Gender and Transitional Justice in Kenya: Guidelines for Engendering the Process


International Center for Policy and Conflict
GENDER AND TRANSITIONAL JUSTICE IN KENYA: GUIDELINES FOR ENGENDERING THE PROCESS

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards each other in a spirit of brotherhood. (Universal declaration of human rights Article 1)

Engendering Transitional Justice and Constitution Implementation Policy Framework
June 2011

This Policy document is a product of Engendering Transitional Justice and Constitution Implementation which was funded by the The Royal Embassy of the Kingdom of Norway, Pretoria, South Africa. It is part of a 3-year Transitional Justice, Governance and Accountability in Africa joint initiative supported by Department For International Development, United Kingdom (DFID-UK)
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Foreword

International Center for Policy and Conflict as a human rights public policy research and education institute working to build sustainable peace, human security and human development for all is focused on gender equality and accountability in ending long-standing impunity for gender-related violence and crimes. Gender based violence as an idea refers to acts of violence committed against females because they are females and against males because they are males, based on how a particular society assigns and views roles and expectations for these people.

In addressing gender based violence, the society needs to pay special attention on the security and safety of the survivors; and their human rights and dignity. In seeking solutions, we have to fully grasp and understand the causes and context of the violence. The bane of Kenya's preventive measures, just like many patriarchal societies, is that they lack proper context analysis and mechanisms to adequately address structural causes and contributing factors. They have to be tangibly identified and considered.

As perpetrators of gender based violence continue to enjoy near complete impunity, we must put pressure on the governments to ensure that perpetrators are brought to justice and survivors accorded remedy. This invites the role of the domestic and international justice systems including the International Criminal Court (ICC) to work in collaboration to eradicate culture of impunity and make meaningful accountability. However, the government of Kenya must also ensure implementation of operational actions that protects those at risk of gender based violence.

The short and long-term costs of gender-based violence are largely underestimated and ignored. There remains a lack of coordinated and effective action. This is due to a culture of silence and impunity, complexity and weak policies as well as institutions that make the situation deteriorate. Durable peace and security are heavily compromised if the perpetrators of such acts are not prosecuted and/or deterred.

Impunity for perpetrators and insufficient response to the needs of survivors is unacceptable. The grave violations of women’s human rights require immediate attention and the following creative measures provided in this policy framework are needed to support national authorities to ensure effective security for women and children are adhered to. They include; policing and deterrence measures, promoting
the effective administration of justice in order to strengthen accountability through providing legal counseling and supporting survivors’ access to justice.

The government of Kenya through the various state institutions should work towards drawing a concrete national action plan to domesticate and implement the United Nations Security Council resolutions 1325 and 1820. These resolutions mandate criminal accountability for the perpetrators of gender crimes in conflict situations. Determined action and leadership both at the national and international level including resources will be required to eradicate gender based violence. Strengthening the protection of women and girls in conflict-affected societies from rape and other forms of sexual violence is vital in order to put in place such a mechanism into concrete action.

Resolution 1325, links gender equality to security and acknowledges the importance of women’s voices in building lasting peace. This represents a milestone on the road to a more gender-sensitive peace process and security policies. We therefore have to work towards building capacity and improving accountability for gender equality. No amount of talk will change things unless we commit ourselves to urgent and concerted action aimed at preventing gender based violence, including in particular, sexual violence, ensuring appropriate care and follow-up for survivors as well as working towards holding perpetrators accountable.

Resolution 1820 recognizes the importance of full implementation of Resolution 1325.

The resolution stresses the need for the exclusion of sexual violence crimes from amnesty provisions. It is our responsibility to ensure that the State complies with its obligations for prosecuting persons responsible for such acts. Providing all victims of sexual violence particularly women and girls access to equal protection under the law and equal access to justice. **Keep stressing the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace and security.**

Moreover, boys who have watched their mothers and sisters being raped run a considerable risk of becoming perpetrators themselves. The damaging effects of post-election violence, such as displacement of persons, the destruction of community structures, poverty and lack of resources increase the risk of gender based violence. We must reinforce our efforts to provide timely and comprehensive assistance and protection.
Gender inequality is directly linked to gender based violence. Addressing gender discrimination through ensuring women play a full participatory role in decision making is a critical step towards ending this form of violence. Building on existing policies and guidelines, we must promote a coherent, participatory and multi-sectoral approach to prevent and respond to gender based violence.

We have to strengthen accountability frameworks and systematic monitoring and reporting on the implementation of resolutions 1325, 1820 and relevant resolutions and treaties. We also need to intensify international, regional and national efforts to end impunity for perpetrators by enhancing the legal and judicial systems. Also, through enacting and enforcing legislation by providing national justice systems with the necessary resources to prosecute cases of sexual and gender-based violence. We recognize the right and ensure access to material and symbolic reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for all survivors.

Finally, Kenya has promulgated a progressive Constitutional order that eliminates all forms of discrimination and inequalities. The Constitution confers equality on all citizens. However, this significant step towards gender parity and equality can be written words on paper with no weight unless there is sustained and proactive advocacy and monitoring in the promotion and implementation of gender equality measures thereof. This gender policy provides a framework that allows for the general protection of men and women against maltreatment, discrimination, obnoxious cultural practices and for equality in the socio-economic sphere.
Preface

As implementation and enforcement of the new Constitution in Kenya gets underway and other strands of transitional justice agenda showing mixed signals, there is an apparent urgency and importance of developing a clear gender policy agenda in advancing gender justice in time of transition and implementation of the Constitution. We are therefore focused in continuing with the journey of laying the foundation in the advancement of gender justice and women’s rights through influencing and reshaping the current frameworks, specifically to ensure access for and influence of equal gender rights during the various stages of Constitutional and transitional justice agenda implementation and its accruing outcomes.

The goal is to focus on how gender justice and equality requirements within the context of re-establishing rule of law and post-conflict peace-building can best be addressed and operationalized. We know post-conflict transitional periods are key opportunities for the transformation of gender power relations and rights; and state transformation. Our role as ICPC is to be a catalyst, advocate, educate and partner in assisting to identify and develop critical strategic entry and intervention initiatives to the implementation of various transitional justice processes including those in the Constitution so that they effectively impact on critical issues on the agenda by promoting opportunities and justice for both gender with an assertive and affirmative action approach.

What we have observed over the years is that we are very good in making laws and having the right policies and producing the right rhetoric but lack greatly in the implementation process. 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 do not just focus on the high politics of the state but also on the spaces where the most profound injustices rest such as in the deep politics of society and the social and psychological barriers that prevent both genders 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, the time or the resources to access justice even in cases where a justice system exists.

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

International Center for Policy and Conflict has overseen and rendered technical support to the development of transitional justice training tool for Kenya in partnership with Kenya Human Rights Commission (KHRC) and Kenya Chapter of International Commission of Jurists (ICJ-K). It has conducted an intensive transitional justice capacity building and training projects. Jointly with Centre for the Study of Violence and Reconciliation, ICPC has conducted research and developed a gender and transitional justice policy, which is part of this policy document.

Further, the two organizations have researched on gender perspectives on the post-election violence, did a documentary, developed a regional transitional justice assessment survey on gender and transitional justice, and held a regional gender conference in October 2010, which bore fruit in developing this policy paper.

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 benchmarking 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, 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 engendering justice policy is ICPC’s commitment towards achieving this key objective. We plan to convene several series of structured dialogue sessions with local and international partners within the next three years to share, advocate and influence interventions in implementation of the Constitution and transitional justice in order to entrench the policy ideas in this document. It is a journey we invite many to partner, support and collaborate with us. We also plan to continue to support and build a constituency and movement aware of and animated by gender justice, and to collectively assess what impact we can have over the next decade.

Thank you!

Ndung’u Wainaina
Executive Director
Acknowledgment

The International Center for Policy and Conflict (ICPC) sincerely thank our partners, The Royal Embassy of the Kingdom of Norway, Pretoria, South Africa and Department For International Development, United Kingdom for the financial support to this project.

“Engendering Transitional Justice-A transformative agenda for building sustainable peace in South Africa, Kenya and Zimbabwe” was part of a three-year joint initiative of the Transitional Justice, Governance and Accountability in Africa”.

We are grateful to Centre for the Study of Violence and Reconciliation (CSVR) South Africa for its technical and facilitative role it played in the entire project.

ICPC offers its gratitude to its partners in the Kenya Transitional Justice Network (KTJN) and its membership for their ideas and input to this document. We also recognize the contributions of Members of Africa Transitional Justice Network (ATJN).

We appreciate the strong leadership and advice offered by ICPC Executive Director Ndung’u Wainaina while executing this project. This policy document benefitted from the efforts and dedication of the team that worked on it. The team includes, in no particular order, Ms. Njoki Ndung’u, formerly Committee of Experts and now Judge of the Supreme Court of Kenya, Executive Director, National Convention Executive Council (NCEC) Cyprian Nyamwamu, Kasiva Muli, Programme Associate, ICPC, Paul Mwaura, Deputy Executive Director, ICPC, Davis Malombe, Kenya Human Rights Commission (KHRC) and Grace Kimani, Federation of Women Lawyers-Kenya (FIDA-K).

Lastly, participants and presenters of the regional gender conference titled, “THE GENDER AGENDA; MOVING AWAY FROM A MINIMALIST CONCEPT; RAISING THE BAR” held on 28th October 2010 made tremendous contributions that partly made this policy document a reality.

We also recognize Eunice Bere and Carnita Ernest who edited this document.
Abstract

Situations of conflict not only have enormous and devastating impact on women’s lives but they also open up new arena and opportunities of transforming gender roles and attitudes. In Kenya, we have several transitional justice processes going on which provides us with an opportunity to develop a clear gender policy for advancing gender in time of transition. However, if we are not careful, it is common for such processes to ignore gender aspects or to look into gender issues from a very narrow point of view. Overlooking gender aspects in any transiting society hinders gender justice and social development. There is an important need to ensure that all genders are involved as agents of peace building, reconciliation and design of transitional justice policies. With Kenya in mind, this policy paper looks at opportunities of ensuring such long term engagement with ongoing transitional justice processes. It highlights what issues to put at the forefront when implanting constitutional reforms, institutional change, prosecutorial initiatives, truth seeking and reparation initiatives as well as electoral reforms.
Institutional Background

About International Center for Policy and Conflict, ICPC

International Center for Policy and Conflict (ICPC) is a non-profit, Independent, human rights public policy research, advocacy and education institute. It was established in Kenya in 2001 but got official recognition as a trust in 2005 under the Trustee (Perpetual Succession) Act Chapter 164. ICPC espouse a free society with dignity, equality and justice for all. Our mission is to create, promote and engage platforms that transform societies.

The Center is an affiliate of Africa Open Democracy Foundation (AODF) and partner of Africa Rights and Democracy Institute (ARDI). Our three over-arching strategic goals are; Larger Human Rights and Freedoms, Democratic development and Human Security.

The organization’s strategic focus and concentration is to; a) Promote, contribute and strengthen respect for human rights and consolidating democratic governance, b) Research, engage and advocate public policy solutions for development of more equal democratic, inclusive and secure societies, c) Mechanisms for access to justice and security, d) Education and information sharing and e) A secure, accountable, visible and resourced institute.

The Center comprises of the five (5) members of the board, Management Committee and a full-time programmatic and administrative paid staffs. In addition, it utilizes a network of Associates and Consulting Experts and works in concert with other local, regional, and international organizations. It also offers internship and fellowships. The Board members are responsible for the strategic policy direction of the Center. The management committee guarantees a sound internal management structure and policies that contribute to the optimal functioning of the organization. The Executive Director is the head of the secretariat, responsible for its management and implementation of policy directions, coordination of programmes and ensuring accountability in utilization of its resources.
Introduction

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 are aimed directly at confronting and dealing with past violations of human rights’1. These processes therefore encompass different avenues and systems that are put in place by society so as to bring about truth telling, justice, reconciliation and reparation. In most cases, transitional justice mechanisms are sought when a country or state is coming out of a period of strife or repressive rule. Transitional Justice Processes are therefore sought to enable a society start afresh and build institutions that will ensure that the society does not disintegrate once again. The main aim of the processes is to achieve national reconciliation through acknowledgment of past injustices so as to create a society that can move forward.

The concept of transitional justice continues to develop since the international military tribunal at Nuremberg after the Second World War to the trials of military junta of Greece in 1975 and Argentina in 1983. However, the concept became contextualized in the late 1980’s and the early 1990’s in Latin America and Eastern Europe due to demand for justice after repressive rules2. Since then there has been tremendous growth of its jurisprudence in the world.

Africa as one of the continent that has experienced brutal wars and repressive regimes has adopted the concept too. This is evident in the successive truth commissions in Sierra Leone (2002-2004), South Africa (1995-2002), and Morocco (2004-2006) among others. There were also prosecutorial mechanisms like the ad hoc international tribunal for Rwanda3 and the special court for Sierra Leone4. Institutional as well as prosecutorial processes continue in different countries in Africa. An example is the I.C.C processes in the DR CONGO, UGANDA, KENYA AND CENTRAL AFRICAN REPUBLIC.

2 http://www.ictj.org
3 Formed under Security Council resolution 955 of 8th November 1994
4 Formed under security council resolution 1315 of August 2000 where United nations together with the government of Sierra Leone formed the court.
However, it is sad to note that while the concept has picked up in Africa, a crucial segment (women) has been marginalized. Many transitional justice processes continue to isolate women by failing to acknowledge that this particular group bears the greatest brunt of any conflict or repressive rule. In instances where they are included, their abuses are viewed and analyzed from a very narrow defined lens. Neglect of gendered patterns of abuse ultimately limits women’s and men’s access to justice. It further entrenches impunity, distorts historical records and undermines the legitimacy of transitional justice initiatives.

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5 Carla Koppel and Jonathan Talbot; Strengthening Colombia’s transitional justice process by engaging women.
Overview

- The “Gender and Transitional Justice in Kenya: Guidelines for Engendering the process” is a tool developed by the Kenya Transitional Justice Working Group for fostering gender justice among state and non-state actors in their work with the transitional justice mechanisms in Kenya. The tool is organized around the following structure:

  - Introduction which highlights Kenya’s background and lays foundation for the transitional justice discussion in Kenya;

  - Transitional Justice and Gender Justice: Conceptual and Contextual Issues which captures the concepts of transitional justice, gender justice, gaps and questions within the Kenyan context;

  - Gender Justice Framework in Kenya’s Transitional Justice Mechanisms which explores the gender concerns or indicators for informing and engaging with the five major processes: Truth, Justice and Reconciliation Commission (TJRC); Legal, Policy and Institutional Reforms; Prosecutions; Reparations; and Memorialization;

  - Finally, the Prognosis summarizes the emerging lessons/ issues.

