acknowledgment of the facts and acceptance of responsibility'.¹¹⁰

From the time the sexual and gender-based violence strategic litigation case was filed, the CSOs in the case and their partners implemented a communication and advocacy strategy alongside the case. The strategy aimed to engage the media and, by extension, the public, to attract international¹¹¹ and national¹¹² attention to the case. With sexual and gender-based violence strategic litigation, an effective communication and advocacy strategy is an important measure to 'anticipate, address and counterbalance possible narratives that perpetuate stigma, gender stereotypes and gender-

¹⁰⁶ HRW (n 77).

¹⁰⁷ Telephone interview with C Alai on 30 April 2021.

¹⁰⁸ As above.

¹⁰⁹ OHCHR (n 26).

¹¹⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly 21 March 2006 UN Doc A/RES/60/147 para 22(e).

¹¹¹ N Kottoor 'Kenya election: Rape victim fears repeat of 2007 ordeal' (2013), <https://www.bbc.co.uk/news/world-africa-21622635> (accessed 3 May 2021).

¹¹² Capital News 'PEV victims file case for compensation' (2013), <https://www.capitalfm.co.ke/news/2013/02/pev-victims-file-case-for-compensation/> (accessed 2 May 2021).

based discrimination'.¹¹³ Although Kenya has a fast news cycle, as elsewhere in the world, this sexual and gender-based violence case contributed to truth telling about sexual and gender-based violence survivors and their reparative needs.

Another significant contribution to discourse is with respect to the needs of children born of post-election violence rape. The children born from post-election violence rape face particular vulnerabilities such as 'stigma and rejection, and physical and verbal abuse by immediate and extended families, as well as in the wider communities'.¹¹⁴ In a Human Rights Watch report where sexual and gender-based violence survivors of post-election violence were interviewed, some of the women who bore children after rape stated that they did not register the births of their children because the registration officers demanded the name of the father that they did not know.¹¹⁵ The human rights violations faced by these children, therefore, can extend to the rights to health, education and identity, among others. On KTN, one of Kenya's local television stations, *KTN News* featured the full story of sexual and gender-based violence survivors, and their children conceived from the 2007-2008 post-election violence.¹¹⁶ The feature described how the 'unwanted pregnancies brought about pain, split families, destroyed peace in homes and wrecked marriages'.¹¹⁷

In March 2020, during the Universal Periodic Review, the Kenyan government supported the recommendation by the UN Human Rights Council to acknowledge the violations of the rights of survivors of electoral-related sexual violence.¹¹⁸ More than a year later, at the time of writing this article in 2021, the Kenyan government has not acknowledged the violations of the rights of survivors of electoral-related sexual violence. After the decision in December 2020, sexual and gender-based violence survivors have expressed appreciation of the acknowledgment and recognition that this case brought to their experiences. One survivor stated that 'the wait has been very long but worth it. We have been recognised as survivors of [sexual and gender-based violence]. No one can ever say that our experiences

113 OHCHR (n 1).

114 HRW (n 77) 59.

115 HRW (n 77).

116 KTN News 'A mother's tale: A story of children born of rape', <https://www.youtube.com/watch?v=DdxCXHlo6OY&t=65s> (accessed 3 May 2021).

117 *The Standard* 'A mother's tale: A story of children born of rape' (2018), <https://www.standardmedia.co.ke/kenya/article/2001306004/mothers-tale-the-story-of-children-born-of-rape> (accessed 3 May 2021).

118 Report of the Working Group on Universal Periodic Review, Human Rights Council 20 March 2020 UN Doc A/HRC/44/9 (2020) (HRC).

were not real. We feel vindicated.¹¹⁹ Another stated, 'we are happy that the court has finally recognised the harm that we suffered as victims. It has been a long journey.'¹²⁰ Could this experience be the same for conflict-related sexual violence survivors outside of Kenya?

