

# 2011

International  
Center for  
Policy and  
Conflict

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**REGIONAL CONFERENCE ON THE GENDER AGENDA**  
*Moving away from a minimal concept*  
**28<sup>th</sup> and 29<sup>th</sup> October 2010 at the Inter Continental Hotel Nairobi**

## ACRONYMS

I.C.P.C	International centre for policy and conflict.
I.C.C	International criminal court
I.C.T.R	International criminal tribunal for Rwanda
UNSC	United Nations Security Council
SGBV	Sexual and Gender Based Violence
CIPEV	Commission of inquiry into the post election violence
L.R.A	Lords resistance army
UPDF	Ugandan people's defence force
IDP	Internally displaced persons
TJRC	Truth Justice and reconciliation commission
C.S.O	Civil society organization
TRC	Truth and reconciliation commission
IIEC	Interim Independent Electoral commission.

## EXECUTIVE SUMMARY

A country's transition period provides a unique opportunity to promote gender equality and justice for the future. It provides an opportunity to ensure that there is re-establishment of the rule of law in a country that has experienced a post conflict/repressive rule and the strengthening of its systems and institutions for the administration of justice taking into account the interests and the needs of the entire population, including women.

Essential to this end is ensuring that women and men participate as equal partners in post-conflict/repressive rule reconstruction; in interim political arrangements and processes leading to elections; in legislative, judicial, constitutional and electoral reform commissions and institutions and rehabilitation. Women can only be equal beneficiaries if all aspects of gender equality are included in transitional justice processes.

In many cases this is usually not reflected. Women tend to be neglected in such processes. Their problems are looked at from a very narrow concept and many recommendations do not include them in policy design and development. This continues to play a major role in hindering women development and participation in post transitional societies.

Kenya is in the process of transition. However Kenyan women and girls have always faced historical injustices as compared to their male counterparts. These injustices include structural discrimination by practice, custom and law, education, employment and political arena.

The Kenyan socio-economic and political context succinctly demonstrates some of the factors that constrain women's abilities to claim and exercise their rights/entitlements. They are varied and include amongst other things: cultural practices and engrained patriarchal values; wide discrepancies in male/female rates of unemployment, particularly amongst youth; the growing trends of violence and crime; widespread gender-based violence (both domestic and social); the differential in performance and participation of girls and boys in schools; the increase in HIV/AIDS and subsequent vulnerabilities particularly amongst girls and women; the under-representation of women in decision-making positions; discriminatory laws related to citizenship, marriage, credit, property, inheritance inter alia; the high incidence of poor, female-headed household inter alia.

The new constitution dispensation is a first step towards dealing with the historical human rights violations and discrimination from a gender perspective as it provides a wide platform to ensuring gender equality and participation. However there is need for vigilance and strategy for Kenyan women to capture and influence the implementation process of the new constitution. Addressing past injustices as well as crimes is critical to women's struggles for human rights. Kenyan women should be prepared to take advantage of this opportunity for social transformation and facilitate in using these mechanisms to contribute to women's struggles for justice, a voice, and historical memory that has a lot to be accomplished in Kenya's history.

## **INTRODUCTION**

This conference is a follow up of a conference that had been organized by I.C.P.C under the banner of Kenya transitional justice network to discuss a tool for policy framework for engendered engagement. This tool was geared towards creating an understanding of gender sensitive transitional justice mechanisms and process in Kenya. The conference was held in April.

This conference is being held when some dynamics have changed like the passage of the new constitution which creates a platform for gender equality. However, there needs to be vigilance to ensure this is achieved. It is for this reason that I.C.P.C has invited stakeholders drawn from civil society, politics, media, private sector and the legal fraternity to try and seek to create a platform for women to map a new discourse on gender and women participation in political and policy development in the wake of a new constitutional dispensation.

The conference will be held under the ICPC programme on gender justice which addresses five critical integrated aspects that include quantitative and qualitative participation and capacity building of both genders, research and gender analysis on the policy and legal frameworks and producing informed policy information; promoting and advocating for the development of new engendered institutions, policies and laws including gender-sensitive judicial and law enforcement agencies; building partnerships to generate and support national gender justice movements advocating to integrate equitable gender into peace, security, development and human rights agendas and support for gender parity and equality in electoral processes and decision making.

The conference was geared towards a shift from a narrow focus of gender issues to a holistic outlook. There was a major focus on the use the reform process ongoing in Kenya and the passage of a new constitution to map out a maximum and effective participation of all genders with a bias to the women role.

The outcome of this conference will inform opportunities and gaps in gender justice.

## **Aims and objectives of the workshop**

### **Main Objective:**

- To create a platform for women leaders to map a new discourse of gender and women participation in political and policy development in the wake of a new constitutional dispensation.

### **Specific Objectives:**

- To consolidate the Kenyan gender voices on the ongoing transition in Kenya.
- To provide a platform for sharing and developing gender sensitive participation mechanisms on policy and political processes.
- To create visibility and publicity to the critical role of women in the transitional justice mechanisms.
- Identify and discuss critical challenges and way forward on Gender and reforms in Kenya.

### **Topical areas of Focus:**

- An overview of the ongoing reform processes.
- A critical analysis of participation index from a gender perspective, where are the gaps.
- Women's role in the reform agenda.
- Strategies for effective engagement.

## **CONTEXT:**

### **PRESENTATIONS.**

#### **KEY NOTE ADDRESS.(Full speech annexure i)**

The Conference was officially opened by the Executive Director of I.C.P.C Mr Ndung'u Wainaina. In his speech he highlighted the following:

This is a follow up meeting from one held in April in which a gender in transitional justice framework policy was tested and adopted. It was a first

in Kenya since the country lacks a coherent gender transitional policy. We are always treated to political promises but implementation never takes place. There is need to look at Transitional Justice in a more holistic way ie truth seeking, prosecution, legal and institutional reforms while taking care of gender perspectives.

The question then becomes how we can deal with emerging new and old challenges of transitional justice while keeping in mind what gender means to both men and women. Currently the challenges that we face in gender justice include:-

- ❖ Skewed systems against one gender meaning that even the policies passed will also marginalize that one gender.
- ❖ Lack of a comprehensive plan in political parties to ensure equality of genders.
- ❖ Lack of institutional mechanisms that provide equity in access to services.
- ❖ In Kenya we have a tendency to deal with triggers and not the real causes of conflicts which makes difficult to solve real issues and problems.
- ❖ There is no accessible information that could assist to make informed choices, decisions.
- ❖ Women and men are affected differently during conflict and thus concerns should be looked at differently.

The enforcement of the new constitution is getting underway while other strands of the Transitional Justice agendas are showing different signals. There is an apparent urgency and importance of developing a clear policy for advancing gender justice in times of transition.

This conference seeks to advance gender justice through influencing and re shaping the current framework specifically to ensure access to justice and influence equality. The goal is to focus on how gender justice requirements within the context of re-establishing the rule of law and post conflict peace building can best be addressed and operationalised in such settings

This dialogue is taking place in the same year we are celebrating Beijing + 15 as well as the tenth anniversary of UNSC 1325. It also takes place when

we are much aware of existing institutionalized gender discrimination within National institutions and in the interpretations of laws.

Our role as ICPC is to be a catalyst, advocate and partner in assisting to identify and develop critical strategic entry points to the implementation of various transitional justice processes so that they can impact critical issues on the agenda to promote opportunities and justice.

Our strategy is based on building partnerships for promoting gender justice who are geared towards realization of the gender charter for effective equality that will see mainstreaming and integrating the gender perspective and dialogue into national policies, processes, institutions and programmes in the state transformation and nation building.

At the heart of any implementation of real gender justice in countries coming from conflict is the demand that human rights violations against women and girls are regarded and treated as crimes by the criminal justice system. Women remain marginalized in the process of peace building and post conflict/repressive reconstruction. Achieving sustainable development will not be possible unless we involve women.

The silence of peace agreements on critical issues affecting the lives of women and girls ignores the human rights of half the population and undermines the foundation of societies emerging from conflict that are aspiring to establish democracy and the rule of law.

### **INFLUENCING THE CONSTITUTIONAL IMPLEMENTATION PROCESS By Njoki Ndung'u (formerly Member committee of experts).**

The implementation of the constitution is not an event but a life long venture. At the moment Kenyans are unrealistic in their expectations in timelines because the workload is huge. There is a high probability that this parliament will not be able to do much and the parliament that will deal with a lot of workload is the next parliament.

Challenges expected in the implementation process include:-

- ❖ There is a general election coming up. This parliament cannot be able to pass a lot of legislation before then.
- ❖ The ongoing ICC process might derail the process. This is because of politizing the process.

Those who will play a key role in the implementation process include:-

- ❖ The government especially through the executive in policy restructuring.
- ❖ The parliament in passage of bills and vetting of appointments.
- ❖ The Judiciary through infrastructure and paradigm shift. It can be used as a platform to fight for equality.

Other actors include:-

- ❖ The commission on the implementation of the constitution.
- ❖ Other commissions that have been provided for in the constitution.
- ❖ Independent electoral and boundaries commission
- ❖ Political parties.

The role of civil society is very essential. But it is also good to appreciate there has been a paradigm shift. This is because of the platforms that the constitution provides. These platforms include:-

- ❖ A comprehensive bill of rights which can be used to push for equality and other rights through public interest litigation.
- ❖ The provision for public participation in many processes including the passage of laws provide an opportunity for civil society to carry out a watch dog role.
- ❖ There is an opportunity to engage with parliamentary committees to lobby for certain issues of concerns.
- ❖ The role of monitoring the compliance of different actors in the implementation process.

Key issues to have in mind when influencing implementation process.

- ❖ Women have to be very proactive. They cannot afford to wait for other people to fight the battles for them. This pro activeness include joining political parties in order to be able to join parliament and influence laws, using the courts through public interest litigation to ensure proper interpretation of the laws as well as adherence to

the law, to influence those who get elected to elective bodies through lobbying.

- ❖ Women should avoid been used as agents of partisan politics.
- ❖ A lot of voter education is necessary to ensure that women are aware that they have power in their vote to change society.

## **PLENERY**

**Q.** How can we use the media to carry out this message since they seem to give politics more prominence than issues affecting the day to day life.

**R.** It is important to establish a relationship with the media as opposed to just calling them when you need them. Establishing a relationship helps them to understand the issues that you are dealing with. The media however, needs also to make a paradigm shift and talk about issues affecting the people.

**Q.** What system of vetting do you think Kenya needs to adopt.

**R.** It is important for Kenyans to adopt a proper vetting system where the public is allowed to participate. A good example is how the senate in America carry's out vetting. Vetting will also involve ensuring that qualified people are elected to office even at county level.

## **COMPARATIVE REVIEW OF GENDER IN TRANSITIONAL JUSTICE IN THE GREAT LAKES REGION By Kasiva Mulli (programmes associate I.C.P.C)(Full presentation annexure ii)**

This is a comparative review that was done by ICPC in August. It involved countries that have had experiences in Transitional Justice Mechanisms and whether those mechanisms factored in Women. The countries are namely:-

- ❖ Rwanda, Sudan, D.R Congo, Somalia, Burundi, Kenya, Uganda

This presentation is a summary of the bigger report that ICPC plans to launch as a publication.

Gender Justice has been referred to as the protection of human rights based on gender equality and explores two such tenets:

- ❖ The acknowledgement of and seeking justice for women's experiences of such violence in conflict situation
- ❖ The securing of increased representation of women in policy and decision – making bodies on post-conflict issues and transitional justice mechanisms.

Another definition of Gender Justice is the protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on the rights themselves as well as the assessment of access and obstacles to the enjoyment of these rights for women, men, girls and boys and adopting gender sensitive strategies for protecting and promoting them.