The draft tool was presented during a workshop for the Civil Society Working Group on Transitional Justice for Kenya (TJWGK) at the Intercontinental Hotel (Nairobi) in April 19-20 2010. The main objective of the workshop was to create a platform for civil society actors to review and develop a gender-sensitive framework for engagement with the transitional justice processes in Kenya. The specific objectives were:

- To create an understanding of gender-sensitive transitional justice mechanisms and processes in Kenya.

- To provide a platform for sharing and developing gender-sensitive tracking mechanisms within transitional justice processes in Kenya.

- To create visibility and publicity to the critical role of women in the Transitional Justice Mechanisms.
• To identify and discuss critical challenges and way forward on engendering transitional justice in Kenya.

The discussions from the workshop were incorporated into the final document.

It is important to note that the selection and design of transitional justice programmes must be unique for each country. Factors to take into account include the regime’s level of legitimacy and political security, its relationship with human rights violators, the strength of opposition groups, the activities of civil society and the presence of international actors. Moreover, understanding the needs and perceptions of local populations concerning transitional justice and social reconstruction is imperative to the development of a legitimate transitional justice strategy and in promoting sustainable peace.\(^6\) A key component in this includes a gendered analysis of the nature of the conflict and the strategies and actions for change.

\(^6\) GSDRC Transitional justice (part 1)
1.0. Background on Kenya’s History

1.1. Entrenching the Culture of Impunity during the Colonial and Post Independence Eras

Kenya, like many other developing countries, is characterized by governance systems which have orchestrated massive violations of human rights including gender based injustices. Such violations and injustices include *inter alia* political assassinations and killings; torture, cruelty, inhumane and degrading treatment; arbitrary arrests and detentions; disappearances and abductions; conflicts, insecurity and civil strife; internal displacements and landlessness; poverty and economic marginalization. Kenya has also witnessed sexual violence cases including sodomy, rape and sexual assault; sexual harassments; female genital mutilation and forced circumcision; domestic violence; the disinheriance and dispossession of property of women; forced wife inheritance, forced marriages, forced prostitution and forced pregnancies; as well as systemic marginalization of women and other disadvantaged groups from decision making processes among others.

Women too suffered directly under the hands of security apparatus but their suffering had not really been acknowledged until 1991 when their cry for justice eventually drew shocking attention after tired and angry mothers stripped naked at Nairobi’s Uhuru Park. The mothers were demanding the release of their sons and husbands detained for political reasons under the KANU government. But, instead of addressing their demands, the government instead unleashed security forces on them who beat them senselessly. The venue of the stripping act, which is considered an abomination in African culture, has since been named “the freedom Corner”.

As pressure mounted on the then government to introduce political reforms in the country, the United States and 11 other donor nations pressured Moi to end corruption in government, improve its poor human rights record and institute economic reforms. In 1991, these donors withheld more than $350 million in aid. In December 1991, Moi and his party legalized multiparty politics but civil unrest continued. Ethnic violence in the Rift Valley erupted from 1991 to 1994 leaving over 3,000 people (Kikuyus and Luos) dead. The ethnic violence was allegedly committed by “trained warriors” from Moi’s ethnic group. In 1993, Africa Watch, a US-based human rights group reported that as many as 1,500 Kenyans had been killed and over 300,000 displaced as a result of ethnic violence instigated by Moi’s regime in the Rift Valley. *In the lead up to the 1997 general elections, ethnic fighting also flared up in Mombasa, claiming over 42 lives.*
As Cecily Mbarire puts it “...the results attested to the brood of the wrist of the cynicism bedeviling women’s political aspirations. There was a candidate without a whiff of a scandal who was rejected because the voters would not fathom a madam president.” “...the setbacks we faced ...” Ngilu said “...strengthened my resolve...” Mrs. Ngilu’s stoicism in confronting political obstacles put her way affirmed her belief that there is so much strength in a woman who knows what she wants to do in life. Mrs Ngilu rode the political tempest with such graceful courage and determination...

Mrs Nyiva Mwendwa’s appointment to the cabinet came on the fourth world conference on women in Beijing. Prior to Mwendwa’s appointment, Kenya had been under intensive regional pressure to appoint a woman to lead Kenya’s delegation to Beijing. She only became minister when the booing in Dakar at the African Preparation Committee meeting of Beijing convinced Kenya that a man leading its delegation to the biggest women’s conference would be a major public relations disaster for the country.

Source: lifestyle Magazine Sunday Nation January 12, 2003

1.2. Violations Of Women’s Rights In Kenya

Introduction

In Kenya, women and girls have faced greater historical injustices as compared to their male counterparts. In order for Kenya to employ successful transitional justice mechanisms, the injustices faced by Kenyan women have to be addressed in a holistic manner. Kenyan women and girls have been subjected to structural discrimination by practice, custom and law. They face discrimination in almost all spheres of their lives – in education, employment, politics, and in other walks of life.

The Kenyan socio-economic and political context succinctly demonstrates some of the factors that constrain women’s abilities to claim and exercise their rights. 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 difference 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.7

According to the 2008/2009 Kenya Demographic and Health Survey, 39% of the married, divorced or separated women aged 15-49 years are reported to have either been physically or sexually violated by their husbands or partners during their relationships. About 32% are reported to having been violated in the last one year before the survey was conducted. Rural women are more likely to be victims of physical and sexual violence. The survey further revealed that 15% of married women are sexually violated. Just over 27% of women reported that they were circumcised.

1.2.1. Structural and legal discrimination against women in Kenya

In Kenya there is a constitutional guarantee on the right to vote and to freely participate in politics. However several factors such as: the requirement of large sums of money, the belittling of women by those in authority, general lack of adherence to electoral laws during elections, lack of political goodwill in the enhancement of the participation of women in political and public life at national level, the threat of violence and abusive language targeting women participants, prevent women from exercising their constitutional right to vote and participate in politics. As a consequence of the above discrimination, the number of women in Parliament fails to reflect accurately the demographics of the electorate.

Of the total 222 MPs in the current parliament, 22 are women, an increase from 18 in the previous Parliament. With only a handful of women in political party leadership we have not made any progress in achieving MDG3, which seeks to promote gender equality and empowerment of women. Moreover women in parliament spend more time and energy trying to prove themselves to the male dominated house that they are equal to the task such that they hardly have enough time to channel their energy and time in promoting policies and laws that seek to protect them.

Women’s participation in the Judiciary is skewed with the majority occupying the bottom tiers of the judiciary, even after the judicial purge carried out in 2003. Prior to December 2011 there was no woman judge in the court of appeal. On 9th December 2011, the incumbent Chief Justice appointed seven judges to the court of appeal out of which five are women. The composition of the Supreme Court spurred controversies as it was perceived to have failed to meet the one third thresholds for either gender as provided for in the Constitution of Kenya 2010 since only two women had been appointed out of seven justices. A constitutional petition filed by FIDA-Kenya among other non-governmental organizations sought to challenge the appointments as unconstitutional.

The petition was dismissed on grounds that there was not yet in place an act that operationalizes that principle. Specifically the three judge bench said “…to the petitioners and supporters we advise you to keep your feminine missiles to their launch pads until the state acts on policies and programmes as are envisaged in article 27(6) and (8) and the legislature has legislated accordingly to set the formulae mechanisms and standards to implement the spirit and import of the whole constitution within the time frame set by the constitution or in default of their complying within that time frame.” Not only that, the executive sought to repeal that section on grounds that it is difficult to find women to meet the one third threshold in decision making positions. Kenya still awaits the law that is supposed to operationalize this provision.

From the social stand point, harmful practices such as female genital mutilation/cutting, forced marriage, early marriage, polygamy and forced wife inheritance compounds women’s risks to HIV/AIDS. Traditional or customary systems that might have protected a woman’s access to land and property during her lifetime are breaking down under population, economic and environmental pressures. Customary practices such as wife inheritance and ritual cleansing have continued in parts of Kenya especially in Western and Nyanza Provinces. Women’s property rights are closely related to wife inheritance and cleansing rituals as many women cannot stay in their homes or on their land unless they are inherited or cleansed. Such practices increase women’s vulnerability to HIV and other STIs.

Threats of violence have continued to inhibit women from pursuing property claims even where the laws are favorable. Many women fear attack by their in laws if they pursue their deceased husband’s property. Those who try to fight back often find it difficult

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8 The Standard Newspaper dated 10th December 2011
to navigate the complex Kenyan legal system, with the police often too reluctant to provide protection to women’s rights. Sometimes, if a woman turns to legal channels, the relatives may slow down the proceedings in belief that she will die soon and leave the property to them anyway.

Men and women face distinct health risks in their living and working environment and have different health needs. Poor health infrastructure and unaffordable health services primarily because of cost sharing, disproportionately affect women as they require more preventive reproductive health services. The government’s approach to fertility reduction has been characterised by an over-reliance on women’s behaviour, neglect of male sexual and contraceptive behaviour and inattention to gender inequalities that accompany reproductive health and child rearing.

The cost of bearing and rearing children is grossly misallocated between partners and this is further entrenched by legislation such as the Children Act of 2001. The Act states that where a child’s father and mother are not married, the father shall only acquire parental responsibility if he makes an application to court to be given such responsibility. In addition, he cannot acquire parental responsibility where he has not cohabited with the mother of the child for a period of 12 months subsequent to the birth of the child unless he so wishes.

An Assessment conducted by National AIDS Control Council in 2006 reveals that female household heads are more likely to be affected by HIV/AIDS than male-headed household. The NACC survey revealed that 87% of the households with PLWHAs required the assistance of a caregiver with only 13% of them indicating that they did not require the assistance of a caregiver. The responsibility for care-giving falls primarily on a woman in the family. The survey findings revealed that the majority of the caregivers had to abandon their normal daily responsibilities in order to spend time with the sick person. In addition to taking care of the sick family members, the caregivers have also to take care of the welfare of the other family members.

Women are most vulnerable in the HIV pandemic and constitute the greater number of new infections. Discrimination, unequal power relations between men and women and economic dependence often puts women and girls at a disadvantage, with little option to either refuse sex or negotiate for safe and protected sex.
2.0. Gender Justice

Gender justice is a concept that encompasses the ‘protection and promotion of civil, political, economic and social human rights on the basis of gender equality. Situations of conflict or repressive rule have enormous and devastating impact on women’s lives. However, they can open new spaces and opportunities for transformation of gender roles and attitudes. The concept of gender justice requires a gender perspective on human rights especially as it relates to the levels, access and obstacles to the enjoyment of these rights for women, men, girls and boys in order to adopt gender sensitive strategies for protecting and promoting these rights.

Inclusion of gender in transitional justice processes is important for the following reasons:

- Both men and women experience violations and its effects in different ways. In most experiences men are usually viewed as victims of murder, torture and violence while women victims are viewed within the context of sexual and gender based violence. Apart from direct victimization, women also form a large number of secondary victims as a result of losing their husbands, brothers and relatives through conflict or torture.

- It is important to delineate the role of both men and women as victims and perpetrators. This is crucial as it affects how they will be included in the design of transitional justice policies. A blanket assumption always leads to alienation of an important group. An example is one where women are always viewed as victims, if there are programs for integrating militias and combatants, and then there is the likelihood for those who were combatants to be left out of such programs.

- 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

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9 Transitional Justice in Kenya; A tool kit for training and engagement 2001
10 Ibid
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 of the effect of direct violations such as Sexual and Gender Based Violence (SGBV), hence the need for a richer notion of justice. A recent development to include victim participation and reparations has given victims a platform to air their views and feel part of the process.

- 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, Darfur in Sudan and Democratic republic of Congo; 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.
- It is considered by international practitioners in transitional justice and human rights as a strong pillar for democratic processes and many have looked at it as a procedure which must be met.
- 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.

2.1. The crisis of Gender injustice in Kenya

Independent Kenya is a product of the colonial occupation that lasted more than six decades. The post colonial state reflected the characteristics of a colonial society in which it was organized to facilitate the exploitation of resources for foreign markets. The human rights and freedoms of the people was not a major concern to the colonial administration. The post independence government while steered by Kenyan nationals did not emphasize on the central issues of justice but rather more towards economic growth regardless of its ownership and the fairness of the production, distribution and consumption patterns.

Women were particularly excluded from access to education, land and credit, decision making and governance positions and to other fundamental human and legal rights. Five decades of this state of affairs has produced a situation where massive inequalities, marginalization and exclusion of citizens have always most adversely affected women.
Gender injustices are pervasive and structural in nature and are deeply entrenched in Kenya and are manifested as;

- Sexual and gender based violence and exploitation
- Political injustice and marginalization of women and men
- Economic and social marginalization of women. This is has led to women having become the image or face of poverty.
- Institutional policies that are skewed leading to gender imbalances
- Lack of willingness to engage in on affirmative action as directed by official statements of government.

A country’s transition does provide a unique opportunity to promote gender equality and justice for the future. It provides a chance to put in place the re-establishment of the rule of law in a country in transition and the strengthening of its systems and institutions for the administration of justice. This is conducted in a manner that takes into account the interests and the needs of the entire population, including women. Essential to this end is acknowledging that both women and men participate as equal partners in post-repression reconstruction, 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 as women tend to be neglected in such processes. Their problems are viewed and interpreted from a very narrow conception and many recommendations do not include them in policy design and development. This continues to play a major hindrance on women development and participation in post transitional societies.

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; 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 is critical to women’s struggles for human rights. Kenyan women should therefore 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.

2.2. Gender and the complex challenges of a society in transition

“Think of how much more we can do, when women are fully empowered as agents of change and progress in their societies”

UN WOMEN EXECUTIVE DIRECTOR Michelle Bachelet

A society in a gradual transition not instigated by revolutionary means but through constitutional and legal victories of democratic forces has to deal with the stranglehold by the dominant forces and systems that have given advantage to the minority monopolizing power for a long period of time at the expense and exclusion of the majority of the citizens.

Politically, transitions are arrested or manipulated by public officials still controlling the levers of powers and formal decision making. These officials will continue to undermine the institutions and legal measures that are recommended in order to build a new society and state. In the Kenyan context, the transition will be undermined at various levels notably the judiciary, the prosecution, the police and investigation departments, the witness protection and the cabinet level. The outgoing officials will be keen to put in place judges and magistrates of their liking as well as prosecutors and investigators who will not seek full accountability for past crimes and violations of human rights. Similarly, a weak and worthless witness protection mechanism may be set in place to ensure that suspects of crimes operate the witness protection agency in order to scare away witnesses and therefore suppress evidence against the officials in power as they leave office.
This stranglehold of the process of reforming the judiciary, the prosecution and investigation departments extends to the tight control of where public funds will be spent in the transition period. The government ministries may continue to prefer policies that stifle the emergence of independent programmes and institutions by denying such programmes funds and political support. The very expensive transitional justice programmes like prosecutions, truth and justice and integration commissions, human rights and anti-corruption commissions are most likely going to suffer acute shortages of funds to drive their programmes and activities.