5.2 Reparation access for sexual and gender-based violence survivors of post-election violence

The UN General Assembly adopted, by consensus, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines).¹²¹ According to the Basic Principles and Guidelines, there are different forms of reparation to redress gross human rights violations, including 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.¹²² Reparation is a right and, therefore, reparation for conflict-related sexual violence should be provided by a state for the acts or omissions that can be attributed to it that are in violation of obligations under international human rights law or international humanitarian law.¹²³ It therefore was a welcome response when the Kenyan government supported the recommendation to design and implement reparation measures and programmes for survivors.¹²⁴

One of the guiding principles is that adequate reparations for conflict-related sexual violence should entail a combination of different forms or reparation. The petitioners in the sexual and gender-based violence strategic litigation sought to address these various forms in submissions, but the decision focused on compensation.¹²⁵ Korir J ruled in favour of four of the eight survivor-petitioners ordering the government to pay general damages. While there was no declaration to the effect that other similarly-affected sexual and gender-based violence survivors would be entitled to the same

119 NNyamu-Mathenge 'Kenya sexual violence survivors get justice, though imperfect' 25 December 2020, <https://www.aljazeera.com/opinions/2020/12/25/for-kenyas-sexual-violence-survivors-justice-though> (accessed 2 May 2021).

120 PHR 'Court delivers justice for several survivors of post-election sexual violence in Kenya' (2020), <https://phr.org/news/court-delivers-justice-for-several-survivors-of-post-election-sexual-violence-in-kenya/> (accessed 29 April 2021).

121 Basic Principles and Guidelines (n 110).

122 Basic Principles and Guidelines (n 110) para 18.

123 UN 'Guidance note of the secretary-general: Reparations for conflict-related sexual violence' (2014), <https://www.unwomen.org/-/media/headquarters/attachments/sections/news%20and%20events/stories/final%20guidance%20note%20reparations%20for%20crsv%203-june-2014%20pdf.pdf?la=en> (accessed 20 April 2021).

124 HRC (n 118).

125 Interview (n 101).

relief, given the analysis of the Court it is possible for other sexual and gender-based violence survivors with similar circumstances to file their own cases to also obtain general damages. For instance, a sexual and gender-based violence strategic litigation case has already been filed in Kisumu County where there was widespread sexual and gender-based violence during post-election violence, drawing on lessons from this case.¹²⁶ However, litigation is not an avenue open to all sexual and gender-based violence survivors given the time, financial and human resources involved. This case lasted seven years, had numerous delays, and was heard by six different judges due to changes in the judiciary, death or recusal, among other factors.¹²⁷ Furthermore, 'there is considerable strain that this case put on the survivor-petitioners throughout the case that must be considered ahead of any future litigation'.¹²⁸

Consultation with victims is an important part of understanding their priorities and views on a proposed reparation intervention.¹²⁹ The sexual and gender-based violence survivors suffer long-term effects in many ways: physically, mentally and socially. The International Centre for Transitional Justice (ICTJ) conducted studies seeking to understand the reparative needs of survivors. Of the 48 women interviewed, 42 suffered severe psychological disturbances and the six exceptions were women who had undergone continuous trauma counselling for at least three years.¹³⁰ Furthermore, in focus group discussions the sexual and gender-based violence survivors indicated that medical assistance was a priority to treat injuries and other illnesses resulting from their assault, and that the conditions of those who had become HIV positive were exacerbated by their poverty.¹³¹ The social impacts of sexual and gender-based violence survivors referenced included abandonment by their husbands, and rejection by their families and communities. Male sexual and gender-based violence survivors are highly stigmatised and remain largely unseen and unheard in their communities.¹³² Based on the study, the priorities of sexual and gender-based violence survivors included compensation or economic support, medical and psychological assistance. Was the sexual and gender-based violence strategic litigation able to provide this?

126 As above.

127 As above.

128 As above.

129 UN (n 123).

130 ICTJ 'To live as other Kenyans do: An article of the reparative demands of Kenyan victims of human rights violations' (2011), <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> (accessed 20 February 2021).