Gender justice goes beyond ensuring that the experiences of the different genders are heard but both men and women participate equally at policy level.

## **RWANDA**

There are five different transitional justice processes that have been undertaken in Rwanda to date. They include:-

- ❖ A National unity and reconciliation commission.
- ❖ International panel of eminent personalities to investigate the genocide
- ❖ International criminal tribunal for Rwanda.
- ❖ The Gacaca courts.
- ❖ International commission of investigation on human rights violations in Rwanda.

Though there is a requirement that 30% of the gacaca judges should be women, the patriarchal and social perspectives still affect the effectiveness of women participation.

ICTR is credited with a landmark ruling PROSECUTOR V PAUL AKEYESU where by Rape was recognized to constitute crimes against humanity, war crimes and genocide. This tribunal marked a departure from a culture of impunity to one of accountability on SGBV and lays foundation on which they are codified in the Rome statute.

Rwanda has also been able to achieve over 50% political representation of women.

## **D.R.CONGO**

There is no genuine Transitional Justice process.

Peace agreements lack to factor in Transitional justice mechanisms. The transitional government supposedly in order to prepare the way for elections and democracy in Congo, not only failed to address justice or human rights issues but the way in which political institutions and the army were formed led to entrenched impunity.

Sexual violence remains prevalent in the region. The country is actually commonly known as the capital of rape. This raises the question as to the extent to which women can participate in a democracy as fully rights bearing citizens especially if they are under constant threats.

## **SOMALIA**

The conflict in Somalia which began in 1991 has caused destabilization and instability throughout the country.

There is a wide view that transitional justice mechanisms in Somalia can only be thought of if a peace agreement is signed. However, it is good to note that women play a critical role in peace process.

## **KENYA**

Kenya is currently undergoing constitutional reform, security sector reform, and judicial reform amongst other Transitional Justice mechanisms. The

civil society in Kenya is very aware of the need to incorporate gender perspectives in Transitional Justice work. However, there are glaring gaps which are as follows:-

- ❖ During the peace negotiations, there was no gender representation. There were three women out of a membership of 11. These women were not appointed on a gender platform and therefore could not be expected to push for gender issues.
- ❖ The CIPEV commission dedicated some time to investigate SGBV although they only dealt with 30% of the overall cases. Effects of post election violence on women was very hard apart from experiencing injuries, displacements and loss of property. Most of them have turned bread winners in their families.
- ❖ The only hope for SGBV victims is pegged on the ICC thus creating an impunity gap for mid level perpetrators.
- ❖ The truth, justice and reconciliation commission is in shambles thus creating a setback for women to access justice and reconciliation.
- ❖ The passage of a new constitution creates a good platform and avenue to push for gender justice and equality.

## **UGANDA.**

The crisis in Northern Uganda is essentially two conflicts in one. The first is propagated by the L.R.A while the other is UPDF. The L.R.A targets civilians and women bear the blunt of it all. Many are abducted by the L.R.A army and made sex slaves while those in the IDP camps are victims of rape by the UPDF.

There are ICC arrest warrants for the L.R.A leadership.

There are also peace negotiations going on between the government and the L.R.A. In these peace negotiations many of women's issues are trivialised and delegitimized. Issues of patriarchy and sexuality are used to deter the participation of women. Women also lack a united front to push for their issues.

## **BURUNDI**

There has been armed conflict from 1993 to 2005. There is no form of transitional justice mechanism fully established yet. However, there are plans to establish one. The effects of civil war and lack of a lasting mechanism to deal with these issues of civil war means that women continue to suffer from the effects of war.

## **SUDAN**

Sudan has had a long civil war between northerners and southerners leading to the signing of a comprehensive peace agreement. This comprehensive peace agreement provides for among other things cessation of the South.

The conflict that has pricked the conscience of the world is the Darfur conflict. This is a conflict between the government and two rebel groups namely the Sudan liberation movement and the Justice and equality movement. The participation of the government is said to be indirect through the support of the 'janja weed'. Women are continuously raped and they are not even safe in the IDP camps. Apart from the ongoing ICC process, there is no comprehensive plan to deal with the issues of transitional justice.

## **GAPS, LESSONS LEARNT, OPPORTUNITIES AND CHALLENGES.**

Transitional justice is largely unexplored avenue for conflict resolutions for most countries in the African region. There is a growing acceptance that the transitional justice processes can bring peace and reconciliation.

However, there are things to note which include:-

- ❖ For effective gender justice there needs to be an understanding of the term gender as gender justice does not translate to women's issues but rather goes beyond that to ensuring that crimes committed to persons purely on the basis of their gender are taken to consideration.

- ❖ It is important for truth commissions and other transitional justice mechanisms to realize that gender justice does not necessarily mean dealing with crimes that are of sexual nature.
- ❖ It is important to ensure that genders are involved and participate in the design and implementation of transitional justice mechanism.
- ❖ The transitional justice mechanisms must understand justice from victim perspective not from state perspective.
- ❖ There is need to collect and record factual data that can be used to obtain truth and justice.
- ❖ Women need to speak with one voice.

## **PLENARY**

Q How strong is the Transitional Justice movement in Kenya and the region.

R Transitional justice movement is a new concept that is gaining grounds in Kenya and the region. It is still not fully adopted and therefore it is not safe to say at this moment it is strong.

Q What International and National resources are there to help in transitional justice.

R. In the international arena, the establishment of the I.C.C is a big step in fighting international crimes while at the National level there are mixed signals because of lack of political will.

## **GENDER ENGAGEMENT IN POLICY MAKING, WHAT ARE THE OPPORTUNITIES** By Nicholas Ngigi (Full Presentation annexure iii)

The platforms that exist include:-

- ❖ Constitution
- ❖ Politics
- ❖ Ongoing policy implementation
- ❖ Other ongoing reforms.

### **How do we engage:-**

There is need to understand the generic processes of policy making so as to identify opportunities to influence. The politics of policy implementation

include political decisions, administrative decisions, implementation decisions all brought out together through the political processes of competition, set of values and interests.

In trying to influence policies one has to identify the spaces/opportunities available. The types of spaces available are as follows:-

- ❖ Closed spaces/opportunities: decisions made by a closed set of designated experts/elected representatives.
- ❖ Invited spaces/opportunities: users, citizens, beneficiaries are invited to participate by various kinds of authorities.
- ❖ Claimed spaces/opportunities: They are claimed by citizens. They can emerge out of sets of common concerns and may come into being as a result of popular mobilization around identity or issue based concerns.

**Best practices of influencing policies include:-**

- ❖ Target people who have the power to influence and make decisions regarding the policy in question.
- ❖ The constitution provides a lot of avenues like the provision on the Kenya National Human rights and equality commission, the national land commission and affirmative action.
- ❖ Political parties: inclusion of gender equality at that level influences the development of manifestos which favour gender friendly policies. Women need to be proactive even in vying for the leadership of parties.
- ❖ The judiciary through creation of jurisprudence and precedence that enhance gender equality. This can be done through constitutional petitions and public interest litigation. But to achieve this, there needs to be a judiciary that is concerned about women, there is need to ensure there are gender friendly judges through influencing appointments and capacity building.
- ❖ The new standing orders in parliament- these standing orders have a provision where citizens can petition parliament. Such a petition is given priority in the order paper and requires only twenty signatures to qualify for the attention of the speaker.
- ❖ Parliamentary committees are allowed to engage experts who can be specialized C.S.O's

- ❖ In parliament there has been formed a new committee on equal opportunity mandated to look at cross cutting issues touching on the minority. Such a committee is very strategic to push for the gender agenda.
- ❖ Vision 2030.
- ❖ Placing the right people in the right places, for example electing to parliament women who are champions of gender issues.
- ❖ Engaging in the politics of policy making even at county level.
- ❖ Monitoring the budget to know where government priorities are at.
- ❖ The use of regional bodies and instruments.

## **Plenary**

Q Where do people get information to influence parliamentarians. There is a problem with information dissemination to the public.

A The public is not proactive in searching for information. The Ministry of planning website has a lot of information. Some organizations have so much information but they do not share. The parliament website also has a lot of information.

Q What is I.C.P.C planning do to reach people on the ground especially in terms of civic education and taking correct information on the ground.

A ICPC has been doing a lot of capacity building around the country. ICPC is also developing partnerships both at the grassroots and at the local level and international partnerships to develop gender policies.

## **USING POLITICAL PLATFORMS TO INFLUENCE GENDER BASED POLICIES.**

**By Hon Millie Odhiambo, (Member of Parliament and constitution implementation oversight committee.**

Parliament is moving fast on the issue of implementation of the constitution and the biggest challenge for the Civil society is to catch up. The C.S.O's need to be vigilante especially because the laws are time bound. Their vigilance should be through influencing the drafting process to ensure issues of concern are captured.

It is also very important to ensure that the C.S.O's are aware of the tactical spaces of influence and thus utilize them.

Among the issues where the C.S.O's can be of influence are:-

- ❖ Providing information according to their specialty.
- ❖ Ensuring the implementation of the constitutional provision where women are supposed to occupy 30% of positions in public institutions.
- ❖ Engagement in the making of the budget. The budget is now an interrogative affair before it is adopted in parliament.
- ❖ There will be a lot of activity going on at county level and there is need for C.S.O's to be vigilant because of accountability measures.

## **Plenary**

Q what are the standards of vetting that are been used by the select committee on legal and institutional affairs?

A The committee has come up with a criteria for vetting those they are already vetting. In the bill for the formation of the constitutional implementation committee, there are some questions that have been annexed. However, the committee is working on coming up with a comprehensive bill on vetting.

Q What is the strategy of dealing with the old folk, who have been in the system?

A We will need to take the old and new as we introduce new ideas gradually.

Q Kenyans are greatly expectant of the new law, are Kenyans expecting too much from parliament, can the parliament deliver.

A The parliament has shown signs of commitment to the new law. In addition to this, there is a time limit of which if parliament does not deliver, it can be disbanded.

On the issue of the crises facing the T.J.R.C, the committee has given the commission 72 hours to solve the crises or else they will be disbanded.

### **USING CIVIL SOCIETY TO INFLUENCE GENDER FRIENDLY POLICIES By Grace Maingi(Chief Executive FIDA Kenya)(full presentation annexure iv)**

Civil society has the following duties:-

- ❖ The watchdog role of holding duty bearers to account.
- ❖ The partnership role on technical support and assistance.

If the government is willing to change from within then the civil society should be willing to provide technical support and information. If the government is not willing then civil society should mobilize public pressure to demand change of the policy.

Challenges that face the civil society as they seek to influence policy are as follows:-

- ❖ Uncoordinated actions
- ❖ Lack of resources
- ❖ Lack of expertise
- ❖ Competing interests

But despite this the civil society can influence through the following means:-

- ❖ A clear understanding of the gender issues.
- ❖ Mapping of policy makers and power spheres of influence.
- ❖ Division of labour and coordinated sharing of strategies and information.
- ❖ Public ownership and education.

Q In the grassroots people do not understand the basics of gender, they actually perceive gender in a negative way, what can be done to change this:-

A continuous public education and also the need for women to support each other and speak in one voice.

### **THE ROLE OF GENDER IN TRANSITIONAL JUSTICE MECHANISM By Christine Alai ICTJ KENYA(full presentation annexure v)**

The considerations of gender in transitional justice processes is important:-

- ❖ Because men and women experience violations in unique and different ways.
- ❖ It is important to delineate the role of both men and women as victims and as perpetrators.
- ❖ It is considered envogue by donors.
- ❖ It provides an opportunity to interrogate the cultural perspectives and the patriarchal nature of society which has given rise to perception on specific gender roles.
- ❖ To ensure that both primary and secondary violations are captured because women tend to focus on secondary violations that is those that have happened to members and their families as opposed to their own, the emerging trend of conflict has been focused on civilians as targets of war and women being the most vulnerable are casualties.
- ❖ Any transitional justice process ought not only to address gender violations but also underlay the structural factors that lead to such violations.