In addition, the Kenyan parliament will continue to play a critical role in the pace, character and direction of the transition. If the dominant political forces gain control of the legislature then it will act as a tool of aborting the transition rather than facilitating the transition. The legislature shall therefore remain a critical force that must be lobbied by the pro-change forces in civil society; the political parties as well as the international community so that the National Assembly supports legislation and policies that consolidate democracy and social justice in Kenya.

In such a complicated democratic transition to democracy, inevitably gender concerns will tend to be pushed to the background while security and stability concerns will be placed on the front banner of the transitional debate. It will therefore take mean lobbying agencies to put gender justice on the top priority list of the considerations and principles that must be considered in the transitional period.

2.3 Efforts and gains made so far towards engendering the reform process

“It is about having the half of humanity participate. The progress of women means the progress of the world” U Joy Ogwu, AMBASSADOR OF NIGERIA TO THE U.N.

In the aftermath of the establishment of the signing of the National Accord in February 28\(^\text{th}\), 2008, certain gains have been made toward reconstruction and institutional renewal. The passage of a new democratic Constitution on August 4\(^\text{th}\), 2010 and its promulgation on the 27\(^\text{th}\) of August 2010 marked a major step towards consolidating the foundation for carrying out the much needed reforms to the institutions of governance in Kenya.
The gains of gender equality in the constitution include:-

1. Article 10(2)(b) on National values and principles of governance include human dignity, equity, social justice, inclusiveness of equality, human rights, non discrimination and protection of the marginalized.

2. Article 12(1) on citizenship provides that every citizen (men and women) are entitled to the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by the constitution. Article 15(1) provides that a person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen. This means that both women and men can pass citizenship to their spouses unlike before when only men could do so.

3. Article 27 on equality and freedom from discrimination provides among other provisions that (1) all are equal before the law, (2) women and men have the right to equal treatment, including the right to equal opportunities in political, economic and cultural spheres. Sub article 4 outlaws discrimination on the basis of sex, pregnancy or marital status. Sub article 6 provides that the state should take legislative measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Most importantly, sub article 8 provides that no more than 2/3 of people in elective and appointive bodies will be of the same gender.

4. Article 43 provides for social and economic rights for all including the right to reproductive health, education and housing. Considering that women are usually identified with poverty because of their economic and cultural status in the society, this provision entitles them the rights which they would otherwise not be entitled to.

5. Article 48 provides for the right to access justice. Women who face discrimination on property ownership, inheritance and employment status can now access courts to seek justice.


7. Article 67 provides for the formation of national land commission whose responsibility is among other things initiating investigations on its own initiative or on a complaint into present or historical land injustices and
recommend appropriate redress. This will be very crucial in highlighting gender discrimination in ownership of property.

8. Article 81(b) on general principles of the electoral systems provides that not more than 2/3 of the members of elective public bodies should be of the same gender.

9. Article 90(2) (b) states that each party list shall contain candidates’ names in alternate of men and women.

10. Article 91(1) (f) provides that all political parties need to respect and promote human rights and fundamental freedoms and gender equality and equity.

11. Articles 97(1) (b) and 98(1) (b) (c) provisions on legislature provides for the special seats for women. Article 100(a) provides that parliament shall enact legislation to promote the representation in parliament for women.

12. Article 175(c) on principles of devolved government provides that no more than two thirds of members of representative bodies in each county government shall be of the same gender. Article 177 (1) (b) further provides that there should be special seats to ensure that no more than two thirds of membership will be of the same gender. Article 197 provides also that members of any county assembly or any county executive committee shall not be of the same gender.

13. On public finance, article 203(1) (i) provides that the following should be taken into consideration while determining the equitable share of resources; there is need for affirmative action in respect of disadvantaged areas and groups.

14. On public service article 232(1)(i) the values and principles of public service should include affordable, adequate and equal opportunities for appointment, training and advancement at all levels of the public service of men and women.
3.0. Transitional Justice and Gender Justice: Conceptual and Contextual Issues

3.1. Understanding transitional justice

Transitional justice generally refers to a range of approaches that states may use to address past human rights violations and includes both judicial and non-judicial approaches. They include a series of actions and policies and their resulting institutions, which may be enacted at a point of political transition from violence and repression to societal stability. Transitional justice is informed by a society’s desire to rebuild social trust, repair a fractured justice system, and build a democratic system of governance.

The core value of transitional justice is the notion of justice; not necessarily criminal justice, but a broad social justice. This notion and the political transformation such as substantive regime change or transition from conflict are thus linked towards a more peaceful, certain and democratic future. In a period of political transition from authoritarian, dictatorial regimes or from civil conflicts to a democracy, transitional justice has often provided opportunities for such societies to address past human rights abuses, mass atrocities, or other forms of severe trauma in order to contribute to a transition into a more democratic or peaceful future.

The formal transitional justice approach emerged in the late 1980s, mainly in response to political changes and demands for justice in Latin America and Eastern Europe. At the time, human rights activists and others wanted to address the systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called “transitions to democracy,” people began calling this new multidisciplinary field “transitional justice.”

The goals of transitional justice include:

• Addressing and attempting to heal divisions in society that arise as a result of human rights violations;
• Bringing closure and healing the wounds of individuals and society, particularly through “truth telling;”
• Providing justice to victims and accountability for perpetrators;
• Creating an accurate historical record for society; restoring the rule of law;
• Reforming institutions to promote democratization and human rights;
• Ensuring that human rights violations are not repeated; and,
• Promoting co-existence and sustainable peace.

Governments in Latin America adopted many of what became the basic approaches to transitional justice. They include the following initiatives:

• Criminal prosecutions. These are judicial investigations of those responsible for human rights violations. Prosecutors frequently emphasize investigations of the “big fish” - suspects considered most responsible for massive or systematic crimes.

• Truth commissions. These commissions of inquiry have the primary purposes of investigating and reporting on key periods of recent past abuse. They are often official state bodies that make recommendations to remedy such as abuse and to prevent its recurrence.

• Reparations programs. These are state-sponsored initiatives that help repair the material and moral damages of past abuse. They typically distribute a mix of material and symbolic benefits to victims, benefits which may include financial compensation and official apologies.

• Gender justice. These efforts challenge impunity for sexual- and gender-based violence and ensure women’s equal access to redress of human rights violations.

• Security system reform. These efforts seek to transform the military, police, judiciary and related state institutions from instruments of repression and corruption to instruments of public service and integrity.

• Memorialization efforts. These include museums and memorials that preserve public memory of the violence and victims and raise moral consciousness about past abuse in order to contribute to the prevention of its recurrence.

While these initiatives are widely understood to form a basis for transitional justice efforts, they do not represent an exclusive list. Many societies have developed other creative approaches to past abuses, one reason why the field has gained both strength and diversity over the years.
3.2. States Obligations under International Human Rights and Constitutional Laws

Transitional Justice is grounded on the government’s obligations to ensure effective remedy to victims under international law. For instance, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) provides that States have obligations to respect, protect and fulfill the rights of victims of violations of human rights and humanitarian law\(^1\). The obligation to respect requires the states parties to refrain from any measures that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. The obligation to protect requires the state to prevent violations of human rights by third parties. Finally the obligation to fulfill requires that states take measures to ensure that people under their jurisdiction can satisfy their basic needs.

Chapter Four of the Constitution of Kenya contains the Bill of Rights. It acknowledges human rights as an integral part of Kenya’s democratic state and the framework for social economic and cultural policies. It also captures the human rights in its entire gamut and provides mechanisms for application, implementation, enforcement and limitation of the Bill of Rights. Some of the rights and fundamental freedoms safeguarded within the current constitution of Kenya include; protection of the right to life, equality and freedom from discrimination, human dignity, freedom and security of the person, slavery servitude and forced labour, freedom of conscience, religion, belief and opinion, freedom of expression among others.

The Constitution provides for limitation of such rights in certain circumstances and in accordance to the law and principles in a democratic society but explicitly states that rights such as freedom from torture and cruel inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial and the right to a habeas corpus are not subject to limitation. Indeed the Constitution states that the high court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of /or threat to a right or fundamental freedom in the bill of rights.

\(^{1}\)It is also recognized in article 8 of the Universal Declaration of Human Rights, article 6 of the International Convention on the Elimination of all forms of Racial Discrimination, article 14 of the Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 39 of the Convention on the Rights Of The child, article 3 of the 1907 Hague Convention concerning the laws and customs of War on Land, article 91 of the protocol I Additional to the Geneva Convention of 12 August 1949 relating to the protection of Victims of International Armed Conflicts (Additional Protocol I), article 75 of the Rome Statute of the International Criminal Court and article 7 of the African Charter on Human and people’s rights.
Moreover, the Constitution of Kenya 2010 (hereinafter referred to as CoK) provides for the national values and principles of governance institutions and other frameworks for dealing with the past injustices and rebuilding the Kenyan state. The values and principles includes patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability and sustainable development.

The key institutions (TJ) proposed for implementation of the CoK includes the National Land Commission, the Independent Electoral and Boundaries Commission, the Legislature/ the Parliamentary Service Commission, the Judiciary and Judicial Service Commission, the Commission on Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission; the Kenya National Human Rights and Equality Commission, the National Police Service Commission, Commission on the Implementation of the Constitution, the Auditor General; the Controller of Budget, Attorney General, the Director General of the National Intelligence Service, Inspector General of the National Police Service among others.

These institutions are also critical in dealing with the past human rights violations and gender injustices in Kenya. For instance, the Kenya National Human Rights and Equality Commission and the Gender Commission inter alia, promote respect for human rights and develop a culture of human rights in the republic; promote gender equality and equity generally and coordinate and facilitate gender mainstreaming in national development. Elsewhere, the National Land Commission will among others investigate and recommend appropriate redress to the present and historical land injustices. Such injustices include gender-based land claims.

In very specific terms, the CoK has provided a number of avenues to address the historical and structural injustices that women face in Kenya. It provides a number of key gains for Kenyan women with regards to addressing discrimination and inequality. The Constitution provides that:

15 Article 248(a) of CoK
16 Article 248(b) CoK
• Women and men have equal opportunities without discrimination.\textsuperscript{17}
• Kenyan women should be enabled to pass on citizenship to their children regardless of whether or not they are married to Kenyans.\textsuperscript{18}
• Right to health should be accorded including reproductive health to women\textsuperscript{19}.
• Provide for equal rights in marriage.\textsuperscript{20}
• Assures the women that parental responsibility shall be shared between parents regardless of marital status.\textsuperscript{21}
• Eliminates gender discrimination in relation to land and property and gives the women right to inheritance and equitable access to land.\textsuperscript{22}
• Maintains a one third requirement for either gender in elective bodies giving women of Kenya at least 1/3 minimum in elective bodies.\textsuperscript{23}

3.3 Importance of incorporating Gender in transitional justice\textsuperscript{24}

The following have been identified as the major gaps in gender and TJ processes both in Kenya and other parts of the world:

• Focusing almost exclusively on women and the girl-child and not exploring the broader notion of gender and how these are constructed by society and affect men and boy’s identities as well;
• Restricting the discussion around women on experiences of sexual violence often at the expense of other injustices such as economic and social violence or injustices;
• Focus on sexual majorities and ignoring the gender concerns of sexual minorities;
• Tendency to tackle gender issues in terms of “victimhood” thus forgetting the role of women as active citizens including the thought that women can be in the role of perpetrators;
• Lack of a progressive gender discourse or framework which can be incorporated or benchmarked within the different transitional justice processes.

\textsuperscript{17} Article 27 (3)
\textsuperscript{18} Article 14(1)
\textsuperscript{19} Article 43 (1) (a)
\textsuperscript{20} Article  45(3)
\textsuperscript{21} Article 53 (1)( e)
\textsuperscript{22} Article 60 (1) ( f)
\textsuperscript{23} Article 81(b)
Moreover, a number of fundamental questions have been asked in assessing whether TJ fully attends to gender-based injustices and whether they wholly address realities in Kenya and Africa. Thus;

- Should we focus on *transitional justice* or *justice in transition* due to the failed transformations?
- Whose truth and justice -for victims or perpetrators, or both and from which gender?
- How does TJ relate and impact to the local gender needs/concerns?
- How does TJ mechanisms increase women’s access to justice or do they reinforce stereo types?
- Do TJ mechanisms address issues of women’s roles and vulnerabilities during the conflict/ political repression and post conflict/ political repression situations?
- How can we re-conceptualize TJ mechanisms and processes and integrate a gender-sensitive perspective in the society?

In responding to these gaps and questions is the need to adopt the concept and process of gender justice as the framework for analysis and engagement in transitional justice. It is therefore important to understand the concepts of gender; gender justice and their relevance to transitional justice mechanisms.

What then is gender? *Gender* refers to the socially constructed roles played by women and men that are ascribed to them on the basis of their sex. These roles are usually specific to a given area and time that is; since gender roles are contingent on the social and economic context, they can vary according to the specific context and can change over time. In terms of the use of language, the word ‘sex’ is used to refer to physical and biological characteristics of women and men while gender is used to refer to the explanations for observed differences between women and men based on socially assigned roles.25

Concerning *gender justice*, Anne Marie among other gender scholars argue that the term is being employed increasingly by activists and academics who are concerned that terms like ‘gender equality’, or ‘gender mainstreaming’ are failing to give a strong sense of, or adequately address, the ongoing gender-based injustices from which women suffer. She also notes that, in the context of cultural variety in perceptions of what is right and fair in gender relations, it is somehow difficult to pin down a definition

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of gender justice. However, she provides a feminist definition of gender justice as the emancipator of projects that advance women’s rights through legal change or promote women’s interests in social and economic policy.26

Other scholars and sources define gender justice as 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.27

It has been generally agreed that incorporating gender in transitional justice mechanisms is not only beneficial but essential in ensuring a successful transition as clearly enumerated in the 2006 World Bank Report on Gender, Justice and Truth Commissions that states “Recognizing the differences between women’s and men’s experience during the immediate post-conflict or transitional period, and consequently including the particular needs and abilities of women and men in post-conflict reconstruction, is fundamental in creating lasting peace and fostering equitable development.”28

Women’s participation in all spheres of decision-making and policy formulation is both a form of justice and redress and a necessary element of real democratization. No policy process or institution can be credible if it fails to incorporate the participation of a majority of the population; and this applies to forums which determine and implement transitional justice policies. Moreover, marginalization and exclusion are often at the heart of the conflict being addressed. Transitional justice mechanisms are intended to address both these causes as well as contribute to the creation of a new society. Creating mechanisms which incorporate the voices of women and women’s experiences begins to address old patterns of exclusion and actively lays down new patterns of engagement for the state. By doing so, it contributes to democratization in valuing equal participation in the public sphere as well as vertical reconciliation as trust is built between previously marginalized populations and state institutions. Beyond being an important end goal in itself, gender balance in all arenas of policy and implementation is a factor in sound policy formulation and implementation as it brings to the table an increased range of

26 ANNE MARIE GOETZ, “Gender Justice, Citizenship and Entitlements Core Concepts, Central Debates and New Directions for Research” in Maitrayee Mukhopadhyay and Navsharan Singh (eds), Gender Justice, Citizenship and Development (Zubaan/ Kali for Women and International Development Research Centre; New Delhi, 2007).
Despite recognition of the need for gender balance in all policy processes concerned with dealing with the legacy of past crimes, actual progress towards this objective has been inconsistent. A United Nations Development Fund for Women (UNIFEM) study on Security Council Resolution 1325 (Women, Peace and Security) notes that rarely have women been ‘consulted about the form, scope and modalities for seeking accountability. Women’s stake in these processes have been minimized or denied and in most cases, crimes against them go unrecorded.’