131 As above.

132 As above.

For the four survivor-petitioners, 'what they were awarded was more than they could have hoped for, but it has created a dichotomy between survivors which is problematic'.¹³³ There is a sense that sexual and gender-based violence survivors violated by police officers are classified differently to those violated by private actors, which disenfranchises a large group of survivors.¹³⁴ There is a large proportion of sexual and gender-based violence survivors that report that they were violated by militias or private citizens. For example, in a study by the Kenya National Commission on Human Rights (KNCHR) on the sexual violence that occurred during and after Kenya's 2017 general election, 45,5 per cent identified civilians and 54,6 per cent identified police as perpetrators of sexual violence.¹³⁵ Furthermore, there are no recorded cases of boys and men having been violated by police officers.¹³⁶ This means that 'the already stigmatised boys and men who were violated by private actors in the form of militia or Mungiki, go unrecognised and are disenfranchised'.¹³⁷ Therefore, in terms of the forms of reparation options, this sexual and gender-based violence strategic litigation provided limited compensation as it applied to only the four survivor-petitioners. There is nothing to suggest that other similarly-affected sexual and gender-based violence survivors would not be entitled to the same relief. However, it did not address other forms of reparation and left other categories of survivors disenfranchised. There is an option of appeal which is being pursued as an avenue to address some of the issues in the judgment.¹³⁸

The TJRC report provides a framework for comprehensive reparations which the government has failed to implement. Survivors and CSOs have been advocating the establishment of a programme or mechanism to implement the recommendations of the TJRC report. However, but the government has failed to respond to the calls to action.¹³⁹ Recently, the UN Human Rights Committee urged the Kenyan government to fully implement the recommendations of the TJRC, including operationalising the Restorative Justice Fund.¹⁴⁰ It is the contention in this article that continuing to utilise several mechanisms in addition to strategic litigation, such as advocacy for the adoption of the TJRC report and institutional reforms, will jointly

133 Interview (n 101).

134 Interview (n 101).

135 Kenya National Commission on Human Rights (KNCHR) *Silhouettes of brutality: An account of sexual violence during and after the 2017 general election* (2018) 43.

136 Interview (n 101).

137 Interview (n 101).

138 As above.

139 OHCHR (n 26).

140 Concluding Observations on the fourth periodic report of Kenya, Human Rights Committee 11 May 2021 UN Doc CCPR/C/KEN/CO/4 (2021).

contribute towards adequate and comprehensive redress for sexual and gender-based violence survivors of post-election violence.

5.3 Impact on domestic accountability

At the time this case was filed, 'there was no other constitutional petition seeking to hold the state liable for [conflict-related sexual violence] perpetrated by both state and private actors in conflict situations'.¹⁴¹ Also, where there has been conflict-related sexual violence strategic litigation at the domestic level, it mostly occurs in military courts or tribunals. An example of a conflict-related sexual violence strategic litigation is the High Risk Tribunal which considered the sexual violence in Sepur Zarco in Guatemala where women were forced to serve soldiers in the military post.¹⁴² Another strategic litigation case is the military court that dealt with the abduction and rape of more than 40 girls in Kavumu village in the Democratic Republic of the Congo (DRC).¹⁴³ There is also the strategic litigation by Valentina Rosendo Cantú which was first before the military justice system in Mexico before the Inter-American Court of Human Rights.¹⁴⁴ However, with a growing number of conflict-related sexual violence strategic litigation cases, this case perhaps can contribute to options for accountability.¹⁴⁵

There is an entrenched culture of impunity connected to violence, including sexual violence, during and after elections in Kenya. In March 2020 the UN Human Rights Council recommended that the Kenyan government intensify efforts to secure redress for survivors of sexual violence following the 2007 and 2017 presidential election.¹⁴⁶ After almost 14 years there still are calls for the Kenyan government to secure redress for post-election violence survivors. While there are flaws, this sexual and gender-based violence strategic litigation case regarding post-election violence has paved the way for other post-election violence survivors to pursue redress, for example, sexual and gender-based violence survivors of the 2017 post-election violence. The KNCHR, which documented sexual and gender-based violence during post-election violence, noted similar patterns of sexual

141 Interview (n 101).

142 JM Burt 'Military officers convicted in landmark Sepur Zarco sexual violence case' (2016), <https://www.ijmonitor.org/2016/03/military-officers-convicted-in-landmark-sepur-zarco-sexual-violence-case/> (accessed 2 May 2021).