#### **Gender in truth seeking.**

This presents an opportunity to document patterns of gender based violations on human rights.

Some illustrations on how truth commissions have incorporated gender aspects include:-

- ❖ In the South African truth and reconciliation commission, women were well represented in the staff. More than 50% testified. There were three hearings held exclusively for women and in the final report, a chapter on gender aspects was included. However, it was criticized for overlooking the structural impact of the apartheid on the lives of the South African Women.
- ❖ The Ghanaian National reconciliation commission opted to mainstream gender in all its operations and did not hold separate hearings for women. As a result only 20% of the women participated.
- ❖ The Sierra Leone Truth and Reconciliation commission paid great attention to the experiences of women and children during the conflict. It held gender hearings and interpreted its mandate to interrogating the experience of women in pre and post conflict thus highlighting the multiple roles of women during the conflict.

Considerations of Gender in TRCs include:-

- ❖ Ensuring gender balance in recruitment policies.
- ❖ Establishment of gender and children's units
- ❖ Ensuring safety, physical and psychological well-being, dignity and privacy of victims and witnesses.
- ❖ Sensitivity of language when interrogating and/or questioning women.

### **Considerations of gender in judicial justice**

There has been numerous developments in international law to prosecute sexual and gender based crimes since the Nuremberg trials. They include:-

- ❖ The Land mark case of ICTR *p v Paul Akeyesu* which recognized that rape could be used to commit genocide, war crimes and crimes against humanity.
- ❖ The Sierra Leone special court which has led to number of landmark legal developments in the advancement of gender justice.
- ❖ The Rome statute which has since recognized rape as a form of genocide, a crime of war and a crime against humanity.
- ❖ Victim support both psychological and physical.

- ❖ Witness protection
- ❖ Accessibility to court.
- ❖ Enactment of effective laws like the sexual offences act in Kenya.
- ❖ Increased visibility of women in the proceedings. A good example is the *P v Akeyesu* where due to women testimony; one of the judges asked the prosecutor to add rape in the indictment.
- ❖ Gender sensitive personnel.

## **REPARATIONS**

This term is derived from the concept of repairing harm. In transitional justice it denotes steps taken to repair harm and losses suffered.

The right to reparations is now well established concept in international law which is articulated in ***the United Nations Basic Principles and Guidelines on the right to remedy and reparations for gross violations of international human rights law and serious violations of international humanitarian law.***

These guidelines provide that such victims have a right to:-

- ❖ Equal and effective access to justice.
- ❖ Adequate, effective and prompt reparations for the harm caused.
- ❖ Access to relevant information concerning violations and reparation mechanisms.

Reparations may take several forms which include individual and collective reparations, material reparations, symbolic reparations, restorative and redistributive reparations and court based and through truth commissions based reparations.

## **INSTITUTIONAL REFORMS**

- ❖ Security sector, judiciary, public service.
- ❖ New opportunities within the new constitutional dispensation.
- ❖ Pushing the boundaries through public interest litigation, lobbying for progressive policies and laws, creating awareness.

**THE GENDER PERSPECTIVES ON THE ELECTORAL PROCESS. (gaps and opportunities) By Commissioner Tiyah Galgalo (IIEC)**

IIEC was created by the constitution of Kenya(Amendment) Act 2008 whose mandate was to:-

- ❖ Reform the electoral process and the management of elections in order to institutionalize free and fair elections.
- ❖ Establishment of an efficient and effective secretariat.
- ❖ Promotion of free and fair elections.
- ❖ Conduct of fresh registration of voters and the creation of a new voters register.
- ❖ Efficient conduct and supervision of elections and referendum.
- ❖ Development of a modern system for collection, collation, transmission and tallying of electoral data.
- ❖ Facilitation of the observation, monitoring and evaluation of elections and referenda
- ❖ Promotion of voter education and culture of democracy.
- ❖ Settlement of minor electoral disputes during an election as may be provide by law.

### **Gender parity at the commission.**

The IIEC, like any other public office is required to recruit at least 30% women. This requirement was certainly met during the recruitment of the national secretariat, regional and constituency election coordinators. The secretariat is headed by the chief electoral officer who is deputized by a lady. Of the nine directorates, five key directories (voter registration, election operation, human resource and administration, research and development legal and cooperate affairs, directorate of registrar of political parties) are headed by women. Out of the 17 managers, six are women and out of 17 RECS six are women and out of 210 CECS 43% are women. This has been replicated in the polling clerks/election officials.

This policy is part of the electoral reforms meant to ensure that there is gender parity in the management of the elections in Kenya.

However, there are gaps which include:-

- ❖ Political parties' representation at national, regional and constituency level however, is lacking the 30% requirement of

women representation. For instance the upper north eastern region, there is no women representative elected.

- ❖ Many women did not apply work at the IIEC because of the temporary nature and because women are not risk takers.
- ❖ Cultural hindrances where it is said that women cannot lead.

49% of all registered voters are women. This is a good indicator of the success of the deliberate concerted efforts by the IIEC and the other partners urging women to participate in the electoral processes yielded results like Isiolo North out of 33,500 registered voters 17,500 were female and 15,000 male. This trend should be replicated in other constituencies.

Women between the ages of 35-60 appear to be concerned with electoral matters compared to younger women. Younger women need to be motivated to take an active role in the electoral process.

It is also important to note that the highest percentage of assisted voters were women, indicating the high percentage of illiteracy among the women. Women also took little interest in electoral processes like registering as voters and even voting using excuses such as they are busy.

### **EXPERIENCE DURING THE REFERENDUM**

- ❖ Unlike their male counterparts, most women politicians participated actively on their own in the campaign trail. Most were seen as escorts of their male counterparts and could be rarely heard orating in the podiums.

### **BY ELECTIONS**

- ❖ IIEC has successfully conducted eight parliamentary by elections since it was established. Out of the eight by elections only five women contested and only one won.

### **GENERALLY**

- ❖ The ninth parliament has 18 women out of 222 members of parliament. Although this is the highest number we have had, it falls short of the 30% international standards.
- ❖ Since the 1990s women's role in political participation in Kenya has been on the increase both at the grassroots and at national levels equally there has also been expansion of women's economic and social opportunities and the advancement of women's rights. However, they have not made much progress in getting representation in elective politics due to a number of factors.
- ❖ Patriarchal culture still continues to play a major role in women participation in electoral politics.
- ❖ Poverty where women are the bread winners give little attention to politics.

## **OUTCOMES AND WAY FORWARD.**

This was what was identified in the meeting

Gaps

There still exist complex challenges of gender issues in Kenya.

These issues include:

- ❖ Political and policy development.
- ❖ Judicial processes
- ❖ Gender in transitional justice
- ❖ Gender in the constitutional process.
- ❖ Gender in the electoral process

But there are already gains. These gains include:-

- ❖ The new constitutional dispensation.
- ❖ The increased role of women in truth seeking processes.
- ❖ The developed jurisprudence on gender crimes.
- ❖ Affirmative action making it necessary for women to participate in electoral processes.

- ❖ New legislations coming up thus giving an opportunity for women to participate and influence laws.

## **WAY FORWARD.**

All these issues were consolidated and used to come up with a gender framework policy. The framework policy will be published and shared with all stakeholders.

## **About International centre for Policy and Conflict (ICPC)**

The International centre for policy and conflict (ICPC) is a non profit and non partisan organization founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The great lakes and the horn of Africa region which have experienced widespread political instability for decades is the ICPC major focus. The centre is registered in Kenya under the trustees (perpetual succession) Act.

### **Institutional Objective**

The international centre for Policy and Conflict proactively reflects and engages in public policy and legal dialogues, research and analysis as well as advocacy and capacity building on broad realms of transitional justice, human security, conflict resolution and gender justice. Furthermore, this is done to prevent conflict recurrence; promote accountability and equality and deepen culture of justice and respect for human rights and democracy. The centre is designed to establish, promote and build sustainable human development and build sustainable human development and democratic adhering states.

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This initiative is supported by the generous support of HIVOS (Netherlands)  
For ICPC transitional justice programme.

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**(Annexure I)**  
**Remarks on Gender, Transition and State Transformation at ICPC**  
**Roundtable**  
**October 28, 2010, InterContinental Hotel, NAIROBI, KENYA**

**Ndung'u Wainaina**

## **Executive Director, International Center for Policy and Conflict**

Welcome to the International Center for Policy and Conflict Gender Justice Policy Dialogue. We are really delighted you are all here and thank you for coming.

As implementation and enforcement of the new Constitution in Kenya gets underway, and as other strands of transitional justice agenda are showing mixed signals, there is an apparent urgency and importance of developing a clear gender policy agenda for advancing gender justice in time of transition.

We are here to continue with journey of laying the foundation of such an agenda to advance gender justice and women's rights. And we are also here to advance gender justice through influencing and re-shaping the current frameworks, specifically to ensure access for, and influence of, equal gender rights during the various stages peace deal implementation and its accruing outcomes.

The goal is to focus on how gender justice requirements, within the context of re-establishing rule of law and post-conflict peace-building can best be addressed and operationalized in such settings. We know post-conflict transitional moments are key opportunities for the transformation of gender power relations and rights; and state transformation.

We are also all aware of the institutionalized gender discrimination within national institutions, processes and the discriminatory interpretations of the law. There are real challenges as the state institutions and political establishment who are themselves struggling with gender inequality are expected to play key role in the implementation of the peace deal outcomes.

This dialogue is also taking place in the same year Beijing +15. It is 15 years since the watershed Fourth World Conference on Women. This is also the 10- year anniversary of the adoption of United Nations Security Council Resolution 1325 on Women, Peace and Security.

Our role, as ICPC, is to be a catalyst, advocate and partner in assisting to identify and develop critical strategic entry points to the implementation of various transitional justice processes so that they effectively impact on critical issues on the agenda to promote opportunities and justice for both gender with an assertive and affirmative action.

ICPC programme on the gender justice dialogue addresses five critical integrated aspects that include quantitative and qualitative participation and capacity building of the both genders; research and gender analysis on the policy and legal frameworks and producing informed policy information; promoting and advocate for the development of new engendered institutions policies and laws including gender-sensitive judicial and law enforcement agencies; building partnerships to generate and support national gender justice movements advocating to integrate equitable gender into peace, security, development and human rights agendas; and support for gender parity and equality in electoral processes and decision-making.

Our strategy is based on building partnerships for promoting gender justice which is geared towards realization of the gender charter for effective equality that will see mainstreaming and integrating the gender perspective and dialogue into national policies, processes, institutions and programmes in the state transformation and nation building.

The manner in which a conflict is resolved, the nature of the compromises made as well as the political commitment to minimum standards of human rights and governance is very important. The focus on gender justice is meant to imply that all of men and women should have equal access to participate in transition processes being implemented.

What we have observed over the years is that we are very good in making laws and having the right policies and at producing the right rhetoric, but implementation is still very weak. Gender biases pervade legal frameworks, economic policies, and socio-political realms.

If we are to create a gender justice sensitive society, it is important that we don't just focus on the high politics of the state, but also on the spaces where the most profound injustices rest, in the deep politics of society, the

social and psychological barriers that prevent both gender from accessing justice. This demands we get rid of humiliating laws and procedures for collecting evidence, insufficient witness protection, and the kind of poverty that allows women not to take the risks and neither the time nor the resources to access justice even when a justice system exists.