Kenya has acknowledged the disproportionate effects of war and conflict on women as well as the influence women can and must have in prevention and resolution of conflict and in peace and reconstruction processes by recognizing women’s role in elective posts and government appointments. Kenya also recognizes international law instruments as entrenched in the Kenya Constitution.

Incorporation of gendered analysis in research will give a more accurate picture when establishing TJ mechanisms as well as contribute to a more complete evaluation of these mechanisms and policies.

Gender perspectives shed light on factors and issues that usually have major implications on all aspects of the work being undertaken, from the substance of the conflict to the processes developed. By taking a gender-sensitive approach to its work, a truth commission can, for example, differentiate between the causes and consequences of human rights violations for men and women and design a gender-sensitive program of reparations.

Incorporation of gender justice into accountability mechanisms requires a series of interventions that include: acknowledging and seeking justice for women’s experiences of sexual violence during conflict; removing gendered bias in the selection of women’s violations to be investigated; securing increased representation of women in arenas of...
policy making and decision making in the transitional justice mechanisms themselves.\textsuperscript{34} It also requires the redress of specific violations to progress toward sustainable peace and transformative justice.

The gender lens can also shed new light on the experience of male victims and on men’s experiences more widely. The trauma that men experience when violated and the social pressures that induce them to withhold emotions can cause tremendous emotional damage. This broadening of the scope of the “whole truth” has serious implications for the recommendations that will emerge from TJRC, particularly with regard to reparations. For instance, during the post electoral violence where systemic abuse of women and girls in the form of rape occurred, requires the TJRC to take account not only of the needs of the direct victims (the mothers), but also of the indirect victims (their rape babies). Recovery and long-term development programs must provide for these victims to enable them to live in dignity, free of discrimination. If they do not, the omission will contribute to the emergence of yet another generation of marginalized youth. Victims of physical attack—men, women, boys, and girls—who are now maimed for life need justice in the form of health care, welfare payments, and opportunities to gain education and skills to allow them to move beyond their victimhood towards dignity and self-sufficiency.\textsuperscript{35}

It is generally accepted that because of gendered power relations, it is women who pay the disproportionate cost of war.\textsuperscript{36} This is not to further entrench the stereotype of women’s identities in conflict as that of the ‘perpetual victim’ – powerless and acted upon - but rather to acknowledge that women’s experiences of both conflicts as well as transitions differ because of power relations and that these experiences and accompanying needs for justice have largely been ignored.\textsuperscript{37}

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\textsuperscript{34} Nahla Valji, Gender Justice and Reconciliation, Occasional Paper, Friedrich Ebert Stifung Nov 2007
\textsuperscript{35} Towards integrating gender in the transitional justice process in Kenya. Research report for the Federation of Women Lawyers in Kenya
\textsuperscript{36} ‘...women and girls suffer predominantly or exclusively from specific types of harm during armed conflict both because they are female [and] while entire communities suffer the consequences of armed conflict, women and girls are particularly affected because of their status in society as well as their sex.’ UN Beijing Platform For Action, Para 131 in Corey Levine, Gender and Transitional Justice – a case study of East Timor (Canadian Consortium on Human Security, September 2004). See also, Maria Stern and Malin Nystrand, Gender and Armed Conflict, (SIDA, April 2006).
\textsuperscript{37} Reflecting on the tension between painting women as uniformly ‘victims’ and yet highlighting the real impact of conflict, Rehn and Johnson-Sirleaf write: ‘[I] have grappled with the dilemma of describing the atrocities experienced by women in war in a way that will not [only] ascribe to women the characteristics of passivity and helplessness. Women are everything but that. But as with all groups facing discrimination, violence and marginalization, the causes and consequences of their victimization must be addressed. If not, how will preventive measures ever focus on women? How will the resources and means to protect women be put in place? How will the UN system, governments and NGOs be mobilized to support women? [It is important to keep writing about the ways women experience conflict as marginalized because] so far, not enough has been done.’ Elisabeth Rehn and Ellen Johnson Sirleaf, Women, War and Peace – The Independent Expert’s Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-Building (UNIFEM, 2002), 2.
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3.4 Key Variables and Considerations for Mainstreaming Gender in TJ

The following are the key variables or indicators in ensuring a gender-sensitive strategy or framework of engaging with the existing transitional justice mechanisms:

- Acknowledging and seeking justice for wo/men’s experiences of gender-based injustices both historical and contemporary violations by applying the requisite TJ mechanisms;
- Ensuring effective and equal representation of wo/men in order to secure gender balance in the arenas of decision-making at all levels in the society;
- Initiating special measures to deal with specific injustices or violations to women or men;
- Integrating gender indicators within the different human rights violations and TJ mechanisms established to resolve them.

This also requires the following considerations:

i. **Learning lessons from other fields.**

Lessons learnt from policies and practices in other fields that are aimed at mainstreaming gender issues should be assessed for their application and use in the field of transitional justice. For example, reparations policies in the past have failed to take into consideration the gendered hierarchies of individual families and the implications for how resources are provided, who benefits and what impact these programs have.

ii. **Use of existing resources.**

In planning transitional justice mechanisms, policy makers should draw upon and make use of relevant existing information which would allow them to understand the overall context with regards to gender relations. For example, the *Gender Empowerment Measure* (GEM) used by the United Nations Development Programme (UNDP) measures the relative empowerment of men and women and examines whether women and men are able to participate in economic and political life and take part in decision-making. Such information is vital to creating policy which is applicable to the context.

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38 For more information, see Nahla Valji, ibid.

39 “Gender Justice in Transitional Justice” in KHRC, ICJ-Kenya and ICPC, Toolkit... ibid, pp. 105-106.
iii. *Increased representation of women.*

There is need for a balanced representation of both men and women in all the institutions that will be responsible for implementing the various transitional justice mechanisms. This will greatly assist the movement towards mainstreaming gender concerns throughout the process.

iv. *Support for local women’s organizations.*

Intervention, funding and technical support should be provided to women operating at a grass-roots level to bridge the post-conflict divide and forge reconciliation based on shared needs and concrete projects.

v. *The role of local mechanisms.*

Local or traditional rituals can play a strong and positive role in community reintegration of victims and combatants as well as for healing and reconciliation as they are likely to resonate with the local population. However there should be caution in adopting this approach as some of these practices may perpetuate inequality or undermine the rights of women and girls – such as the practice in some communities of exchanging girls of marriageable age as ‘compensation’ for a life taken or a crime committed.

vi. *Sustained and long term funding for a range of initiatives.*

Psycho-social support for example requires long term investment and is not a one off event. Dealing with trauma is integral to halting the cycle of violence and implementing sustainable reconciliation, but victims of gender based violence in particular may not be ready to access psycho-social assistance until there has been some space and time from the actual conflict and until immediate issues of security are addressed.

vii. *Underscore the gender perspectives of men and women both as victims, perpetrators and duty-bearers in transitional justice mechanisms.*

The traditional alternative dispute mechanisms may be utilised. However caution must be applied and strict guidelines adhered to guard against discriminatory practices against women. Customs and traditions have been the strongest factors in discrimination against women. This mechanism must therefore adopt a participatory bottom up approach.
The victims and perpetrators ought to be brought before third parties who will aid the reconciliation process as was done with the Gacaca traditional courts in Rwanda. This should be engendered for a progressive healing. The persons presiding must be alive to prevailing gender situations and the contexts within which the violations occurred to avoid re-victimising victims by subjecting them to a process that is blind to gender considerations. Consequently the government of the day will have to invest heavily on awareness and capacity building on gender justice.
4.0. Policy Options For Engendering Transitional Justice In Kenya

“critical to achieving gender justice is the participation of women’s rights groups and victims in shaping and implementing T.J policies” Carla Koppel and Jonathan Talbot in Strengthening Colombia’s transitional justice process.

Gender justice can be greatly served when incorporated into accountability mechanisms and transitional justice processes especially in a country such as Kenya which is carrying out a broad debate and sustained reform initiatives since the signing of the National Accord and the formation of the Grand Coalition Government. It will be important for Policy makers and all stakeholders therefore to undertake and/or lobby for the following actions;

4.1 Engendering the Implementation of the constitution

• Ensure that all institutions to be formed under the new constitutional dispensation are gender sensitive at the stages of formation, recruitment, and operationalization. This should also be the same in the allocation of resources to the operations of these institutions.

• Ensure the realization of gender equality under the new Constitutional dispensation which offers a platform for extensive reforms in the security sector, judiciary, public service, governance and electoral systems.

• The New county level promises to offer a new space for the greater participation of women and men in governance and policy making. Gender equity and gender sensitive management of public affairs ought to be a key feature at this new governance platform.

• Ensure that the Judiciary under the new constitutional dispensation offers a platform for gender sensitive operations to acknowledge the unique needs and conditions of men and women are appreciated in the access to justice.

• Encourage the use of Public interest litigation to ensure that the courts are utilized to not only for free access to justice but also to challenge the structures of dominations and to deter recurrence of discriminations that are gender based.
• Devolved funds and the budget in the new Kenya should be gender sensitive and must be invested in the most vulnerable members of our nation - the poor. The unique problems of men and women in poverty must be appreciated by public officials in the making of policy to respond to the needs of the people.
• Political parties are one gender skewed and that will need to be addressed in accordance to the Constitution which provides for gender equity in political parties. With the provision of gender equality, there is greater influence to adopt manifestos that promote gender equality.
• Kenya National Human Rights and Equality Commission have a greater role to play to challenge discriminatory structures from a gender perspective. One of its crucial roles as provided for in Article 59(b) of the constitution is: 
  “To promote gender equality and equity generally and coordinate and facilitate gender mainstreaming in national development.”
• The National land commission has a great role to play to ensure equal and proper distribution of land to all. Women make 80% of casual labourers in the agricultural sector while only 20% own land.
• The public service and the technocrats should implement gender policies to promote gender justice.
• The government, the cabinet and other government institutions should not only be composed of individuals who have been vetted for integrity but should reflect gender balance and infused with officials who have a known commitment to promote gender justice. At this point it is good to note that the mere inclusion of females does not mean achievement of gender balance. It means having people who are committed to gender justice.
• Parliament as a critical body that represents the nation and makes laws ought to reflect the interests and people of Kenya in its composition and in the laws it passes. The new Constitution should be implemented in letter and spirit to ensure that parliament and indeed all elective bodies reflect gender balance.
• Regional and international/intergovernmental bodies should ensure that the laws and practices that guide their operations and policy frameworks are gender sensitive.

40 Article 91(f)
41 F.A.O 1994 women, agriculture and rural development. A synthesis report of Africa region held in ROME.
4.2 Gender and social economic empowerment

“My dream is that gaps in gender equality close, that women can have equal opportunities to contribute to economic and social development.” Maria Dolores Almeida, Deputy Minister of Finance, Ecuador

Most women are not socially and economically empowered. Failure to pay closer attention to differentiated positions of women and men in the society inform of accessibility to opportunities and resources when formulating policies and designing projects can have adverse impact on development outcomes. There is a link between opportunities offered to women and the reason why majority are poor. Thus the inclusions of Millennium Development Goal number three (MDG 3) on gender equality is essential to ensure development.

The reason why women are not as empowered socially and economically is due to existing cultural and customary barriers that prevent them from gainful employment, ownership of property and access to social amenities such as education and right to health. Others include wide discrepancies between men and women on issues of unemployment, educational opportunities and access to credit facilities and resources to build themselves economically. Due to this and existing discriminatory marriage and property laws, women are subjected to poverty such that they have become the face of poverty.

The new Constitution apart from providing for equality also provides for social and economic rights. Article 43 is very clear on provision of the right to health including reproductive health, education, food, adequate housing, water and social security. These rights however can only materialize if government is committed to providing them. There is need for women organizations and civil societies to push for the implementation of these rights.

There is also a need to acknowledge that certain things are looked at in order to enhance social and economic empowerment of women. Such are:-

1. Equal access to employment with equal payment for job done
2. Laws that protect women in marriage to ensure that they have access to matrimonial property.

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42 Yeshiareg Dejene: Promoting women economic empowerment.
3. Access to resources such as land and credit facilities to guarantee economic power.
4. Provision of adequate social facilities including quality education, access to vocational training facilities, quality health and reproductive health facilities.
5. Provision of money in the budget for gender empowerment programs.
6. Reengineering the economic policy to respond to gender aspects.

4.3 Gender and regional instruments for gender justice and Human rights

“It is tragic that it has taken graphic images of women raped in DR Congo and young girls with acid thrown in the faces in Afghanistan for daring to return to school to shame our collective conscience” Donald Steinberg, Author of Women and War; Power and Protection.

Kenya is part of the international community. As such it participates in creation and implementation of international laws and treaties which it is also bound by its obligations to the international community to observe. The international community and the African Union have adopted numerous treaties that seek to promote Gender Justice. These treaties include:-

- Universal declaration of human rights 1948
- Convention on the political rights of women 1954
- International covenant on civil and political rights 1966
- International covenant on Economic, Social and cultural rights 1966
- Convention on elimination of all forms of discrimination against women 1981
- Declaration on elimination of violence against women 1993
- Universal declaration on Democracy 1997
- African charter on human and people’s rights 1986
- Protocol to the African charter on human and people’s rights on the rights of women in Africa 2005
- African charter on human and people’s rights on the rights of women in Africa 2002

Kenya is a signatory to seven of these treaties43 which under the new Constitution have become part of our laws. These treaties provide for among other things the right to

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43 Universal declaration of human rights, international covenant of civil and political rights, international covenant of economic, social and cultural rights, convention on elimination of all forms of discrimination against women, African charter on people and human rights, African charter on people and human rights on the rights of women in Africa.
vote, to health, to education, to hold public office et al. It is imperative that Kenya as a member of the International Community adopts and implements the provisions of these treaties. It is also important that the International Community under the United Nations monitors state implementation of these treaties as well as seeking for their implementation simultaneously.