143 D Perissi & E Taquet 'The Kavumu trial: Complementarity in action in the Democratic Republic of Congo' (2018), <https://www.ijmonitor.org/2018/02/the-kavumu-trial-complementarity-in-action-in-the-democratic-republic-of-congo/> (accessed 2 May 2021).

144 *Rosendo Cantú et al v Mexico* 31 August 2010 Ser C No 216.

145 OHCHR (n 1).

146 HRC (n 118) 9.

violence in 2017.¹⁴⁷ There has been no official acknowledgment, condemnation or investigation of the violence around the 2017 general election by the Inspector-General of Police. Instead, KNCHR reported that 'President Uhuru Kenyatta, through the Director of Police Operations, commended the National Police Service for a job well done during this period'.¹⁴⁸

The decision of the Court in this sexual and gender-based violence case has vindicated, albeit minimally, the ability of the judiciary to adjudicate post-election violence cases. In 2011 the ICTJ reported that, of the victim respondents interviewed, 74 per cent sought ICC involvement in prosecuting perpetrators, and 82 per cent stated that they did not trust Kenya's judicial system.¹⁴⁹ Given what transpired with the involvement of the ICC in Kenya, perhaps an interview with victims may show a different perspective on the Kenyan judicial system. Could this judgment trigger the government's willingness to pursue the investigation and prosecution of sexual violence in relation to post-election violence and even in 2017? At the same time, perhaps domestic accountability through strategic litigation as opposed to criminal litigation could also yield alternative outcomes that benefit survivors of sexual and gender-based violence.

6 Conclusion

In the introduction this article mentioned that when it comes to Kenya's transitional justice process, international criminal accountability dominates discourse. Based on the research undertaken for the article, there are very few domestic strategic litigation cases on conflict-related sexual violence. A comprehensive mapping of these cases as well as the lessons learnt and impact, from both the perspective of survivors and practitioners, would significantly inform future strategic litigation cases. Furthermore, the article indicated that other transitional justice processes contributed to the sexual and gender-based violence strategic litigation case. Perhaps this is the case in other national justice systems. Could research be undertaken to ascertain whether there are a set of bare minimums or components that must be in place to ensure the success of conflict-related sexual violence strategic litigation? In other words, what circumstances are needed to be in place to maximise the transformative potential of conflict-related sexual violence strategic litigation?

147 KNCHR (n 135).

148 KNCHR (n 135) 17.

149 ICTJ (n 130).

This article provided first an overview of transitional justice in Kenya, highlighting the contribution of the CIPEV, TJRC and ICC and constitutional and institutional reform processes in making the strategic litigation possible. Second, the legacy of historical injustice and human rights abuse was discussed to contextualise the occurrence of post-election violence and accompanying pattern of systemic sexual and gender-based violence. Furthermore, the nature and scope of violations experienced by sexual and gender-based violence survivors during post-election violence were provided to appreciate the significance of the strategic litigation case. Third, the article considered the sexual and gender-based violence strategic litigation case and the key aspects of the judgment. Fourth, the contributions and lessons learnt in respect to the recognition and acknowledgment of sexual and gender-based violence survivors during post-election violence, reparation access for these survivors and impact on domestic accountability were examined.

The article concludes with the perspective that, although imperfect, the sexual and gender-based violence strategic litigation regarding post-election violence was a *pièce de résistance* for survivors who continue to struggle almost 14 years later. It made a notable contribution towards the discourse on the pursuit of redress and reparation for conflict-related sexual violence survivors. However, given that the judgment was delivered only nine months ahead of this analysis, the cumulative and long-term value of this strategic litigation is not yet fully evident, and further research would be important.