There are those who say it will take many generations to bring about gender justice. However, it need not be so. What is needed is increased collective effort and commitment especially of men. We have to ensure that women are not marginalized in critical institutions and in decision making processes. Together, we need to bring gender into the framework of rule of law. If there is to be real justice, gender concerns must be addressed at earliest stages of transition by forming part of the foundation of rule of law and democratization process.

Gender perspective must be implemented in every dimension of justice and the rule of law. Gender justice can no longer be bargained away as a "soft-chip" for realizing other political and operational gains. It must be central to any rule of law re-establishment strategy.

This means establishing standards of justice and formulating laws that recognize gender concerns, strengthening the institutions that implement them, developing the mechanisms to monitor them, and supporting people's equal access to them. It also means bringing both genders to the peace-building and recovery and reconstruction processes as equal partners.

At the heart of any implementation of real gender justice in countries recovering from conflict is the demand that human rights violations against women and girls are regarded and treated as crimes by the criminal justice system. Gender justice must not simply be relegated to the realm of customary or traditional legal systems. However, if that constituency is to move beyond women's rights advocates to make a real difference in the lives of women and girls, it must also be embraced by men and boys

Women remain marginalized in the processes of peacebuilding and post-conflict reconstruction. Achieving sustainable peace will not be possible unless we make progress towards sustainable development and we cannot

achieve sustainable development without the full involvement of women in conflict prevention and post-conflict peacebuilding. We must also apply this commitment to all levels of decision making-national as well as at the local levels.

There are, however, some important conditions for women to participate fully in all stages of the peacebuilding, reconstruction and development process. It is crucial they enjoy their human rights and have access to crucial services like education, basic healthcare, training and economic opportunities. Peace agreements provide the best opportune framework for the reconstruction of the political, legal, economic and social fabric of a conflict-affected society and its institutions. They thus have a direct impact on the extent of women's and men's involvement in post-conflict peacebuilding and reconstruction and achieving gender justice.

The silence of peace agreements on critical issues affecting the lives of women and girls ignores the human rights of half the population, and undermines the foundations of societies emerging from conflict that are aspiring to establish democracy and the rule of law. Such states then lack the legitimacy and inclusiveness to generate a sense of ownership among the population, men and women alike.

Equally important, peace deal lays the foundations for women's engagement in political and public life in post-conflict societies. The overriding goal for women must be social transformation not reintegration into a system in which they are marginalized. They seek full citizenship rights, social justice and empowerment based on respect for international standards of human rights and security that, too often, did not previously exist.

The very important concern is the under-representation of women in elected and appointed bodies, especially in high-level bodies. Among the key factors and challenges that hinder the effective participation of women in politics, have been identified: The absence or weakness of democratic institutions, guaranteeing an open political environment and real level playing political competition; reasoned formal mechanisms for selecting leaders are not formed; the weakness of the parties does not allow them to

perform the function of political mobilization; against the backdrop of prevailing in the society of traditional gender perceptions the issue of women's political participation often becomes an instrument of political manipulation by various power groups.

The dominant model of political leadership is the traditional type - a competitive, masculine, with a limit not only women but also men; the de facto absence of a functioning institutional mechanism (responsibility for the implementation of gender policies is vested in the department of social development, while the implementation of national plans of actions is not provided with adequate financial resources); and finally the feminization of poverty and gender segregation at the labor market.

Critical here is the lack of institutional access of socially disadvantaged groups to formal state institutions including mechanisms for justice

We have to do critical gender analysis on the gap between the leadership on the level of the "big" policy and local policy level and barrier in form of prevailing gender stereotypes about role of men and women in political arena. This is vital in overcoming the current challenges including concept of traditional women's political leadership, prevailing traditional concepts about masculinity and femininity, and exclusion of opportunity for equal partnership and disallowing for possibility of political competition between a man and a woman.

The core of the response is to develop and adopt a national action plan strategy that renders effective achievement of gender equality and parity and equal opportunities for both genders.

International Center for Policy and Conflict has overseen and rendered technical support to the development of transitional justice training tool for Kenya ( partnership with KHRC and ICJ-Kenya); conducted intensify transitional justice capacity building; jointly conducted research and developed a gender and transitional justice policy( way to publication-jointly done with CSVN); research on gender perspectives on the post-election violence and also a documentary; and lately regional transitional justice assessment survey on gender and transitional justice.

From this work and a stakeholders' roundtable held at the Intercontinental Hotel, Nairobi in April 19-20, 2010, the following issues and lessons are noted as critical in strengthening the gender justice agenda:

- The need to understand and respond to the social, cultural, political and economic contexts of the country and develop the appropriate transitional justice and gender frameworks for dealing with both the manifestations and root causes of gender injustices.
- The need to develop a clear framework for defining and benchmarking engagements on gender injustices and related issues in the society. The concept of gender justice within the discourse of human rights is critical.
- The need to map out all the existing and envisaged information and mechanisms on transitional justice relevant to advancing the gender justice agenda at all levels in the society.
- The need to have the identified gender justice issues and bench marking frameworks integrated into the existing or envisaged transitional justice and reform processes in the society-from conceptualization to implementation, monitoring and evaluation. This will help to move gender issues from the background (periphery) to the core/ mainstream of decision making processes.
- The need to create mechanisms and platforms for support and protection of witnesses across the two genders, while at the same time, responding to the needs and demands of each gender. For instance, encouraging men to freely express themselves emotionally as opposed to the current cultural context where breaking down is viewed as a 'weakness'.
- The need to deal with all the dynamics of women as far as violations is concerned. This ranges from responding to the specific violations on women to targeting women as both perpetrators and accomplices in violations.
- Finally, is the need to focus on other elements of diversity and vulnerability within or beyond gender justice in transitional justice. For instance, understand the rights of women and men within a society which is economically, politically or socially disadvantaged or deprived.

This gender justice policy dialogue is ICPC's commitment towards achieving this key objective. We plan to convene several series of this type within the next three years, as we develop together a gender justice policy agenda. We plan to continue to support and build a constituency and movement aware of and animated by gender justice, and to assess collectively what impact we can have over the next decade.

Thank you

I now welcome you all to lively presentations and discussions; Welcome;

**Annexure ii**

## **A REGIONAL ASSESSMENT OF THE GENDER PERSPECTIVES IN TRANSITIONAL JUSTICE PROCESSES**

*"It is tragic that it has taken graphic images of women raped in DR Congo, and young girls with acid thrown in their faces in Afghanistan for daring to return to school to shame our collective conscience<sup>1</sup>.*

*Successor governments must think creatively about building institutions that bring justice to the past while at the same time demonstrate a commitment that justice will form a bedrock of governance in the present and future.<sup>2</sup>*

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<sup>1</sup> Donald Steinberg, *Women and War; Power and protection.*

<sup>2</sup>Katherine M. Franke: *Gendered Subjects of Transitional Justice*  
[http://www2.law.columbia.edu/faculty\\_franke/Franke%20\(Final%20Version\).pdf](http://www2.law.columbia.edu/faculty_franke/Franke%20(Final%20Version).pdf)

## **TRANSITIONAL JUSTICE**

Transitional Justice processes have come to be defined as ‘ a set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.’<sup>3</sup>These processes therefore encompass different avenues and systems that are put in place by society so as to bring about truth telling, justice and reconciliation. In most cases, transitional justice mechanisms are sought when a country or state is coming out of a period of strife or political unrest.. The main aim of the processes is to achieve national reconciliation through acknowledgment of past injustices and as a result ensure that by looking back, the society can move forward.

The goals of Transitional Justice are:

- Address and heal divisions in society that are the result of gross human rights violations
- Restoring the rule of law and social balance
- Bringing closure to victims through the recognition of the violations against them
- Providing justice through the prosecution of perpetrators
- Documentation of history so as to serve as a reminder to the society
- Creating opportunities to reform institutions of governance and recognition of human rights
- Creating sustainable peace by dealing with the underlying causes of conflict

## **GENDER JUSTICE**

Gender justice has been referred to as ‘the protection of human rights based on gender equality and explores two such tenets: the acknowledgement of and seeking justice for women’s experiences of sexual violence in conflict situations; and the securing of increased representation of women in policy- and decision-making bodies on post-conflict issues and transitional justice mechanisms.’<sup>4</sup>

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<sup>3</sup> A Roht, M& Javier (2006:2). Transitional Justice in the Twenty first century, Cambridge, UK: Cambridge University Press

<sup>4</sup> Gender Justice and Reconciliation- Nahla Valji <http://library.fes.de/pdf-files/iez/05000.pdf>

Another definition of gender justice is the protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on the rights themselves, as well as the assessment of access and obstacles to the enjoyment of these rights for both women, men, girls and boys and adopting gender-sensitive strategies for protecting and promoting them.<sup>5</sup>

There is therefore a need to recognize that gender justice goes beyond ensuring that the experiences of the different genders are heard, but that there is equity and equality for both men and women at policy level and engagement. It involves ensuring that effective measures are undertaken to ensure that women have an active role in the development process.

Gender justice therefore requires that a gender sensitive perspective is taken when formulating transitional justice mechanisms.

### **Gender Agenda in Transitional Justice Mechanisms**

The Gender Agenda in Transitional Justice Mechanisms has to be seen and recognized as being beyond the TJ process and as being more forward looking to strengthening and ensuring the participation of women in legal, political, educational, social and economic reforms of the state.

The increased participation of women has opened the doors to legislative and social reform to ensure that the rights of women are upheld and that previously held beliefs and practices on the role of women in governance are slowly eradicated.

There is limited research on looking at Transitional Justice from a Gender lens. 'The most notably two UN studies undertaken in response to UN Security Council Resolution 1325 (October 2000), indicate that the modeling and analysis of transitional justice practices would be improved if gender-based perspectives were included, enriching our understanding of

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<sup>5</sup> Ibid

factors that lead up to armed conflict and thus improve our ability to cope with their aftermath.<sup>6</sup>

The Gender Agenda in Transitional Justice Mechanisms is therefore cross-cutting.

### **Incorporate the Gender Perspective within the Mandate of the TJ Mechanisms**

Many Transitional Justice Mechanisms employed in various parts of the world were gender neutral and as such most of them failed to incorporate gender in their transitional justice mechanisms.

'In countries like Haiti<sup>1</sup>, Sierra Leone, and Timor-Leste gender or sexual violence was explicitly incorporated into the mandate and, from the beginning, these topics were identified as critical avenues of investigation. For these commissions, investigating egregious bodily injury crimes helped expose the reality of gender-based torture, including rape, genital mutilations of men or women, or forced sexual violence against prisoners of both genders. For instance, defining human rights victims in terms of harsh bodily injuries, the Sierra Leone TRC found that approximately 35 percent of adult victims and 45 percent of child victims were female. The Sierra Leone commission's work on gender violence has contributed to law reform efforts that seek to enhance gender justice on a number of fronts.'<sup>7</sup>

### **Recognition of Gender based crimes as being war crimes**

Sexual violence was initially recognized by most states undergoing a transitional justice process as being crimes that were gender based. The ICTY and ICTR have recognized sexual violence as a crime against humanity as well as an act of genocide. However there is a need for transitional justice mechanisms to recognize sexual violence as being a war crime.

### **Ensuring the effective participation of women in Transitional Justice Mechanisms**

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<sup>6</sup> Gender and Transitional Justice: A case study of Afghanistan  
[http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/7/0/2/6/p70261\\_index.html](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/0/2/6/p70261_index.html)

<sup>7</sup> Ibid

There has to be a conscious effort to ensure the participation of women in Transitional Justice processes.