These treaties also carry a very important role of being used as a benchmark to monitor the entrenchment of gender equality in Kenya.

Recently, the international Community, being aware of the cost of failure to protect women in conflict situation has passed two key resolutions meant to involve women in post conflict rebuilding and to protect women from sexual violence. These are the United Nations Security council resolutions 1325 and 1820 respectively. While the world has quickly adopted resolution 1820 and pushed for its implementation, with the growth of jurisprudence in sexual crimes under international law, Resolution 1325 seems to be lagging behind. This is unfortunate considering that women in sub-Saharan region will be great beneficiaries of this resolution. In his book on women and war: power and protection, Donald Steinberg proposes the following action plan for the implementation of Resolution 1325 which is essential for international policymakers to have in mind:—

1. The need to build political will among state parties for the support of its implementation.
2. The need for key players in post conflict situations to ensure women and gender experts are brought at the negotiating table of peace processes.
3. The need for donors contributing to rebuilding of post conflict situations to prioritize issues of importance to women including girl education, reproductive health care and security of women.
4. The need to empower the office of the United Nations spearheading the implementation of resolution 1325 with resources and global reach to make a difference.
5. The need for donor agencies to expand their assistance to private women groups in affected countries. Women must have the institutional strength to influence local and global decisions that impact their lives.
6. The need to ensure there are time bound goals that are backed by monitoring, accountability and enforcement mechanisms to reduce violence against women, ensure participation of women in the peace process and provide reconstruction resources.
7. The need for the humanitarian community to strive to protect the most vulnerable groups in conflict areas. For example, women and girls in internally displaced camps.

4.4 Gender imperatives in criminal accountability processes

“It was either the second or the third man who said that he was not able to get into me properly so they cut me. I think it was the panga they were carrying that they used”. They cut my vagina - A witness appearing before the Commission of inquiry into post election violence; 2008.

Women and men are usually causalities in conflicts or environments of repressive rules. When this happens they become victims of war crimes, genocide and crimes against humanity. They also suffer sexual and gender based violence which not only goes unreported but causes a lot of psychological damage.

During the post election violence it was reported that many people suffered sexual violence and mutilations. It is also reported that only 30% of those who had been considered to have suffered gender and sexual based violence came forward to testify before the commission of inquiry into the post election violence\(^44\). It is important to note that women and men do not only suffer sexual and gender based violence but also other forms of bodily harms which are covered in our domestic as well as international laws\(^45\). Women bear the greatest brunt and burden of violent conflicts\(^46\) and it is sad to note that even though this is the case, the issue is always trivialized and much consideration is not given to obtaining justice for them.

This section is going to deal with sexual and gender based violence specifically as this is one of the crimes that is still new even though having serious negative effects on victims. It is also underreported because of not only the stigma it carries but also by the fact that many people fail to link it to conflict patterns.

4.4.1. Prosecutions of gender based violence

Prosecutions form one of the central elements of an integrated transitional justice strategy aimed at moving a society beyond impunity and a legacy for human rights abuse\(^47\).

\(^44\) Report of the commission of inquiry into the post election violence 2008
\(^45\) Torture, assault, arbitrary imprisonment, covered in the Kenyan penal code and most international instruments that deal with international criminal law and human rights have outlawed crimes of torture, murder, intentionally causing bodily harm.
\(^46\) Women facing war: ICRC study on impact of armed conflict on women
\(^47\) Rule of Law; Tools for post conflict states: prosecution initiatives’ office of the united nations High commission for human rights 2006.
Prosecution of SGBV in international law surfaced in the 1990s after much lobbying and activism by women rights advocates and civil organizations\textsuperscript{48}. Now the description of SGBV has moved to diverse forms of description which include mass rapes, enforced prostitution, sexual enslavement, forced pregnancies, enforced sterilization and sexual mutilation\textsuperscript{49}. SGBV was ignored in Nuremburg and Tokyo tribunals\textsuperscript{50} but picked up with the establishment of two ad hoc tribunals in the 1990s namely the International Criminal Tribunal of former Yugoslavia and International Criminal Tribunal of Rwanda. These ad hoc tribunals formed the basis for the codification of these crimes in the Rome statute\textsuperscript{51}. They have also developed a wealth of jurisprudence conceptualizing SGBV.

SGBV can now be prosecuted under International law as constituting crimes against humanity\textsuperscript{52}, war crimes\textsuperscript{53} and the crimes of genocide\textsuperscript{54}. In addition to this, the Rome statute has expanded the crimes that can fall under the SGBV category to include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence. The Office of the prosecutor of the International Criminal Court has established a gender crimes unit which investigates gender crimes in any situation before the court as well as training of investigators on how to handle gender and sexual based crimes.

Other international developments that have contributed to the growth of SGBV as an international crime include:-

- The landmark case of Prosecutor vs jean Paul Akeyesu ICTR -96-4-T. The ICTR held that rape and sexual violence may constitute genocide in the same way as any other act as long as they were committed with specific intent to destroy a particular group\textsuperscript{55}.
- The special court for Sierra Leone 2002 – led to a number of landmark legal developments in the advancement of gender justice: recognized gender crimes in definition of crimes against humanity and widened interpretation to include sexual slavery and forced marriages. The court also made ground-breaking

\textsuperscript{48} Japheth Biegon: Transitional justice and accountability for sexual and gender based violence in Kenya; issues and approaches
\textsuperscript{49} Article 7(g) of the Rome statute.
\textsuperscript{50} These were tribunals set up to prosecute war criminals in Germany and Japan after the Second World War. Sexual and gender based violence was ignored despite the fact that, women were massively sexually abused during the two wars.
\textsuperscript{51} Japheth Biegon; Transitional justice and accountability for sexual and gender based violence in Kenya; issues and approaches.
\textsuperscript{52} Article 7(g) Rome statute
\textsuperscript{53} Article 8(2)(b)(xxii) Rome statute
\textsuperscript{54} Article 6 Rome statute.
\textsuperscript{55} Akeyesu case ICTR 96-4-T paragraph 731.
decision to pay and arrange for access to health facilities to perform procedures such as fistula repair for women who were to testify before the Court\textsuperscript{56}.


Domestically, sexual and gender based violence is covered by the penal code cap 63 of the laws of Kenya and the sexual offence act of 2006. However, the implementation of the acts is not fully achieved because of challenges in the justice system. These include lack of forensic equipment to investigate rape, a highly comprised criminal justice system and lack of gender friendly staff. It is thus important that the following is put into consideration by the policy makers:-

4.4.2. Judicial Mechanisms

To achieve progressive judicial roles in enhancing gender justice in Kenya there should be;

- Judicial officers with knowledge and expertise in gender related issues.
- Increased capacity of the judiciary to carry out its functions of administration of justice
- The judiciary is run by ethical and gender sensitive personnel
- There is increased participation of women in criminal proceedings as judges and advocates to ensure that women concerns and needs in the justice system are enhanced.
- Recruitment and retention of personnel that is gender sensitive
- Facilities where victims of gender based violence can comfortably testify while taking care of their physical, psychological well being, dignity and privacy of SGBV.

4.4.3. The Security Sector

- The police should treat victims of such crimes with sensitivity and promptly due to the nature of the crimes and the trauma associated with it.
- There is need to have expertise in investigation of such crimes.
- There is urgency to have prosecutors trained on SGBV so that they can take on such cases with the seriousness they deserve.
- The existence of a powerful witness protection system.

There is need for gender activists and civil societies working on gender issues to do a lot of public outreach leading to victims in availing themselves and have those cases prosecuted.

\textsuperscript{56} Presentation on the role of Gender in Transitional Justice by Christine Alai – ICTJ in October 2010
4.5. Gender and Truth Commissions

“Too often when we do not undertake specific actions to draw attention to the issues that affect women, what happens is that men and the experiences of men become the yardstick by which judgments’ are made” Cheryl de la Rey
South African TRC women’s hearings final report.

Truth Commissions present an opportunity to document patterns of gender-based violations of human rights and their enabling conditions, create a record of a past era abuse and propose gender sensitive recommendations that will challenge structures which promote marginalization and inequality. They have the valuable potential for transforming gender relations in post conflict societies.

Truth commissions can provide an extra ordinary window of opportunity to highlight neglected abuses, research the enabling conditions of gendered violations, provide a forum for victims and survivors, recommend reparations that redress injustices and leave a long term legacy that is responsive to women’s history and quest for reforms57

Effective Truth commissions should ensure that over and above meeting international standards for independent and competent Truth commissions they should endeavor to fulfill the following gender benchmarks as indicated by Vasuki Nesiah in Truth commissions and Gender: Principles, policies and procedures.

1. Definition of Mandate; during this crucial step of defining its mandate it’s important to hold an open consultative process that pays attention to the marginalized groups.

2. Definition of human rights violations; even though sexual and gender based violence are as essential and critical to gender based violations, they provide a too narrow Lens to women experiences as they are not the only violations that women suffer from. Women undergo complex and multidimensional experiences as a result of structural and cultural inequalities; in addition, they may have participated in liberation movement thus becoming victims of torture, arbitrary arrest and imprisonment among other violations. A wider definition of engendered human rights violations is recommended to encompass the multidimensional violations.

3. Appointment and recruitment; it does not necessarily mean that if we have a commission with equal number of men and women, it will automatically

57 Vasuki Nesiah Truth commissions and Gender; Principles, policies and procedures
result to having a commission that will entrench gender issues in its mandate. It is essential that the staff and commissioners of the truth commission have positive perception towards gender issues and understand the importance of probing them. While this can be achieved through training, there is also need to have women commissioners and staff as they give supportive and affirming environment for women victims.

4. **Consultations and dialogue with women groups, feminist academics and activists in defining and implementing the commissions mandate**; these are people who have keenly followed the oppressive regime/ conflict impact on women and they can provide valuable advice, information as well as mobilizing women victims. They also play an important role of monitoring the work of the commission.

5. **Involvement of media**; involving media that is well versed with the role of truth commissions can influence how the commission is perceived in the broader community. Through their role to disseminate information they can encourage women victims to understand the importance of participating in the process.

6. **Statement taking**; this is a process which forms the backbone of any truth process because it is from the statements that window cases which will be investigated are selected from. At this stage, statement takers need to be well trained on gender dimension of statement taking. It’s also important that they be people whom victims feel comfortable talking to. This is the only way they will be able to get qualitative statements.

7. **Investigation**; Investigators in truth commissions need to look at the injury more broadly and enquire into a range of factors that have impacted the crime including the legal and ideological enabling conditions. Since truth commissions are usually engaging in evidentiary requirements that are more victim friendly and are not subjected to standards of prosecutions, they are in a position to tell a larger story which will contribute positively to the quest for reforms.

8. **Research**; this is critical as it provides in depth information of enabling conditions of engendered human rights.

9. **Thematic and individual hearings**; this enables broader public discussions on the structural conditions of conflicts/ repressive eras as well as key dimensions of violations. Through this there is a more understanding of women’s role.
10. **Report writing;** this is critical as it extends the commissions work into the future through influencing policy change resulting from recommendations. This is crucial if the impact of the truth commission is expected to change existing structures that propel engendered violations. Thus, the way in which women enter this narrative can be critical to how their experiences will impact future generations.

11. **Reparations;** while constructing the reparation policy of any truth commission, it is essential to put into considerations that both genders experience violations differently. Women are usually victims of rape, torture, forced pregnancies among other violations that would specially affect them. Some women victims may come from communities where they have no rights to own money, property, or inherit thus the need to take in cultural and social factors into considerations.

- **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. Many victims feel comfortable dealing with people of the same gender, and thus able to tell their story.

- **Victim and witness protection;** it is important to ensure 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;** capacity building of the personnel on interviewing technique is crucial especially when dealing with victims of Sexual and gender based violence. This is because of the stigma attached to the crimes.

4.6. **Gender and Electoral processes and elections**

> *“If a boy can be president, a girl can be president”* Gabriel Pierre, Haiti

The right to vote, run for public office and participate in elections has been entrenched in the Constitution. However, in Kenya due to cultural obstacles, women especially in the rural areas do not get a chance to freely vote and run for elective offices. Kenyan politics is usually marred with violence, bribery, intimidation, clan and ethnic polarizations and tensions and the pervasive use of abusive, humiliating and demeaning actions and language aimed at discouraging women from participating. Thus there is need to ensure;
GENDER AND TRANSITIONAL JUSTICE IN KENYA

- A gender sensitive electoral system, process and administration that deals with the needs and challenges of all citizens in the electoral process.
- An engendered Administration should consider the issues of voter registration, voter turnout, voter education, election financing and monitoring of the application of finances in campaigns et al all are pillars of ensuring that both women and men participate effectively in free and fair elections on an equal platform.
- Electoral system: an electoral system that guarantees just representation of both men and women is important to ensure that the interests of citizens from all regions and genders are materialized in the governments and legislative assemblies that emerge from those elections.
- Electoral environment should deal with the gender perspectives of how electoral violence is organized, and how political, economic and other social dimensions affect voter patterns and electoral outcomes. A conducive electoral environment is necessary to ensure that both men and women participate fully in electing a government and representative of their choice.
- Dealing with Structural problems associated with lack of adequate participation of Kenyans from a gender perspective demands that the government, political parties and Civil society organizations carry out continuous gender audits to ensure that political party financing is based on a gender criteria.
- In the making of the new elections laws in Kenya, the imperative of gender equality and the specific place of women in political parties should be given significant elaboration.
- The government must now specifically outline what law enforcement measures it shall take to ensure that electoral violence that disproportionately targets women candidates and supporters is punished in order to guarantee an equal platform for women and men to participate in the exercise of forming government and elected representatives of the people.
- Massive voter and civic education on the special seats for women provided for in the Constitution should be undertaken.

4.7. Reparations as an opportunity for advancing gender justice

“Reparations play an important role for the victims and are one of the few efforts undertaken directly on their behalf” Juan E Mendez

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. Reparation is a right and has become increasingly acknowledged with the realization that transitional scenarios not only need to do something to the perpetrators but something for the victims.

To achieve engendered reparation policies; it is important to consider the following:

1. It is important to identify special reparation needs of women. When dealing with sexual and gender-based violence, adoption of a broad definition to include crimes in addition to the traditional rape is essential for example forced pregnancies, forced abortions, forced sterilization, genital and breast mutilations.

2. It is important to realize that women suffer other violations apart from sexual violence. They include forced labour, torture and arbitrary imprisonment among others. Thus reparation policies should consider such victims.

3. Most reparation policies are as a result of judicial decisions that deal with case to case basis or administrative policies that establish a reparation program. An administrative policy is favourable to women especially those who are victims of sexual and gender-based violence because judicial processes are associated with litigation procedures especially aggressive cross examinations. However, they are also not easily accessible to women because of expenses and literacy levels. It is encouraged that an administrative process is ideal because it simplifies processes and spares such victims of cross examinations and rigours of litigation.

4. Limiting the time when reparation applications should be delivered shuts out many victims because they are not willing to access any institution after suffering violations. It is therefore essential to leave the process open for a longer period.

5. It is important to involve victims, victim groups and women groups in formulation of a proper design for the establishment of a program as they provide valuable information and ideas.

6. Reparation programs should not conform to or contribute to the entrenchment of existing patterns of legal and cultural inequalities like employment, ownership of property and culture. This is because women will always be at a disadvantaged position as a result of the existing structures classifying them as second citizens to men.

58 Adopted and Proclaimed by General Assembly Resolution 60/147, 16 December 2005.
7. It should be noted that women suffer secondary harm meaning that they are the widowed and/or left to become breadwinners of their families. A reparation initiative that does not go beyond the primary victim and incorporate both the social tissue and the relationship disrupted by violations especially in family context is not ideal.  

8. Group and symbolic reparations are also ideal and should be included in such a policy. They represent building of schools, hospitals, apologies from government among other things.  

9. Reparations should be used to transform settled practices and norms which are part of pre-existing gender hierarchies.  

10. A broad definition of victims is encouraged to ensure comprehensiveness.

### 4.8 Gender and Memorialization

“Memorials are in this way, mechanisms for transitional justice that address the legacies of the past. They call to attention the injustices, publicly acknowledge individuals and groups, victims and survivors who have suffered” Louis Bickford.

The act of offering a true account of what happened through the stories of the victims of repression and violations is a key part of putting in place a story call to the end of the violations and violence even in times of peace. This is the exquisiteness of memorialization in transitional justice. Specifically, women should actively participate in the memorialization process so that their stories are adequately represented.

As Kenya searches deep into her conscience to come to terms to what befell the nation in the post-election violence dark moment, it is important that a national framework is constructed where women and women organizations shall be encouraged to source the various stories of past atrocities against women. A memorial or memorials at various levels should be supported so that they can be of great impact to ensure that these stories pierce the conscience of the nation.

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60 Ruth Rubio-Marin and Pablo de Greiff: Women and reparations  
61 Outlined in the *Transitional Justice In Kenya Tool Kit For Training And Engagement*
5.0. Gender Justice Framework in Kenya’s Transitional Justice Mechanisms

5.1. Truth, Justice and Reconciliation Commission (TJRC)

Truth commissions are defined as official, temporary, non-judicial, fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law usually committed over a period of time. Their mandate covers relatively short periods of time for statement taking, investigations, research and public hearings before completing their work with a final public report. For such Commissions to be effective, they must be led by personnel which has integrity and credibility; its formation must be legitimate and consultative; its mandate must be adequate and victims-centred; and its operations and funding sources independent and autonomous\(^{62}\).

The Kenya’s TJRC which is based on the 2008 Act\(^ {63}\) following the post-election violence has a mandate to promote peace, justice, national unity, healing and reconciliation among Kenyans by establishing the truth and proposing recommendations around such issues as gross human rights violations, crimes of sexual nature, economic crimes, economic marginalization, historical land injustices, civil strife among others.

5.1.1 Gender implications and indicators for engagements with the TJRC

Nesiah et al (2006) in analyzing Gender and truth commissions begin by defining whether truth has a gender. The following are the key gender justice issues and indicators for engagements with the TJRC in Kenya:

- How the Commission defines gender mandate and gender based injustices

First, within the TJRC Act 2008, gender based injustices are accorded the broad *human rights dimensions* under international laws. For instance, *Crimes Against Humanity*

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meaning any of the following acts; murder, enslavement, extermination, deportation, or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, enforced disappearance of persons among other human acts of a similar character intentionally causing great suffering or serious injury to the body or to mental or physical health. Moreover, ‘Gross human rights violations’ meaning violations of fundamental human rights, that is torture, killing, abduction and severe ill-treatment of any person; imprisonment or other severe deprivation of physical liberty, rape, any form of sexual violence, enforced disappearance of persons and persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender among other grounds impresmissible under the international law.

Secondly, the Act accords the violations against women sexuality if not gender dimensions. Section 6 of the Act empowers the Commission to investigate and provide redress to among others, crimes of a sexual nature against female victims. However, the Commission should be very cautious about this dimension for it limits gender-based injustices to sexual crimes and to women only.

Finally, the Commission must ensure that beyond the above two general and specific dimensions, it deals with the gender justice implications to other violations or crimes. For instance, how economic marginalization, civil strife and economic crimes affects men and women differently.

• How the composition of the commission is engendered

The Act provides that the appointment of both the Commissioners and staff shall take into consideration gender equality. It also provides that both the chair and vice-chair of the Commission shall be from the opposite gender. Moreover, although some of the commissioners must have knowledge and experience in human rights, gender among other fields, this should be extended to all including the staff. Since statement takers and investigators interact more with the victims during truth seeking, they must be given in-depth training within the gender framework proposed below.
• **How gender empowered and sensitive are the statement takers and investigators**

Statement takers should be sensitive to the gendered patterns of women stories whereby during recording, women may prefer to tell stories of their male relative’s experiences instead of their own experiences. This may be due to cultural aspects whereby women fear to tell what they underwent, or sometimes may be due to the fact that the males are viewed to have contributed much to the course of the country and thus are given priority in their experiences. Whatever the case, women should be encouraged to talk about their own experiences so that more information on the crimes against women can be recorded and a straight historical record achieved. Employment of women statement takers will be critical in providing a safe space for women to tell their stories of gender violence. The statement takers should be able to sift and know which experiences to proceed for hearing. The commission will then hold thematic and individual hearings but the rest of information received will be stored to be used in writing the reports.

While carrying out all investigations, the commission may undertake a case-by-case analysis of violations and the harm inflicted on the individual. It may also look at the institutional context whereby a crime can be viewed from a thematic point of view. When the thematic viewpoint is undertaken, the commission will be able to analyze the gender aspect of human rights violations. A research will then be done based on the findings to help analyze the contributing factors to the gendered dimensions of human rights violations and accountability. The commission can partner with various experts so that this is achieved.

• **How the trainings of curriculum of the Commission is engendered**

Since gender justice as indicated above is a major and cross cutting issue, measures must be put in place to ensure that all the Commissioners and staff have a background on gender and are conscious in their work. The training curriculum may contain such basic issues as concepts and processes of enhancing gender justice, gender equality, parity and equity; transitional justice; gender justice verses Kenya’s transitional justice processes and TJRC, statement taking among others.
• How the Commission manages women/men and other vulnerable groups during its hearings

The Act envisages the Commission to establish Special Units to address the special experiences for women, children, and persons with disabilities among other vulnerable groups. This should be extended to men who were victims of sexual and gender-based violence and in need for such services.

Secondly, the Commission must organize closed hearings for both male and female victims who are uncomfortable with open hearings in regards to their gender-based violations.

When dealing with victims, the Commission must ensure that all are treated with compassion and respect; treated equally regardless of race, ethnicity, religion, language, sex or nationality. Sufficient measures will be taken to allow victims (both male and female) to communicate in the language of their choice.

Finally, the Commission must ensure that all persons implicated in any or concerned with any matter by the inquiry (both male and female victims and perpetrators) shall be equally entitled to legal representation in the proceedings of the inquiry.

• How the Commission captures the gender violations from both the men and women victims.

The Commission must be able to capture all the gender based violations to men and women; and look into ways of getting the gender perspectives from men and women who are secondary victims. For instance, the Commission must be able to underscore the gender violations for both men and women (e.g. the rape and sodomy during the post election violence in Kenya or the historical marginalization of women in decision making processes).

The gender implications to both men and women as the secondary victims are equally critical. For instance, the emotional deprivation to both husband and wife as a result of detention, or a situation where women suffered career disruptions as a result of detentions to their husbands (e.g. the case of Ida Odinga who was sacked from her teaching job in the government after the detention of her husband Raila Odinga in the 1980s And 1990s).
• How the Commission captures women perspectives from the disadvantaged regions or communities or women as perpetrators

Since women from marginalized communities are more vulnerable and disadvantaged, specific measures should be put in place to get their stories, experiences and recommendations. The Commission must be accessible to all the victims in the context of its work. Measures must be taken to foster access by female/male victims from the marginalized communities.

The Commission must initiate measures to get the perspectives of women as both active and passive actors in the conflict and violations. This is important for there is a tendency to focus on women’s victimhood.

• How the functions on reparations and amnesty are managed

Though substantive reparations are expected from the recommendations of the commission, TJRC has a leeway to grant urgent interim reparation to victims. Victims of egregious gender injustices among other human rights violations must be considered, and their demands considered as well.

On reparations, the Commission should pursuant to the Act, ensure that there is no amnesty for crimes against humanity; in respect of gross violation of human rights or an act, omission, extrajudicial execution, enforced disappearance, sexual assault, rape and torture. Both the female and male victims must also be involved in all the sittings where amnesty is being considered.

• How the report on the findings and recommendations of the Commission is structured.

According to Nahla, a gender perspective in a truth commission’s report can help to build gender relations post-conflict. The report by Kenya’s TJRC will be based on the various elements of the commission’s mandate and analyses of the history of human rights violations it has investigated, the enabling conditions of abuse, and recommendations for reparations, justice and reform.

Moreover, the report will be best positioned to address the gendered history of human rights violations if they combine individual case narratives with a systematic focus on reporting. For example, it can allow the use of the first person narrative for a few stories, and have a summary of the rest of the stories. A thematic focus will allow the
commission to analyze the role women played in the history of the conflict, the enabling conditions of abuses against women and the complex situation of female perpetrators. Such reports will be valuable in opening the space for further research. The report must recommend mechanisms for concrete resolution of the human rights violations and gender-injustices.

- **How the Commission relates with other processes or actors in regards to gender justice.**

The TJRC must have in-built mechanisms for monitoring and collaborating with the relevant national and international processes and actors on gender justice. For instance, it must be informed of the emerging and envisaged legal, policy and institutional frameworks in regards to gender justice so that in its final report, it can isolate the processes for implementation from those requiring formulation or legislations.

Moreover, the Commission must have *gender sensitive media and outreach units*. Relationship with the media is also important for the commission. The media shapes the public’s perceptions of the work of the commission hence the need for it to work closely with the media to ensure efficient and effective dissemination of its work and agenda.

On the outreach, the Commission must forge relationships with feminist academics, women groups, women activists and human rights organizations, in defining and implementing their mandate. This helps to ensure that the commission’s long-term legacy includes greater attention to the gender perspective of human rights violations. The commission can rely on these groups for assistance in soliciting statements, training statement takers, preparing gender hearings, and mobilizing female victims of gender-based violence. These women and human rights organizations can aid in interpreting the commission’s findings from a gender lens and developing an analysis of the gendered patterns of human rights violations in ways that can assist the commission plan its work.

### 5.2. Legal, Policy and Institutional Reforms

The culture of impunity in Kenya as characterized by gross human rights violations and conflicts over resources is more attributed to repressive governance frameworks. After the removal of the KANU regime in December 2003 and signing of the National Accord (during the National Dialogue and Reconciliation to end post election violence) in February 2008, there have been attempts to initiate pro-citizens policy, legal and
institutional reforms through the so called Agenda 4. Agenda 4 was crafted alongside the goal of the National Dialogue and Reconciliation towards achieving of sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

The following legal, policy, institutional and administrative processes are being implemented within and outside this agenda item: constitutional reforms; land reforms; judicial reforms; civil service reforms, parliamentary reforms, electoral reforms, police reforms, security sector reforms, human rights and IDPs policies, enactment of the Anti-Torture, Media and Freedom of Information Laws, and the pending Gender Equality Laws (Affirmative Action Bill; Equality Bill, and the Family Protection Bill) and the enforcement of the Sexual Offences Act. Others are the response to poverty, inequality and regional imbalances; unemployment among the youth; consolidating national cohesion and unity, transparency and accountability to mention but a few. Below are the implications and indicators for engagements with these reform initiatives.

Generally, the progress in these reform agendas has faced such challenges as the inadequate conceptualization of initiatives, slow phase of implementation of reforms owing to poor coordination of processes and political differences between the coalition partners. From the gender perspectives, most of the reforms were not conceptualized with adequate expectations and indicators on gender; both the specific and thematic areas, save for judicial reforms which expected “strong commitment to human rights and gender equity”.

This makes even the monitoring and evaluation process undertaken by the South Consultants almost gender blind for reports against what was planned. For instance, their report for January 2009 focuses on the general issues and only provides gender indicators in areas where such aspects were expected or captures the process without focusing on the progress. E.g. The report only highlights the formation of the Gender Task Force in response to the gender-based injustices by police captured in the Waki report.

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64 For details about the Agenda 4 Matrix and Framework see: [http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf](http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf)

65 Constitutional review process is the bedrock for other reform processes under Agenda 4. The principles and roadmap for the current review process we set during the National Dialogue and Reconciliation process as captured in [http://mirror.undp.org/kenya/RoadMapComprehensiveConstitutionalReform.pdf](http://mirror.undp.org/kenya/RoadMapComprehensiveConstitutionalReform.pdf). It however, important to underscore the fact that the review process has been on course for the last twenty years.

66 [http://www.dialoguekenya.org/docs/Agenda%20Item%20Four%20chapter.pdf](http://www.dialoguekenya.org/docs/Agenda%20Item%20Four%20chapter.pdf)
5.2.1 Gender implications and indicators for engagements with Reforms

On Constitutional Reforms

- The number and quality of leadership and participation of women/men in all the organs and processes of review—from the drafting, harmonization, consensus building, dispute resolution Court, civic education, voter registration, referendum and implementation stages;

- The extent to which gender justice and human rights principles are entrenched in the Constitution of Kenya 2010. This involves ensuring full participation of women among other vulnerable groups in the political, social and economic life of the nation and dual citizenship for all.

Also, having Bill of Rights that safeguards human dignity, non-discrimination and gender equality principles for both men and women; family life, health and reproductive rights; rights of the girl child, minorities, marginalized and other vulnerable groups. Also, provisions on the land and property rights for both men and women; and Human Rights, Gender and other Commissions and institutions to enforce these;

- The extent to which gender justice agenda is safeguarded in the CoK 2010; and the progress made in implementation.