A gender approach to transitional justice mechanisms and Security Council Resolution 1325 share many of the same principles and goals: both seek to increase the participation of women at decision-making levels in conflict resolution, both emphasize the state's responsibility to end impunity and prosecute perpetrators of gross human rights violations, both want to learn about and respond to the impact of armed conflict on women and girls.<sup>8</sup>

It is therefore important to ensure that the following are taken into consideration as the Gender Agenda in Transitional Justice Mechanisms:

1. Effective participation of women in the process.
2. Address women's needs from the process in terms of prosecution and reparations.
3. Security Sector reform must address security for women.
4. Understand women's sense of Justice in order to satisfy them.

## **GENDER PERSPECTIVE IN TRANSITIONAL JUSTICE: REGIONAL ASSESSMENT**

### **RWANDA**

After the 1994 Genocide, there was a need to go through mechanisms that would bring about reconciliation in Rwanda. The effects of the genocide had split the country into two and with crimes having been committed by members of both the Hutu and Tutsi Community, there was a need to deal with the atrocities that had been perpetrated.

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<sup>8</sup> Ibid

There have been five different transitional justice processes that have been undertaken in Rwanda, a National Unity and Reconciliation Commission, an International Panel of Eminent Personalities to investigate the 1994 genocide, *Gacaca* courts, the International Criminal Tribunal for Rwanda and the International Commission of Investigation on Human Rights Violations in Rwanda.<sup>9</sup>

The Organisation of African Unity set up the “International panel of eminent personalities to investigate the 1994 genocide in Rwanda,” in late 1998. It was charged with the responsibility of investigating the history of Rwanda and the circumstances leading up to the 1994 genocide and operated between January 1999 and June 2000. The panel published a report entitled, “Rwanda: The preventable genocide.”<sup>10</sup>

These processes have created avenues for women as well as challenges. Examples are as follows:

- Women are not included in the agenda of traditional Rwandan transitional justice mechanisms, so even though there is a requirement that 30% of the *Gacaca* Judges should be women, the patriarchal and social perspectives still affect the effectiveness of women participation.
- Women will always have a differing opinion when it comes to issues of implementation of reparations mechanisms and truth telling thus affecting the process.
- SGBV has been categorized as crime number one thus the government showing the seriousness of treatment of SGBV.
- ICTR has been crucial in ushering a departure of impunity against SGBV in the region and in the world. This is one of the adhoc tribunals that have been able to codify sexual violence in their statutes thus developing a wealth of experience and thus able to conceptualize SGBV as a weapon of war and thus can be a crime against humanity, war crime and an act of genocide. This has created the foundation for the adoption of SGBV in the ICC statute.
- Rwanda has a success story as far as political representation is concerned. It is the only country in the world with over 50%

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<sup>9</sup> [http://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions.htm](http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions.htm)

<sup>10</sup> See <http://www.vivionty.ca/RememberRwand/Report.pdf>

representation been women. This has had an effect on the social, political and governance sphere as far as gender issues are concerned.

As many transitional justice mechanisms have been introduced in Rwanda it is key for those within the continent to learn from the lessons and mistakes made in Rwanda. In order for Rwanda to move forward in prosperity it will need to keenly guard against inequalities within its borders, allow for democratic growth and gender equality.

### **DEMOCRATIC REPUBLIC OF CONGO**

Although the Transitional Government (2003–2006) brought a formal end to the war, it largely failed to usher in democracy or sustainable peace. Rather, the Global and All-Inclusive Agreement froze the conflict dynamics and entrenched both the power of the military leaders and impunity for even the most egregious crimes committed during the conflicts. The Transitional Government, supposedly in order to prepare the way for elections and democracy in Congo, not only failed to address justice or human rights issues, but the ways in which the political institutions and army were formed led to entrenched impunity.

- Sexual violence remains prevalent in the region. The country is actually commonly referred to as the capital of rape.
- Impunity for crimes of sexual violence raises the question as to the extent to which women can participate in a democracy as fully rights-bearing citizens, especially if their security is under constant threat.<sup>11</sup>
- All armed forces in the conflict are guilty of rape and so are the militia and other insurgent groups.
- Since rape is so prevalent, it is classified into two: the sexual act where a man is merely satisfying his sexual urge without the consent of the woman and the one that is a result of the violence.

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<sup>11</sup> Laura Davis, Justice-Sensitive Security System Reform in the Democratic Republic of Congo, February 2009  
[http://www.initiativeforpeacebuilding.eu/pdf/Justice\\_Sensitive\\_Security\\_System\\_reform\\_in\\_the\\_DRC.pdf](http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf)

- DR Congo has not come up with any measures of transitional justice or even laws to protect women.

An assessment of the transitional justice initiatives undertaken thus far in the Democratic Republic of the Congo (DRC) suggests that— despite some initial progress—a lack of security, fear of destabilization, limited political will, and scarce resources, have thwarted the development of effective transitional justice policies and that much needs to be done before a comprehensive framework that adequately addresses the country's troubled past can be implemented.<sup>12</sup>

The DRC can benefit heavily from the lessons learnt in transitional justice worldwide as it is yet to make any significant steps in that area.

## **SOMALIA**

The conflict in Somalia, which began in 1991, has caused destabilization and instability throughout the country, with the [current phase](#) of the conflict seeing the Somali government losing substantial control of the state to rebel forces.

Somalia is largely termed as a failed state due to the fact that formal power structures have collapsed and there is no legitimate authority capable of providing law and order and maintaining such order. There is widespread view that transitional justice mechanisms for Somalia cannot be thought of until and unless a peace agreement is signed. However there is a divergent view that perhaps transitional justice mechanisms for Somalia cannot afford to wait for a peace agreement.

In order for Somalia to engage in transitional justice the war has to come to an end. Somalia will be in a position to greatly benefit from the lessons learnt within the region.

Women experiences in Somali as in any war ravaged country are severe. They have been forced to live under deplorable conditions with many of them turning brea winners for their families as their men join insurgents or

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<sup>12</sup> <http://www.ictj.org/en/news/press/release/283.html>

government forces. The rise of fundamentalistic Islamic groups like al shabab is a worry to women because they do not respect the rights of women.

Somali women have played and continue to play a very crucial role in the peace process. Any Somali transition government and transitional mechanism in Somali needs to include as well as appreciate this critical role.

### **KENYA**

Kenya is currently undergoing constitutional reform, security sector reform, judicial reform amongst other transitional justice mechanisms. Civil society organizations within Kenya are very aware of the need to incorporate gender perspectives in transitional justice work and it remains to be seen how well women will be incorporated and participate in the same.

It is vital for Kenya to strengthen its already ongoing transitional justice mechanisms by ensuring that both reconciliation, truth telling and justice occur. Further to this Kenyans will need to critically analyse their political environment and develop key programmes to ensure that Kenyans who have faced past atrocities receive adequate compensation and that far-reaching peace programmes are instituted country wide in order to ensure that there is no re occurrence of the 2007/8 post election violence.

The issue of gender in Kenya transitional justice mechanisms is as follows:

- During the peace negotiation, there was no gender representation. The three women in the Kenya National Dialogue team out of eight men were not appointed in the gender platform.
- During the investigation into the post election violence. The commission dedicated some time to specifically deal with SGBV however the people who came forward to give evidence it is said are 30% of the victims during the post election violence.
- The effects of post election has hit women very hard, apart from experiencing injuries, displacements and loss of property, most of them have turned breadwinners for their families, they live under

- deplorable conditions in the IDP camps and they are exposed to dangers of sexual assault and rape.
- There is no meaningful effort to deal with SGBV that happened during the post election violence thus the only hope is pegged on the ICC which may not deliver much. Poor investigations by police have seen no one prosecuted for SGBV during the post election violence.
  - The problems facing the TJRC will affect its delivery and thus SGBV victims may be left without much to look forward to as a way of accessing justice.

Following the 2007/8 post election violence many civil society organizations in Kenya begun working in the area of transitional justice. Various transitional justice networks have been formed at the national and local level and these work in partnership with international organizations, these include the transitional justice network housed by the International Centre for Policy and Conflict (ICPC). Other organizations working in the area of transitional justice include the Kenya National Human Rights Commission, the Kenya Human Rights Commission, Kenyan Section of the International Commission of Jurists, the Federation of Women Lawyers (FIDA Kenya), Mazingira, the Kenya Land Alliance just to name a few.

## **UGANDA**

The crisis in northern Uganda is essentially two conflicts in one: first, the fighting of the Lord's Resistance Army (LRA), which was initially waging war against the Ugandan government and terrorizing the civilian population in the north; and second, the deep grievances of northern Ugandans against the existing government. The British employed a "divide-and-rule" strategy, pitting southerners against northerners to maintain control. Since gaining independence in 1962, Ugandan politics have been marked by continued tribal and regional divisions, most poignantly the North-South divide.

Women in Uganda have borne the blunt of this war. Many are abducted by the lords resistance army and made sex slaves, others in the IDP camps are victims of rape by the Uganda army.

The Ugandan government referred the issue of the L.R.A to the International criminal court and in 2005 the court swiftly issued arrest warrants for Kony and the top command of the L.R.A on charges of war crimes. The next year the government and the L.R.A began peace negotiations, however Kony has consistently refused to sign the peace agreement instead unleashing terror in the neighbouring D.R.C.

The experience of women in this situation is that they are continuously ignored in the peace negotiations. Many of their issues are trivialized and de-legitimized. Issues of patriarchy and sexuality are used to deter the participation of women, and women lack a united front to push for their issues as the grassroots and the elite women crash on various issues.

As a way forward for Uganda it will be key for the war in Northern Uganda to cease in order to allow peace to prevail in the area. With the advent of peace Ugandans will then have an opportunity to ensure that past atrocities are investigated and those responsible brought to book. This will be a difficult task due to the accusations of violations by the Ugandan army. It will be necessary for the democratic space in Uganda to be opened up in order to ensure that justice is not one sided or the truth buried. International and donor support will be key in ensuring that Uganda undertakes transitional justice mechanisms that will be meaningful to the Ugandan people. A strong civil society presence will also be a key contributing factor to the success of transitional justice mechanisms in Uganda.

## **BURUNDI**

The Burundi Civil War was an [armed conflict](#) lasting from 1993 to 2005. The [civil war](#) was the result of long standing ethnic divisions between the [Hutu](#) and the [Tutsi](#) tribes in [Burundi](#). The conflict began following the first multiparty elections in the country since gaining independence from [Belgium](#) in 1962 and is seen as formally ending with the swearing in of [Pierre Nkurunziza](#) in August 2005. The estimated death toll stands at 300,000 killed.<sup>13</sup>

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<sup>13</sup> [http://en.wikipedia.org/wiki/Burundi\\_Civil\\_War](http://en.wikipedia.org/wiki/Burundi_Civil_War)

In June 2007 the government, its partners, and the UN Peace building Commission agreed on a strategic peace building framework document for consolidation of peace in Burundi. It includes the following priority areas: promotion of good governance, completion and implementation of the cease-fire agreement between the government and the FNL, completion of security sector reform, equitable access to justice, promotion of human rights, the fight against impunity (including the implementation and functioning of transitional justice mechanisms), sustainable solutions to the land issue and socioeconomic recovery, and mainstreaming gender into ongoing transitional justice initiatives.

As no form of transitional justice mechanism has been fully established, we are yet to know how gender will be incorporated. However the effects of civil war and lack of a lasting mechanism to deal with issues of the civil war means that the women continuously suffer the effects of the war.

Burundi, going forward, will require immense assistance from neighbouring countries in order to progress its democracy and build a strong opposition and civil society movement. Burundi is at a crossroad whereby the success or failure of various transitional justice mechanisms is about to be decided. Civilian participation in the transitional justice mechanisms will be key to ensuring success of the same.

## **SUDAN**

Sudan has had a long civil war between the northerners and southerners leading to the signing of a comprehensive peace agreement that will see the country divided into two after the much anticipated referendum.