On Legal, Policy and Institutional reforms

- How the existing or envisaged legal, policy and administrative actions offer opportunities for redressing the specific gender justice and human rights issues, e.g. the extent to which the affirmative action policies decreed by President Kibaki in 2007 have led to effective representation of women in decision making processes in the government of Kenya.

- How the existing or envisaged legal, policy and administrative actions offer opportunities for resolving the broad and sectoral issues from the gender and human perspectives. E.g., the National Land Policy provides the principles and frameworks for resolving all the historical land and gender-related land injustices which have led to dispossession of communities and women respectively.

- The capacity of the implementing(state) or engaging(non-state actors) institutions—its governance framework, administrative structure, clarity of
mandate and issues, administrative and financial independence and political legitimacy to enforce the proposed actions and interventions from the gender-justice dimensions. For instance, while the TJRC is empowered to deal with gender-related violations, its mandate is however limited by what is captured as crimes of sexual nature, and its legitimacy weakened by its current credibility and integrity crisis (April 2010).

- How the different legal and policy frameworks dealing with gender, justice, human rights, accountability and governance processes are conceptualized and linked to ensure integrated approach and cumulative effects on gender and women gains. For instance, there is a lot of duplication in both the government and civil society on gender and human rights interventions. E.g. there is no clarity on how the TJRC and the National Land Commission will collaborate in resolving the truth and justice related to gender based land claims in Kenya.

- Quality and quantity of indicators and standards for monitoring, evaluating and reviewing the women and gender gains from the above reform programmes. There is a need to develop and apply qualitative and quantitative gender indicators of the outputs (short-term), outcomes (mid-term) and impact (long term) of the reform and TJ processes.

5.3 Reparations

Reparations have been defined as efforts to redress past wrongs through compensation, the restoration of property and rights, guarantees of non-repetition or other forms of restitution for victims. Reparation programmes are meant to redress gross and systematic human rights violations, not sporadic or exceptional ones.67

Reparations may be directed toward individuals or communities and can include goods, services, money and legal rights such as citizenship or nationality, as well as symbolic gestures such as disclosures of truth, apologies from perpetrators and commemoration of victims. In Rwanda, for example, perpetrators have been known to rebuild the homes of genocide survivors.68 De Greiff (2006) notes that reparations can be understood in four different forms. These are:

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• Restitution – refers to the measures that seek to re-establish the victim’s former condition, for example through job reinstatement, restitution of property or restoration of rights such as citizenship or liberty.

• Compensation – measures that seek to make up for the harms suffered through quantification of harms. Here, harms refer to economic, physical, mental as well as moral injury.

• Rehabilitation – refers to the measures that provide social, medical, psychological and legal services.

• Satisfaction and guarantees of non-recurrence – includes measures such as cessation of violations, verification of facts, official apologies and judicial rulings that establish the dignity and reputation of the victim, full public disclosure of the truth, searching for, identifying and turning over the remains of dead and disappeared persons; application of judicial and administrative sanctions for perpetrators and institutional reform.

The approach that offers direct benefits to the victim takes two forms, that is, material and symbolic benefits. As De Greiff indicates, material reparations may take the form of compensation, either payments (in terms of cash or other negotiable forms), or service packages (which may include provisions for education, health and housing). Symbolic reparations may take the form of official apologies, rehabilitation, change of names of public places, establishment of commemoration days, creation of parks and museums dedicated to the memory of victims, among others.

Whilst reparations in the form of developmental interventions are viewed as delivering collective reparations, it is important not to lose sight of the need for the individual reparations. Collective forms of reparations are meant to heal the community and help in reconciliation. These initiatives benefit the whole community and are in the forms of infrastructure such as schools, hospitals, roads.

All reparations programmes aim to ensure that every victim receives benefits. This ‘completeness’ can be hampered by lack of information about the victims,

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70 Towards integrating gender in the transitional justice process in Kenya. RESEARCH REPORT. For the Federation of Women Lawyers in Kenya
limited victim participation, poor publicity, limited accessibility and excessively high evidentiary thresholds. Further, challenges faced by reparations programmes include the following:

- Reparations programmes must decide on a definition of victims and which violations are eligible for reparations.

- Setting the level of monetary compensation and deciding how it is distributed are often the most challenging aspects of reparations programmes.

- Low socio-economic development and a large universe of potential beneficiaries constrain a government’s ability to implement a reparations plan. Establishing a reparations programme requires the mobilization of significant public resources, which involves a political struggle.

- Linking reparations programmes to other justice measures and to civil litigation and making them gender sensitive are also important challenges.

- The violations that reparations benefits are meant to redress and are frequently of the sort that is, strictly speaking, irreparable.

- There is much less familiarity among NGOs on reparations than with other redress mechanisms, especially criminal justice.\(^{71}\)

International actors should consider providing financial support to reparations efforts, particularly in cases which they played an important role in the conflict. They could provide technical assistance in the design and implementation of reparations programmes and support local groups involved in reparations discussions. Further actions could be to:

- Pressure multilateral institutions into fostering conditions under which post-conflict economies can afford to pay due attention to the victims of conflict

- Promote linkages between the reparations programme and a comprehensive transitional justice policy

- Make international support for re-integration plans for ex-combatants conditional on comparable local commitment to reparations for victims.\(^{72}\)


\(^{72}\) Rule-of-Law Tools for Post-Conflict States: Reparations Programmes. Office of the United Nations High Commis-
5.3.1 Engendering reparations

Reparations are often last on the agenda of transitional justice mechanisms and first to be overlooked. Further to this, reparation programs often fail to recognize and address areas where women’s vulnerability may be particularly heightened, including violations of human rights in relation to displacement, sexual violence and health care, as well as the secondary impacts of conflict in relation to areas such as education. Human rights abuses often impose familial care burdens on women such as additional care for “dependents” or “secondary” victims. As principal caregivers in most societies, especially where health and other infrastructure have collapsed, women are often responsible for the re-integration of their families, many of whom may be injured and frequently traumatized. The roles of women as agents of re-integration are key, particularly in those societies that have overlooked transitional justice such as Mozambique. Furthermore, gender power dynamics in controlling financial decision-making in the household have often been overlooked with financial reparations being given to women who did not have access to banking facilities in South Africa and Morocco.

A significant development in the area of reparations has been the delivery of reparations by military tribunals in the DRC. In April 2006, a military court in Mbdandaka found seven army officers guilty of mass rape of more than 119 women (according to the UN estimate, the number was over 200) at Songo Mboyo on 21st December 2003. This was the first time rape was tried as a crime against humanity in DRC and the first such sentence against military personnel for these crimes. The officers had rebelled against their commanders and attacked the villages of Songo Mboyo and Bongandanga. For the destruction of the villages and the mass rape, they received life imprisonment sentences and the verdict required each victim’s family to receive reparations in the amount of US $10,000. Rape victims were to receive US $5,000.

Even before a reparations programme is designed, gender-sensitive strategies must be set in place to gather gender-specific information that will be relevant for the programme downstream and to secure the participation of women in debates about the design of the programme. Their presence might be crucial if decisions about criteria of access (including, importantly, application deadlines and evidentiary thresholds) are to be taken in ways that increase the likelihood that women will be appropriately served by an eventual programme.
In the critical issue of the choice of the list of rights whose violation will trigger reparations benefits, once again, the participation of women may help ensure that the sorts of violations of which women are predominantly victims are not left out. In general, requiring those responsible for the design of reparations programmes to articulate the principles or reasons underlying the selection of “repairable violations,” one may have a positive impact from the standpoint of gender by preventing gratuitous exclusions.77

More complex programmes, i.e., programmes that distribute a greater variety of distinct benefits, such as educational support, health services, truth-telling and other symbolic measures, in addition to material compensation, open possibilities for addressing the needs of female beneficiaries. These possibilities are not self-actualizing. Each type of benefit requires gender-sensitive design and implementation; for instance, truth-telling and memorialization can exclude all but the memories of largely male ex-combatants. Health services can be designed and implemented in ways that serve mainly the medical needs of male patients. But the different elements of a complex reparations programme can also be designed and implemented with an eye to female beneficiaries.78

Where the level of material compensation is set and how the compensation is distributed have a significant gender impact. All other things being equal, modes of distribution that ensure that women not only access, but also retain control over, the benefits are preferable.

5.3.2 Policy direction for Kenya

In order to ensure an engendered reparations programme, it is imperative that wide consultations are undertaken in order to explain to women the reparations concept and to objectively gauge what reparations would be most meaningful to the women.

Whilst the design of reparations is intended to restore victims to being equal rights holders, it is important to bring visibility to the fact that Kenyan women have not had equal rights in the first place and it is possible that these inequalities may have rendered them vulnerable to human rights violations. For instance, due to unequal power relations, women in past incidences such as the post electoral violence, past tribal clashes, shifāta and banditry incidents were viewed as property to be inherited and some even exchanged sex for food and security as a norm. Hardly is there sufficient visibility to these incidences as human rights violations, neither is the subsequent

stigma they suffer reflected upon as one of the constraining factors to them seeking reparations or other forms of redress. Reparations to women must therefore address the inequalities so as not to return them to the situation in which they once again face discrimination.\textsuperscript{79}

It is critical that recommended reparations must also address specific gender needs, for instance, if hospitals are proposed, sexual and reproductive health needs arising out of sexual gender based violence e.g. trauma counseling, fistula repairs should be included.\textsuperscript{80}

Ownership of the reparations programme is also key and in order to achieve this, female participation in the design and implementation of reparations programme is one sure way of guaranteeing community ownership and participation.

5.4 Memorialization

Memorialization has been defined in various ways to mean the creation of physical representations or commemorative activities that concern events in the past and are located in public spaces. They are designed to evoke a specific reaction or set of reactions for example personal reflection or mourning, or public acknowledgement of the event and the people represented. They can be in the form of commemoration days, creation of parks and museums dedicated to the memory of victims, monuments, among others.\textsuperscript{81}

The report on the International Conference Memorialization and Democracy (2007) argues that in enormously different contexts, communities view memorialization as central to Justice, reconciliation, truth telling, reparation, and coming to grips with the past through various debates and calling for memorialization action before, in the case of Rwanda for example, they could bury their dead.

Memorialization is often not recognized as an important tool of transitional justice initiatives. National and international actors involved in transitional justice—especially in tribunals and truth commissions—have largely missed the opportunity to incorporate memorialization into their initiatives. The repeated failure to deal with memorials (whether ad hoc or sanctioned) and their potentially negative impact can imperil transitional justice efforts and peace-building\textsuperscript{82}.

\textsuperscript{80} Towards integrating gender in the transitional justice process in Kenya. Research report. For the Federation of Women Lawyers in Kenya
\textsuperscript{81} De Greiff 2006.
\textsuperscript{82} The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice
Successful memorialization draws upon specialists from many fields, transitional justice experts, historians, museum designers, public artists, trauma specialists and human rights activists, among others who traditionally have not worked together or are not viewed as having concerns in common. Tribunals and truth commissions share with memorial projects the fact that their work depends in part on collecting documents and other materials used to establish historical truths. Collecting, managing and deriving value from these materials is especially challenging when the amount of documentary materials is overwhelming. Those involved in truth commissions and tribunals need to consider how their documentary collections can be made accessible to those involved in memorial projects. Truth commissions can make better use of their proceedings and final reports to prepare countries for tasks that logically follow incorporating the truth commissions’ findings into educational programs and memorial projects designed to prevent future generations from forgetting the past and repeating its mistakes.  

In planning and budgeting for tribunals and truth commissions, national and international authorities need to consciously lay the groundwork for national memorialization projects designed to advance the goals of earlier transitional justice initiatives. Determining what contributions memorial initiatives make toward reconciliation or social reconstruction is difficult in part because of the complexity and contested meanings of those terms. Memorial initiatives describe evolving, long-term social, economic, cultural and political processes that are difficult to measure. Assessing the impact of memorials and museums is possible, but doing so requires careful planning, investment of resources and willingness to track changes over time. Understanding what effect a memorial project has on promoting social reconstruction also requires being clear up front about the goals the project is trying to achieve.

Effective evaluation also requires assessments before, during and after project implementation, as well as the understanding that future generations may form entirely different, unanticipated opinions of a memorial. Researchers seeking to link changes in attitude and behavior to a specific initiative may find it difficult to do so in relation to broader social and political change, but consider it worth trying nonetheless. More broadly, the impact of all transitional justice processes—memorialization among them—remains under-researched.

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83 The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice
84 The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice
85 The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice
Memorialization is something that also has to come from the people and for the people so that there is ownership and appreciation for it bringing forth healing and reconciliation. Before setting up a memorial therefore, policy makers should consider for example the group that should lead the initiative (civil society or government?), who should be involved and how? and what is being commemorated? This is to avoid resentment from the very people the memorial represents like in the case of Kurdish citizens of Halabja who attacked the state-party-funded memorial honoring their family members killed with chemical weapons, considering it a symbol of local government graft and American influence. Apart from this, memorials developed by grassroots groups with minimal or no government support may serve only a small group of people with little impact on broader peace building and transformation strategy.

Various sectors and disciplines of society should also be involved in order to ensure that memorialization supports rather than undermines justice and democracy. For example, taking one particular memorialization project in mind, civil society organizations should actively be involved in citizen engagement and connecting the site to its stories, urban planners should help guide its physical development and public access, educators to integrate its history into the school curriculum, historic preservationists, artists, and exhibit designers to preserve the site as a museum, and tourism managers to promote visitation.

International actors need to be clear about the limits of their role. Memorialization is a process that locals must initiate although outsiders may make important contributions through technical assistance, financial help or facilitation in bringing contending parties together.

The form of a memorial also matters a lot. For example, it should easily convey meaning and should not be too detached from other justice initiatives or policy debates. All stakeholders including the general public should therefore be involved in setting up a memorial. Memorials should as well be easily accessible and viewed by public, not hidden somewhere where no one visits regularly. This will act as a regular reminder to citizens and visitors of where they have come from and why they should not go back there.

In the Kenyan context however, past human rights violations are as diverse as they are caused by different circumstances with differing effects on victims from various
regions. Considerations should therefore be made on the way all the different stories can be captured using one memorial or different memorials can be made as in the South African case.

### 5.4.2 Policy Direction for Kenya

As noted earlier, memorialization is something that has to come from the people and for the people and therefore women should actively participate in the memorialization process so that their stories are adequately represented. There is therefore a call for women and women organizations to get the various stories of past atrocities and narrow down to the specific themes that should be represented in a memorial. The form of memorial should also promote gender justice and encourage women empowerment in the attempt to forge ahead and break traditional stereotypes on gender.

On top of this, the memorial should not only represent past experiences and an end to past violations against women, but should always be a reminder to end gender violence even at peace time. The memorial should also call for an end to gender based violence not only at the national level, but also at the basic family unit where violence against women is rampant.