However there is another conflict that is pricking the conscience of the world in Sudan. This conflict is in the Darfur region between government and two rebel groups namely the Sudan liberation movement and the Justice and equality movement. It is said that the government involvement is indirect as they support a militia group known as Janja weed

The conflict in Darfur has had a very devastating effect on women. Women are continuously raped by the janja weed militia with an aim of making them pregnant so that they can have white skinned babies. Women are not even protected at the IDP camps and most of them are victims of sexual assault as they carry out their daily chores like collecting firewood. Women have also turned bread winners after their husbands have either been killed or joined the militias.

There is no comprehensive plan to protect women in Darfur. These victims rely on help from nongovernmental organizations and the U.N because the government lacks a comprehensive plan of dealing with the Darfur situation.

The only transitional justice mechanism in place is the indictments by the International criminal court for the president and top government officials. They have been charged with genocide, war crimes and crimes against humanity. This has been controversial as some feel it will affect the peace process.

### **GAPS, LESSONS LEARNT, OPPORTUNITIES & CHALLENGES**

Transitional Justice Mechanisms remain a largely unexplored avenue for conflict resolution for most countries in the African Region. There is a growing acceptance that they are processes that can effect peace and bring about reconciliation but there remain few countries that can stake claim of having had effective Transitional justice mechanisms. However, there is much that can be learned from the processes that have take place thus far.

1. It is worth noting that for effective gender justice, there needs to be an understanding of the term gender as gender justice does not translate to women's issues but rather goes beyond that to ensuring that crimes committed to persons purely on the basis of their gender are taken into consideration.
2. It is important for Truth Commissions and other transitional justice mechanisms to realize that gender justice does not necessarily mean dealing with crimes that are of a sexual nature.

3. There is a need to ensure that victims of both genders are involved and participate in the design and implementation of Transitional Justice Mechanisms.
4. Transitional Justice Mechanisms must understand justice from the victims' perspective and not from the 'state' perspective.
5. There is a need to ensure that factual data is well recorded.
6. Women organizations and coalitions must learn to present a united front and speak with one voice when articulating their issues in TJ mechanisms.

It is worth noting that there is a lot that can be learnt from the processes in the various countries. Effective TJ mechanisms must be backed by political will, capacity and availability of resources.

It is important to ensure that all stakeholders are involved in the design and implementation of the programs. In addition to the above, it is also important to incorporate lessons learnt from other countries. TJ processes as stated earlier are constantly evolving and while there is no 'one-size fits all' process, countries can learn from the processes held by other countries and conform them to suit their needs.

There is also a need to conduct further analysis to examine the differences and factors that influence views and attitudes about peace, justice and social reconstruction, such as exposure to violence, psychological trauma or socioeconomic characteristics.<sup>14</sup>

## **CONCLUSION**

Transitional justice is a new area in Eastern Africa and most processes are steadily being introduced in various countries by the United Nations and other international organizations. States Institute for Peace works in the area of transitional justice.

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<sup>14</sup> Ibid

The Eastern African region is faced with a key opportunity to employ transitional justice mechanisms that recognize the gender dimensions to any conflict. This opportunity can either be missed or ignored due to the patriarchal society; lack of respect for women and other factors that lead to marginalization of women in Africa. As the various countries undertake various transitional justice mechanisms it is imperative that key attention is given to the experiences faced by both men and women during the conflict and subsequent programmes respond to the same.

### **Annexure iii**

#### **GENDER ENGAGEMENT IN POLICY MAKING by Nicholas Ngigi.**

##### **What are the opportunities?**

- Constitution
- Politics
- Ongoing policy implementation
- Other reform issues

##### **How do we engage?**

- Policy
- Institutional declaration of intent: for government this is the declaration of how it intends to deal with a particular matter e.g on education, provide free primary education.
- It may be written or unwritten (practice)
- Normally the law follows the policy, but in Kenya either can come first e.g the Refugee Act of 2008, policy is being developed now, the national Land policy, various legislations will follow this policy.

##### **Why Understand Public Policy?**

**Because the study of public policy is to be concerned with the question:  
"Who gets what, when, and how?"**

- Generic Policy Processes
- The Policy Cycle
- Policy spaces
- **Closed or provided spaces:** Some decision-making spaces are closed in the sense that decisions are made by a set of designated actors such as elected representatives and experts behind closed doors, without any scope for broader consultation or involvement.
- **Invited spaces:** As efforts are made to widen participation, new spaces are opened which may be referred to as 'invited spaces', where people (users, citizens, or beneficiaries) are invited to participate by various kinds of authorities, such as government, supranational agencies or non government organisations. Invited spaces may be regularised or more transient, such as an annual forum or a one-off intensive consultation period on an issue.
- **Policy spaces Cont:-**
- **Created or claimed spaces:** These are spaces created or claimed by citizens independently of government or by government and citizens together. They can emerge out of sets of common concerns, and may come into being as a result of popular mobilisation, such as around identity or issue-based concerns, or may consist of spaces in which like-minded people join together in common pursuits.

#### **Who are the decision-makers?**

- Analysis of power and the decision making space begins with an analysis of those who have the power to make decisions on your issue

- This analysis will prepare you to make decisions regarding the level of authority and power they have on the issue and whether they could potentially support your issue.

What is the “lay of the land”?

- It also includes an analysis of the institutional spaces within which those decisions are made and the power
- If you have a legislative change agenda, you need to develop a good understanding of how parliament and other legislative bodies work
- If you have a policy change agenda, you need to understand how policy making is done and who the key players in that process are

The constitution.

- Women were active both formally and in informal spheres in pushing for a new constitutional dispensation. Now that it is here what do we do with it?
- The national human rights and equality commission.
- The national land commission
- The county governments
- The power of the technocrats vis – viz the political players in terms of responsibilities
- The cabinet secretaries

Kenya National Human Rights and equality Commission

- Art 59
- Functions specified under sub art – 2
- (b) promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development

- To promote the protection, and observance of human rights in public and private institutions
- Tracking government implementation of international treaties on human rights
- The national human rights and equality commission cont:-
- Keep an eye on how it is constituted. Don't assume all women will represent women interest, women are not necessarily homogenous.
- It is likely to be a more informal institution to ventilate human rights and gender issues and thus could improve access to Justice to all including women.

#### The National Land commission

- Have broad powers.
- Will hold and manage public land on behalf of the central and county governments.
- Recommend land use planning across the country
- Recommend national land policy
- Investigate and recommend redress on historical land injustices.
- Influence the people that will sit in this commission.
- Put the women agenda in the agenda for the commission

#### Politics

- Politics is about how actors - individuals, businesses, civil society and others - in a society organize themselves to increase their influence, as they seek to promote or protect particular interests
- The dynamic process of negotiations and decision making, in both formal and informal spheres that determine access to resources and opportunities.

## Political parties

- Gender considerations in political parties under the political parties Act and constitutional guarantees.
- 14 (f) prohibits political parties that do not allow regular, periodic and open elections of its office bearers
- 17 (6) provides for equal rights of all political parties members during elections.
- Engage with the political parties to meet their gender requirements – focus in the executive decision making committees.
- Influence the development of the parties Manifestos, and ensure they are implemented should the party form government
- Government generally including counties
- The cabinet secretaries – make up?

The number of ministries, need to watch that the gender focused issues aren't orphaned into some non-descript ministry

The county government has gender requirements.

- The civil service

The public Service committee – has broad powers in recruitment and development of the civil service and had gender requirements

- So
- Look at the formation of the cabinet secretaries, it will be the first step, let's set the standards.
- Given the number of ministerial limitation in the constitution, watch where the ministry in charge of women issues is domiciled.
- Are high-caliber women engaged and prepared to take their place in the county governments.

- The Judiciary
- The current constitution provides for a fairly powerful judiciary.
- The values enshrined in the constitution will apply to the judiciary, including gender considerations.
- So?
- Watch for numbers and positions of women in the structure
- The judiciary will be a centre empire in the implementation of the new constitution, including ability to dissolve parliament if it does not pass the required legislations in time. Women should focus on women interest bills and be ready to approach the judiciary should the priorities of this bill not
- The new standing orders
- Has a provision of a petition by citizens to parliament. The petition is given priority in the standing order paper and requires only 20 signatures to qualify for the attention of the speaker.
- Under the new standing orders committees can engage experts – who can be specialized CSOs
- a committee on delegated legislation which generally tracks how councils are legislating by laws and executing them, this would mean that advocates interested in devolved funds like the Local Authority Transfer Fund (LATF) have a natural ally in parliament in this committee as they audit and seek to strengthen the councils.

New Standing orders Cont:-

- Introduces a committee on implementation, mandated to track decision and promises of the executive and ensure that the executive executes them. This committee may prove crucial with dealing with the issue of executive impunity – e.g. where a statute mandates a minister to draft enabling regulations to actualize legislation

- a new committee on equal opportunity mandated to look at cross cutting issues touching on minority issues, and given the constituency that most CSOs represent this committee would be handy in pursuing mutual interests.

Parliament cont:-

- There exist certain 'informal' spaces in parliament that advocates can utilize when lobbying parliament for example parliamentary caucuses'' – e.g. Kenya Women Parliamentary Association (KEWOPA), Kenya Young Parliamentary Association among others. Caucuses are helpful, for they are less formal and are important points of contacts for engagements
  - Parliament is a tactical space and people have to negotiate the political, personal and competing communal interests. CSOs need to understand the space.
  - Ongoing reforms and agenda 4 items
  - There is an undue focus on agenda item number 4, there is need to remind the nation that there was agenda item number 1,2 and 3.
  - TJRC – Should women support or undermine the current commission?
  - Judicial – The Ouko report, outside the provision of current constitution provisions
  - Police – should we care? Why?
  - Etc
  -
- First medium term plan of Vision 2030 2008-2012**
- Vision 2030 has adopted a long-term goal of achieving an average 10 percent annual growth rate

- Vision 2030 is to be carried in a series of medium term plans with the first (2008-2012) being rolled out.
- Vision 2030 is built on three pillars namely political, economic and social. The social pillar is weak on distributional aspects of growth and hence poverty reduction.

#### Existing policies

- Vision 2030 – in creation of entrepreneurs, the new set of entrepreneurs will have to differ markedly from the current set in race, gender etc for equalization to be achieved.
- Emphasis on agriculture and tourism is good, but is government investing sufficiently in this to produce the desired effect? Are we tracking budget allocations of these critical sectors.
- Is gender a purely social issue (under the social pillar) or does it have economic ramifications? Do we have gender indicators in the economic pillar?
- So how do we influence the resultant policies
- Place the right people in the right places – these places need not be the most visible places, but should be the most strategic places.
- We must engage in the politics of policy making.
- Be pro active, by the time most policy issues come to the public, it has been simmering for awhile below the public radar, and some players have been engaging with it.
- We can make policies in Kenya or outside – through the automatic application of ratified international treaties.
- Look at the budgets – government to put its money where its mouth is.

- Be wary of tokenism
- Regional bodies and international treaties
- Opportunities provided for by the EAC and other regional bodies where Kenya is a member.

Article 121 of the EAC treaty

- **a)** promote the empowerment and effective integration and participation of women at all levels of socio-economic development especially in decision-making;

**(b)**

EAC cont:-

- **(b)** abolish legislation and discourage customs that are discriminatory against women;

**(c)** promote effective education awareness programmes aimed at changing negative attitudes towards women;

**(d)** create or adopt technologies which will ensure the stability of employment and professional progress for women workers; and

- Regional bodies
- **(e)** take such other measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every respect.

**Intergovernmental trade policies ; in Africa women constitute the bulk of small and informal traders, even cross border traders, thus care ought to be taken to see the trade policies do not only benefit big business, mostly owned and benefitting men.**

International instruments now part and parcel of the Kenyan law. (Art. 2 (5)

(6)

Thank you.

(Annexure iv)

**INTERNATIONAL CENTRE FOR POLICY AND CONFLICT**  
**REGIONAL CONFERENCE ON THE GENDER AGENDA By Grace Mainqi**  
**(EXECUTIVE DIRECTOR FIDA KENYA)**

**Using civil society to influence Gender friendly policies**

**CIVIL SOCIETY'S ROLE IN DEMOCRACY AND GOVERNANCE**

Watchdog role

- Holding duty bearers to account

Partnership

- Technical support and assistance

Change agents

- Lobbying and advocacy

**INFLUENCING GENDER FRIENDLY POLICIES**

Government will

Partnership

- Change from "within"
- Technical support and assistance
- Lack of Government will

Change agent

- Drafting of gender friendly policies
- Mapping of policy makers and influence shapers
- Influencing like minded policy makers to carry the agenda
- Using public pressure to influence demand for change

**CHALLENGES THAT FACE CIVIL SOCIETY'S ABILITY TO INFLUENCE POLICY**

- Uncoordinated actions
  - Competing interests
  - Jostling for leadership
  - Lack of resources to organise
- Lack of expertise in moving from lobbying to advocacy strategies
- Lack of commitment and belief in gender issues

**MOVING FORWARD TO INFLUENCE GENDER FRIENDLY POLICIES**

- Clear understanding of gender issues that need to be addressed
- Mapping of policy makers and power spheres of influence
- Division of labour and coordinated sharing of strategies and information
- Public education and ownership

**Annexure v**

**THE GENDER AGENDA IN THE REFORM PROCESS: *MOVING AWAY FROM A  
MINIMALIST CONCEPT; RAISING THE BAR***

**29<sup>TH</sup> OCTOBER, 2010**

**HILTON HOTEL, NAIROBI**

**THE ROLE OF GENDER IN TRANSITIONAL JUSTICE MECHANISMS**

***Christine Alai – International Center for Transitional Justice, Kenya***

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**INTRODUCTION:**

1. This presentation is based the International Center for Transitional Justice's (ICTJ) ongoing work in the field of Gender and Transitional Justice. It highlights concerns and lessons which have been hitherto publicized, particularly in the *Handbook on Truth Commission and*

*Gender: Principles, Policies and Procedures* written by Vasukia Nesiha and others for the ICTJ in July 2006; and most recently, *the African Journal on Conflict Resolution Special Issue on Gender and Transitional Justice in Africa* which was published by ACCORD in partnership with ICTJ in 2009.<sup>15</sup> The latter was published following a conference on the theme of “Gender and Transitional Justice in Africa: Progress and Prospects” hosted by ICTJ in Cape Town in September 2008. It also draws from a recent conference on “*Confronting Impunity in the Great Lakes Region: Gendered Challenges*”, which was held in Nairobi in May, 2010.

2. The presentation also recognizes ongoing work on gender justice by other partners and concerns highlighted by speakers yesterday; in particular, discussions that touched on the concept of transitional justice and the various judicial and non-judicial mechanisms employed to achieve accountability for past human rights abuses and guarantee non-repetition.
3. Consideration of gender in transitional justice processes is important for the following reasons:
  - ✚ Men and women experience violations in unique and different ways.
  - ✚ It is important to delineate the role of both men and women as victims and perpetrators.
  - ✚ It is considered en vogue by donors and many have looked at it as a procedure which must be met.
  - ✚ It provides an opportunity to interrogate cultural perspectives and the patriarchal nature of society which has given rise to perceptions on specific gender roles resulting in entrenched and systemic gender-based violations. This could be a window for consideration of other marginalized groups in our society including children and elderly persons.
  - ✚ It provides an opportunity to interrogate both primary and secondary violations as women tend to focus on secondary violations that happened to members of their families as opposed to their own. In many instances, international justice looks at just any victim that would help build a case, failing to take cognizance

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<sup>15</sup> These publications can be found on ICTJ's website: [www.ictj.org](http://www.ictj.org)

of the effect of direct violations such as Sexual and Gender Based Violence (SGBV), hence the need for a richer notion of justice.

- ✚ The emerging trend of conflict has been focused on civilians as the targets of war. This has often been typified through gender based violence e.g. rape and fistula in Rwanda and Sierra Leone, making women and children the prominent and most visible demonstration of the war. This makes it necessary to have a focus on women during transition, albeit with recognition of feminization of sexual violence such as rape and castration of men.
  - ✚ Any Transitional Justice measures need to have authorization by affected constituents – victims – for them to be legitimate. Given the number of women affected, they form a significant constituent whose participation and consideration in the transitional justice processes cannot be overlooked.
4. The presentation also recognizes that transitional justice processes can only be effective if they address not only direct gender violations (e.g. sexual violations) but also underlying structural factors that lead to violations in contexts where women are marginalized even prior to periods of conflict/violence.<sup>16</sup>
  5. Indeed *“neglecting gender patterns of abuse entrenches impunity, distorts the historical record, and undermines the legitimacy of transitional justice initiatives, and thus ultimately affects both men’s and women’s access to justice.”*<sup>17</sup>
  6. In spite of comparative experiences of countries in transition having neglected or poorly addressed the gender agenda, there is an opportunity for us (in Kenya) to learn from the experiences of other contexts to better ensure protection and enhancement of women’s rights and access to justice in our transitional processes.

## **Gender and Truth-Seeking**

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<sup>16</sup> Simon Robins, Gender and victimhood in transition: Wives of the disappeared in post-conflict Nepal; Post-war Reconstruction and Development Unit, University of York, UK. Simon Robins states that: “...both the literature and practice around gender issues (in transitional justice contexts often) emphasize sexual violence against women, and more particularly judicial process to address such violations. This discourse reduces women to their injury in a violation and perpetrator-centered way, rather than discussing the gendered power relations that lead to violations, and ignores structural violence in a context (such as Nepal) where women are also marginalized by ethnicity, caste and class”.

<sup>17</sup> Helen Scanlon and Kelli Muddell, *Gender and Transitional Justice in Africa: Progress and Prospects* in the African Journal on Conflict Resolution Special Issue on Gender and Transitional Justice in Africa, ACCORD and ICTJ, 2009

7. Flowing from the conventional mandate of Truth Commissions, they present an opportunity to document patterns of gender-based violations of human rights, to propose gender-sensitive recommendations, to create an accurate record of a past era of abuse and to enable the creation of more gender-sensitive programmes to address the structural causes of violation.
8. Some illustrations on how TCs have incorporated gender aspects:
  - ✚ In the South African Truth and Reconciliation Commission (1995), women were well represented in the staff, constituted more than 50% of those who testified, three hearings were held exclusively for women and the TRC's final report included a chapter on gender aspects. However, the TRC was criticized for overlooking the structural impact of the apartheid on the lives of SA women.
  - ✚ In contrast, the Ghanaian National Reconciliation Commission (2002) opted to mainstream gender in all its operations and did not hold any separate hearings for women. As a result, women formed less than 20% of those who testified before the Commission and gender-violations were subsumed within the broader human rights violations rendering gender-based violence largely invisible during the process.
  - ✚ The Sierra Leonean Truth and Reconciliation Commission on the other hand paid great attention to the experiences of women and children during the conflict. It held gender hearings and interpreted its mandate to include interrogating the experience of women pre and post-conflict. Thus, the final report highlighted not only gender-based violations but also the multiple roles played by women during the conflict. The TRC's recommendations have been used by CSOs to advocate for legal reforms to advance gender justice.

### **Considerations of Gender in Kenya's TJRC**

- ✚ Ensuring gender balance in recruitment policies
- ✚ Establishment of a gender unit – Article 27 of the TJRC Act makes provision for the TJRC to establish specialized units to address the experiences of women, children, persons with disabilities and other vulnerable groups. However, due to financial constraints, the TJRC

- has established a merged unit that considers all vulnerable groups together.
- ✚ Ensuring safety, physical, psychological well-being, dignity and privacy of victims and witnesses – do not expose victims to further stigmatizations; e.g. use of in-camera hearings as provided by the TJRC Act.
  - ✚ Sensitivity of language; e.g. in the Sierra Leone Commission the women were asked “what were you wearing when it happened”? Capacity building of TJRC personnel on interviewing techniques is mandatory to ensure that sensitive language is employed when interacting with victims of SGBV etc.
  - ✚ CSOs have a role to document cases of gender-based violence throughout a period of conflict or abuse. Proper documentation can help fill in gaps where the Truth Commission is unable to reach victims.

### **Gender and Judicial Justice**

9. There have been numerous historical landmarks which have led to the development of regional and international law to prosecute sexual and gender based crimes. These include:
  - 1994 Rwanda genocide where as many as 500,000 women were raped leading to the International Criminal Tribunal for Rwanda Tribunal & the 1998 *Akayesu* case;
  - Sierra Leone Special Court (hybrid tribunal) 2002 – led to a number of landmark legal developments in the advancement of gender justice: recognised gender crimes in definition of crimes against humanity and widened interpretation to include sexual slavery and forced marriages. Also made ground-breaking decision to pay and arrange for access to health facilities to perform procedures such as fistula repair women who were to testify before the Court.
  - The Rome Statute/International Criminal Court – rape recognized as a form of genocide, a crime of war, crime against humanity and a form of torture and enslavement;

- International and Regional instruments e.g. UN Resolutions 1325 & 1820 on sexual violence as a tactic of war and the African Charter Maputo Protocol.

### **Key considerations on gender in judicial justice mechanisms in Kenya:**

- ✚ The 1998 Rome Statute establishing the ICC expanded the definition of crimes against humanity and war crimes to recognise rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, trafficking or any other form of sexual violence after the intense lobbying by women's groups globally. As such the ICC can both prosecute these crimes and create an obligation that all investigations include gender-based crimes. However from the consideration of cases in DRC (Thomas Lubanga, Germaine Katanga, Matthew Ngudjolo) – removal of counts of sexual slavery from the indictments on the basis of **lack of witness protection**.
- ✚ The foregoing emphasizes the need to create a sustainable judicial system that can continuously challenge impunity for gender-based crimes in post-conflict/violence/abusive era.
- ✚ Moreover, while enacting effective laws is critical, this is only but the beginning which needs to be buttressed by an effective judicial system and awareness among victims of the relevant procedures for prosecuting offenders.
- ✚ There must not be over-reliance on the ICC which may only prosecute those bearing the greatest responsibility, thus risking the creation of an impunity gap where majority of the perpetrators are not held accountable. Discussions around the establishment of a Special Tribunal or any other effective national processes must therefore be sustained.
- ✚ Increasing visibility of women in proceedings e.g. in Akayesu case (1998) – initial charges did not include rape but presiding judge insisted that it be probed due to its frequent mention by witnesses; there was also mounting pressure from women's groups. As a result, it was the first time an international court had punished sexual violence in the context of civil strife and the first time rape was found to be an act of genocide aimed at the destruction of a group.
- ✚ Gender-sensitive personnel in judicial and legal systems – Sierra Leone's Special Court ensured that 20% of its personnel focused on

- SGBVs vs. Rwanda Tribunal which only worked with 1-2% of the investigators on this area.
- ✚ Documentation vis-à-vis the potential of the TJRC and efforts by CSOs – it is only through proper documentation that we can ensure evidence-based interventions, map out the universe of SGBV victims and begin to address the opportunities to seek for redress on a case-by-case basis.
  - ✚ Sensitivity in the conduct of investigations and prosecutions – training, institutional considerations, development of relevant protocols, protection of vulnerable witnesses, consciousness on factors which affect women’s access to justice e.g. transport and childcare.
  - ✚ Reparations – the judicial process should not only focus on the final outcome but should incorporate provisions to assist victims through interim reparation measures.
  - ✚ Complementarity of judicial measures with other TJ measures e.g. truth seeking, institutional reforms – legal, judicial, Constitutional, security sector reforms. Need to ensure an integrated and holistic approach to Transitional Justice measures which do not give more emphasis to criminal accountability at the expense of for instance, addressing structural discrimination and violence perpetuated during peace time. In this regard, SEQUENCING and TIMING will be critical considerations.
  - ✚ Innovation and creativity in pursuing gender justice – using established precedents; pushing the boundaries through public interest litigation.
  - ✚ Co-ordinated strategies/approaches – potential of a network/working group that could synergise different sets of expertise e.g. legal, capacity building, outreach, psychosocial support etc.
  - ✚ Victims and witness support – witness protection efforts; protection of vulnerable victims and survivors from repeated trauma; legal representation for victims participation before the ICC and local processes.

## **Gender and Reparations**

*Studies in low income States show that victims emphasise a need for basic services, rather than processes which focus narrowly on the violation that victimized them. Victims' emphasis on livelihood demonstrates that they seek to challenge the poverty of the status quo ante, rather than seek a return to it through a purely restitutive process.*<sup>18</sup>

10. The term 'reparations' is derived from the concept of repairing harm. In a transitional justice, it denotes steps taken to repair the harm and losses suffered by victims and their families as a result of large scale and gross human rights violations.
11. The right to reparations is now a well established concept in international law, which is well articulated in the ***United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.***<sup>19</sup>
12. The Guidelines provide that victims of serious international human rights and humanitarian law have a right to:
  - ✚ Equal and effective access to justice
  - ✚ Adequate, effective and prompt reparation for harm suffered
  - ✚ Access to relevant information concerning violations and reparation mechanisms.
13. The right to reparation is further emphasised in the "**Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation**"<sup>20</sup> which broadly underscores the imperative of ensuring reparation for women and girls who are often victims of SGBV in the context of conflict, and that measures are undertaken to take into address not only the actual violations but also the underlying causes/reasons and consequences of the crimes and violations to guarantee non-repetition.
14. Reparations may take several forms including (restitution, rehabilitation and compensation):
  - ✚ ***Individual and collective reparations:*** Individual reparations are important because international human rights standards are

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<sup>18</sup> *Ibid.*

<sup>19</sup> Adopted and Proclaimed by General Assembly Resolution 60/147, 16 December 2005.

<sup>20</sup> Adopted by women's rights Advocates, activists and survivors of sexual violence in situations of conflict from Africa, Asia, Europe, Central, North and South America during the International Meeting on Women's and Girl's Right to a Remedy and Reparation held in Nairobi from 19<sup>th</sup> to 21<sup>st</sup> March, 2007.

generally expressed in individual terms. However, they tend to be difficult to achieve as they require precise identification of the victims entitled to the reparations and may cause confusion among victims and tension in communities. Collective reparations on the other hand can recognize different impacts of violations within communities, seek to repair damages caused to communities and avoid tensions of solely individualized programmes.

- ✚ **Material reparations:** These could include pensions and lump sum payments, costs of locating deceased family members, reburials, rebuilding of houses, community facilities and social services such as academic scholarships, housing and health care.

The provision of social services as reparations however often overlaps with state obligations and development programs. States are obligated to provide basic services and development for their citizens, and also to repair where there has been violation. The distinction between the two concepts however is that reparations, while they may take the form of social services or development programmes, must be accompanied by an ACKNOWLEDGEMENT of the violations committed against communities.

- ✚ **Symbolic Reparations:** Include **public apologies and acknowledgement** for wrongs committed (e.g. President Aylwin of Chile recently offered a moving apology to the nation about the years of repression and human rights abuses under General Pinochet), **building monuments and memorials**, locating the remains of victims and re-burials, setting official days of commemoration, and paying modest pensions.

- ✚ **Restorative and redistributive:** As emphasised by the Declaration on Women's and Girl's Right to a Remedy and Reparation; that it is not enough to restitute the victims to their status before the harm was suffered but also to address the causes and consequences of violations in order to ensure non-repetition. For

instance, in the case of women, if we were to restore them to their previous positions post-conflict, this would be a situation of marginalisation and discrimination – all causes which ought to be addressed in the cause of transitional justice. **Need for structural transformation to address social inequities.**

### **Truth Commissions-based reparations**

- In Chile, a National Truth and Reconciliation Commission was established in 1990 following a period of Augusto Pinochet's dictatorship from 1973- 1990 – resulting in systematic human rights abuses and disappearances. Commission's mandate was limited to cases of disappearances of detainees, political executions and torture. At the conclusion of its mandate, it recommended reparations for victims including monthly pensions to direct relatives of the victims, health care, education, memorials and human rights museums, recognition of those politically dismissed, and pensions for peasant farmers. The implementation was undertaken by a different Committee, National Corporation for Reconciliation and Reparations.
- Similarly in Sierra Leone, the Truth Commissions made extensive recommendations for reparations for victims including health, pensions, education, skills training and micro-credit; community reparations – capital and technical assistance; symbolic reparations – commemorations, memorials, symbolic reburials. Implementation undertaken by the National commission for Social Action (coordinated through various task forces.
- Many more illustrations exist from Peru, Timor Leste, Nepal and other jurisdictions. However, these have been fraught with serious challenges including lack of political will, lack sufficient resources, corruption, lack of local ownership –over reliance on international/donor funding.

### **Court-based reparations**

The ICC may award reparations on collective and/or individual basis for victims at the conclusion of a trial. It may order that such reparations be deposited with the TFV where it proves impossible or impracticable to make direct awards to each victims or where the number of victims or the scope, form and modalities of reparations make collective awards more appropriate.<sup>21</sup> However, in recognition of the need to respond to the urgent and immediate needs of victims of international crimes, Rule 98(5) makes provision for the TFV to accord victims general assistance before the conclusion of a trial. Such assistance is not restricted to victims participating in the Court's proceedings.

The Trust Fund for Victims (TFV) is an independent organ of the ICC established in accordance with Article 79(1) of the Rome Statute to implement the Court's orders on reparations upon conviction of accused persons and to utilize resources from the Fund for the benefit of victims<sup>22</sup> of crimes within the jurisdiction of the ICC i.e. genocide, war crimes and crimes against humanity committed after 1 July, 2002 when the Rome Statute came into force.<sup>23</sup> The TFV is the first of its kind which seeks to provide restorative justice for victims while the process of retributive justice is ongoing.

The TFV is managed by a five-member Board of Directors representing the major regions of the world. The Directors are elected by the Assembly of State Parties and serve on a *pro bono* basis for three year terms.<sup>24</sup> The TFV receives its funds from voluntary contributions from State Parties and court ordered fines and forfeitures. Only 23 States out of the 113 current State parties to the Rome Statute have made contributions to the Fund with Finland as the highest contributor and South Africa as the only African contributor. Kenya is yet to make a contribution to the fund.

The TFV provides three forms of support to victims<sup>25</sup>:

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<sup>21</sup> See Rule 98 (1) – (4) of the ICC Rule of Procedure and Evidence.

<sup>22</sup> Victims covered by the TFV are as defined under Rule 85 of the ICC Rules of Procedure and Evidence.

<sup>23</sup> <http://www.trustfundforvictims.org/>

<sup>24</sup> The current Board of Directors include Ms. Betty Kaari Murungi representing African states; Ms. Elisabeth Rehn from Finland representing Western European and other States and the Chair of the Board; His Excellency Mr. Bulgaa Altangerel from Mongolia representing Asian States; Mr. Eduardo Pizarro Leongomez from Colombia representing the Americas and Caribbean States; and Her Excellency Ms. Vaira Vike Freiberga from Latvia representing Eastern European States.

<sup>25</sup> <http://trustfundforvictims.org/projects>

1. Medical assistance: includes reconstructive or general surgery for victims of mutilation and torture; physical rehabilitation through the provision of prosthetic limbs and orthopaedic support for amputees; and HIV screening
2. Psychological rehabilitation: this is provided for all TFV projects and involves individual or collective trauma treatment which is undertaken through community social healing rituals and practices, community sensitization, music and drama.
3. Material support: this includes provision of shelter, vocational training, micro-credit support, educational grants and accelerated literacy.

\*\* However, court-based reparations (particularly in relation to ICC) are prospective (on conviction) and can rarely be able to deal with the universe/mass of victims post-conflict/situations of massive atrocities.

15. "Reparations are essential to any transitional justice initiative because out of all the dimensions of transitional justice, reparations focus most directly and explicitly on the victims' situation, as it seeks to provide some repair for rights that have been trampled, for harms suffered, for indignities endured... Moreover, reparations should serve as a vehicle for acknowledging past violations and state responsibility for harms as well as a public commitment to respond to the enduring impact. Often public acknowledgement is indicated by victims as the most important element of the reparations they seek. It is also what is most frequently absent."<sup>26</sup>
16. However, reparations will be made more effective when complemented by other initiatives such as truth-seeking, institutional reform, accountability mechanisms and memorialization to ensure that they are not perceived as a ploy to buy victims' silence and allow perpetuation of impunity, that perpetrators are still held accountable and that there is a guarantee of non-repetition.<sup>27</sup>

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<sup>26</sup> Ruben Caranza and Lisa Magarell, International Center for Transitional Justice Reparations Unit, "Reparations in Theory and Practice"; available at [www.ictj.org](http://www.ictj.org)

<sup>27</sup> *Ibid.*

### **Key considerations and challenges for gender and reparations in Kenya:**

- The provision in the TJRC Act requiring victims' to make application to the TJRC for reparations
- Who will the TJRC Commission consider for reparations – only those who come before it or make applications? How easily can SGBV victims make applications to the TJRC for reparations? It is likely that, the recommendations for reparations could mirror the TJRC's shortcomings e.g. its inability to reach the multitude of victims or inaccessibility.
- Who is considered as a victim – will the TJRC only consider primary victims? What about the women who have suffered as secondary victims?
- Lack of political will: TJRC recommendations will not be binding.
- Reparations as a right and not a favour: Need for an exclusive reparations policy driven by proper documentation and not one that is only pegged on the TJRC recommendations.
- CSOs need to create awareness among victims to enable them to access possible avenues for redress
- CSOs and victims need to be constantly vigilant and continuously mobilise to advocate for victims' right to reparations.

### **Gender and Institutional Reforms**

17. The new Constitutional dispensation, as extensively discussed by previous speakers during the forum, offers a platform for reforms in the security sector, judiciary, public service, governance and electoral systems within which women's lot can be improved.

18. Pushing the boundaries: public interest litigation, lobbying for progressive policies and laws, creating awareness.

### **CONCLUSION:**

The challenges for us in Kenya's transition:

19. To ensure gender concerns are not limited to "victim-hood" and inclusion of more gender-oriented notions of justice e.g. addressing

underlying causes of violations, as well as economic and social violations

20. Inclusion of men and boys beyond their role as perpetrators – e.g. there was castration of men during PEV, how has this been addressed to date?
21. Reconceptualisation of TJ from a restorative justice perspective that does not only seek to retribute victims to pre-violation *status quo* but that seeks to heal and rehabilitate women within a context hitherto prone to marginalisation and discrimination of women.
22. Appreciation of the continuum of violations in post-conflict/transition era – using a holistic approach to ensure that a framework exists to address structural inequalities and continuously challenge impunity of gender-based violence.

- \* **Women's participation in all these processes**
- \* **Education, awareness, empowerment of women**
- \* **Solidarity – one voice**
- \* **Learning from other's experiences**