### 5.5 Prosecutions

Prosecutions as a form of transitional justice are aimed at giving justice to the victims of past abuses. Prosecutions may be undertaken through domestic trials at the domestic level through national trials or the use of the national judicial system, international ad hoc tribunals and hybrid courts or through the International Criminal Court. There are disadvantages and advantages for use of these various prosecutorial mechanisms.

The last few years have seen a proliferation of domestic prosecutions initiatives in Argentina, Peru, Colombia, Croatia, Rwanda, Ethiopia, the Democratic Republic of the Congo (DRC) and Serbia. In 2007, a military tribunal in the Ituri District in northeastern DRC sentenced five former militiamen to life imprisonment for killing two UN military observers in 2003. In Rwanda, prosecutions of those suspected of leading the 1994 genocide have taken place locally, but the inability to deal with more than 100,000 accused through trials led the authorities in Kigali to institute a massive programme of traditional courts in individual villages, known as “gacaca” courts.89

The other form of prosecutions includes the use of ad hoc International tribunals. Examples of ad hoc International tribunals are the International Criminal Tribunal for

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89 Reporting transitional justice. A handbook for journalists. ICTJ
the former Yugoslavia (ICTY)—the first international war crimes tribunal since the Nuremberg and Tokyo military tribunals and the International Criminal Tribunal for Rwanda (ICTR) to prosecute perpetrators of Rwanda’s genocide in 1994.

Mixed or hybrid courts located within the country in which the crimes were perpetrated have been introduced as a mechanism for combining international intervention and support for the national judicial system. In Kosovo (Serbia) and Timor-Leste, international legal professionals were incorporated into domestic systems by a United Nations administration to cope with the challenge of trying mass crime and politically sensitive cases against a background of an extremely weak national system. Hybrid courts (or processes) were established by the United Nations Interim Administration Mission in Kosovo (UNMIK) in 2000 (international judges and prosecutors programme) and by the United Nations Transitional Administration in East Timor (UNTAET) in 2000 (Serious Crimes Unit and Special Panels for Serious Crimes).

In 2005, the Special War Crimes Chamber was established in Bosnia and Herzegovina by agreement between the Office of the High Representative, the International Criminal Tribunal for the former Yugoslavia and the national authorities. In other contexts, the United Nations was invited by national authorities to establish a hybrid tribunal within its territory. This was the case in Sierra Leone, where the Special Court for Sierra Leone was established by agreement between the United Nations and the Government of Sierra Leone in 2002. Similarly, in 2003 the United Nations and the Government of Cambodia concluded a lengthy negotiating process and agreed to create Extraordinary Chambers in the Courts of Cambodia to try the Khmer Rouge. Negotiations are currently under way with the Government of Burundi and pursuant to Security Council resolution 1664 (2006) with the Government of Lebanon.

The International Criminal Court (ICC) governed by the Rome Statute is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries. The ICC is an independent international organization and is not part of the United Nations system. The ICC has intervened in ongoing conflicts in Northern Uganda, Darfur and the Democratic Republic of the Congo, which has led to further debate about peace versus justice. In a broad sense, the regime of the Rome Statute

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90 GSDRC Transitional justice (part 1)
92 International criminal court. About the court.
93 GSDRC Transitional justice (part 1)
and the principle of complementarity that underpins it will have its own impact on domestic legal systems in that States parties to the Rome Statute are required to amend their national legislation to implement their treaty obligations. Furthermore, the International Criminal Court’s actions may either catalyze domestic processes or the Court may employ specific efforts to assist national jurisdictions.94

5.5.1 Prosecutions through a gender lens

The pervasive nature of gender-based violence in conflicts, especially sexual and reproductive violence has resulted in increased acknowledgment in international criminal law. While sexual violence in conflicts has been recognized under international law since the Second World War, it remained largely invisible until the 1994 Rwandan genocide - during which as many as 500,000 women were raped95. This led to a more radical recognition of the need for a gender-based prosecution strategy to address sexual violence in conflicts as a war crime.96

The Arusha-based International Criminal Tribunal for Rwanda (ICTR) was established by UN Security Council Resolution 955 in November 1994 to prosecute those “responsible for serious violations of international criminal Law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1st January 1994 and 31st December 1994” (Moghalu, 2005). The tribunal was set up on an ad hoc basis with the intention of trying those most responsible for crimes against humanity during Rwanda’s 100-day genocide, including former Prime Minister Jean Kambanda. In 1998, the ICTR found former mayor Jean-Paul Akayesu guilty of nine counts of genocide, crimes against humanity and war crimes that included his having incited and encouraged his troops to commit acts of rape. While the initial charges against him did not include rape, the presiding judge, Navanethem Pillay, insisted this be probed. As a result of her intervention as well as mounting pressure from women’s groups, charges for rape were investigated. This was particularly significant as it was the first time an international court had ever punished sexual violence in a civil war; and it was the first time that rape was found to be an act of genocide, aimed at the destruction of a group. It was also indicative of the need to have adequate gender representation in the judiciary as well as open interaction with women’s groups. The Akayesu judgment was to affect future principles for the prosecution of sexual violence and served to influence the jurisprudence of a permanent International Criminal Court.97

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95 Human Rights Watch, 1996
96 Militarization, Gender and Transitional Justice in Africa. Helen Scanlon
97 Militarization, Gender and Transitional Justice in Africa. Helen Scanlon
In the realm of international law, there has been considerable progress in recent years toward acknowledging and addressing women’s experiences of sexual violence during conflict. Where crimes of this nature were once covered in a complicit silence by both sides in a conflict, both law and the interpretation of law has shifted in recent years. The Rome Statute which established the International Criminal Court recognizes sexual crimes as well as persecution on the grounds of gender. In cases before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) rape has been confirmed as both a crime against humanity as well as an act of genocide. Other notable initiatives at an international level include Security Council Resolution 1325 which deals specifically with justice for women’s experiences of violence during conflict and the 2004 Report of the Secretary General on ‘The rule of law and transitional justice in conflict and post-conflict societies’ – which confirms the need for women to be included in all initiatives which seek redress for past violations as well as assurances that these interventions will not re-victimize marginalized and at risk groups, in particular women who have been victims of sexual violence.98

Whilst there have been important gains in the international legal arena with regards to redressing sexual violence during conflict, these have been tempered by the actual number of convictions secured which have been few and far between. Moreover, despite these early victories, subsequent cases of sexual violence have not received the same levels of attention.99 Precedent setting cases make an important contribution to curbing impunity and sending a message that these violations will be treated with condemnation due to such atrocities. But, these gains have little impact on the ground if they are not consistently applied or given sustained attention.100

Beyond the individual cases, international law is in a unique position to serve as a driving force for the reform of national law and the encouragement of domestic prosecutions of sexual violence. With regards to legal reform and implementation, the Rome Statute has again been a positive step in this regard. By recognizing gender persecution and requiring state parties to bring their own laws into conformity with the provisions of the Statute, the ICC can influence the adoption of domestic remedies and thus broaden access to justice for women in post-conflict states.101 Again, real impact will require

101 This assumes a functioning and effective judicial system which is often absent post-conflict and as such, international support for legal reform needs to be a coordinated effort which targets both law reform as well as the reform of institutions to serve all citizens where they previously may have been the preserve of only certain groups.
follow through: As states rarely have the political will to prosecute cases of this nature, progress will entail the prioritization of these crimes at an international level with the backing of a credible threat of referral to the ICC.102

5.5.2 Policy direction for Kenya

Kenya is currently in a unique position. Charges were preferred in 2011 against 6 Kenyan suspects. There was subsequent confirmation of charges against four of them. The process was kicked off following the defeat of the bill seeking to establish a special tribunal. The Witness Protection Act is under review and Kenya now has the opportunity to ensure that its witness protection programme meets international standards and addresses the gender challenges faced by women who would want to provide testimony either as witnesses or victims.

Lately, there have been debates in favour of Special Tribunal to address the aspects of the transitional justice that were not referred to the International Criminal court or to have the cases referred to the International Criminal Court referred back to a Special Tribunal.

In an ideal scenario, it is imperative that the Special Tribunal envisioned for Kenya addresses key gender concerns. These include:

- Ensuring gender balance in staffing of the Special tribunal from the judges panel to the prosecutions department and all through the tribunal;
- Providing gender training for all tribunal staff;
- Encouraging civil society participation and maintaining the networks in the work of the tribunal;
- Providing for outreach and witness protection programmes that reach both men and women effectively;
- Ensuring that female perpetrators do not receive stiffer penalties as compared to their male counterparts

There is need to ensure impartiality and upholding the rule of law. Given the history that Kenya has had with political interference in the judicial process, the Waki report proposes a framework that will ensure the Special Tribunal is indeed impartial and capable of achieving its objective.

Waki report argues that the tribunal must be self contained. In other words, it must completely detach itself from all other institutions such as the Attorney General. If possible it should have its own gender unit that maintains collaborative approaches with other gender institutions. There also ought to be internationalization. This is to say that judges should not only be drawn from Kenya but also other commonwealth countries preferably those that have experience with gender issues. Independence is another factor that ought to be adhered to. The tribunal must have authority to recruit and control its own staff. It also must possess constitutional status to guard against any constitutional challenges that may be preferred against it. This means it must be anchored against the constitution to avoid objections. It should also act in good faith. Yash Pal Ghai\textsuperscript{103} also improves on the Waki recommendations by stating that the Chief Justice should be the one with the authority to appoint the judges to the tribunal. He also argues that tribunals are expensive and the source of funds usually affects their independence. Therefore, care should be taken to ensure the funds are timely and that the sources are impartial. The tribunal should also allow a defense system for domestic and foreign lawyers to represent those appearing before it. The jurisdiction and definition of the Gender based violations must be specifically and exhaustively defined and the mandate explicitly worded to include the gender violations. Lastly, there ought to be effective monitoring especially with regard to how it handles gender issues and the kind of attention it pays to the same.

\textsuperscript{103} Yash Ghai is a professor of constitutional law. He is the head of the Constitution Advisory Support Unit of the United Nations Development Programme in Nepal and a Special Representative of the UN secretary general in Cambodia on human rights.
6.0 Implementation of the Policy

“With gender equality, everyone would be a part of the advancement and empowerment of mankind. Society would be united, and the world would be a better place.” Vacharin Patjekvinyusakul, Chief of Judges, Thonburi Criminal court, Thailand.

The transformational goal of promoting gender justice for men and women, boys and girls requires a concerted, consistent and significant investment from state and non-state actors. The movement for gender justice built on the momentum of Beijing +15, since the watershed Fourth World Conference on Women; and the United Nations Security Council Resolution 1325 on Women, Peace and Security of 2000 should be sustained by harnessing the resources and competencies resident in our institutions and agencies.

Civil Society organizations and gender justice

Civil society organizations should play a pro-active role in shaping the gender justice agenda in Kenya as a watch dog, change agent and partner in gender justice and development. Civil society should sustainably and consistently;

- Endeavor to broaden the understanding in the various stages of policy formulation and implementation by identifying and engaging the key players at the various stages within government, parliament and other agencies.
- There is need to utilize the strategy of public interest litigation, lobbying for progressive policies and laws, creating awareness.
- Build relationships and movements for pushing for gender justice.
- Learn from other countries’ experiences and continue to deepen civic education as regards to the evolving process of gender and development in transitional justice.
- Continuously carrying out monitoring and evaluation of implementation of the new Constitution and the gender imperatives of the transitional justice processes.
- Maximize the opportunity presented by the Grand coalition government and the National Accord agenda 1-4 to engender the delivery of those agenda programmes.
**Government** is the most important actor, implementer of policies that enhance gender justice. Every effort should be made to ensure that the executive branch is populated by officials who are committed to democratic principles including gender justice and an open and participatory political culture.

**Parliament and parliamentarians** as law makers should continuously on their own motion take up progressive role of giving every single bill or motion that is before the house with a gender perspective. This has been provided for under the new Constitution of Kenya.  

**Constitutional Commissions** and **governmental bodies** ought to progressively interpret their mandates and ensure that they promote the equal participation of men and women in all process of justice, the economy and socio-political programmes and processes.

**The Private sector** can engineer a gender transformation by initiating an agrarian, industrial and information-technology revolutions that facilitate fair access to both men and women in the political and socio-economic spheres of life.

**The media and gender justice:** The media like civil society must continue playing its critical role of monitoring, offering information, technical support to the movement for gender justice, and supporting the advocacy role of the civil society/change agents.

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104 The Bill of rights in Kenya’s constitution shall serve as directive principles of state policy. State policies that are inconsistent with Bill of rights can and should be challenged by Kenyans. In promoting the Bill of rights as the touchstone of governance and socio-economic policies, equality and justice shall become a reality.
7.0. Prognosis

7.1. Lessons for Kenya on Gender Justice

From the research and discussions during the stakeholders’ workshop held at the Intercontinental Hotel, Nairobi in April 19-20, 2010, the following issues and lessons were noted as critical in strengthening the gender justice agenda within the transitional justice process in Kenya:

- 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 our engagements on gender injustices and related issues in the society. The concepts of gender justice within the discourse of human rights have been critical in this paper.

- 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 benchmarking 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 wo/men within a society which is economically, politically or socially disadvantaged or deprived.
Conclusion

Democratization and social justice necessitate that women be involved at every step of post-conflict reconstruction. Pressure should be brought to bear on international institutions and donor agencies for a minimum number of seats to be reserved for women during peace negotiations and in all forums where decisions are being made regarding justice for past crimes.\textsuperscript{105} A space at the table does not however guarantee that these voices will be heard. To increase effectiveness and impact, international agencies should work with local civil society, and particularly women’s organizations to build the capacity and expertise necessary to strategically represent the needs of previously marginalized constituencies during these deliberations.\textsuperscript{106} International agencies must reflect the practice they preach. Many such organizations continue to be dominated by men, particularly in those missions operating in a post-conflict context and particularly at higher levels of responsibility. To date, only 2 of the 27 UN peacekeeping missions in post-conflict countries have been headed by women.\textsuperscript{107}

Women’s movements demand that women’s access to justice be enhanced and seek to claim greater public space in the context of post-conflict momentum for general legal reform. Women look to the new constitutions to affirmative action strategies and quotas, and push for gender sensitive judicial reform. A key potential of transitional justice lies in the possibilities for addressing extreme violations of women’s rights and seeing this transfer to broader changes in gendered socio-political relations. Transitional justice mechanisms such as prosecutions, security sector reform and truth commissions may be just some of the measures that can provide a critical role in addressing the gendered human rights record in post conflict situations.

As noted during the 2007 Nairobi declaration in regards to the gender-based violence committed during conflicts:

“is the result of inequalities between women and men, girls and boys, that predated the conflict, and ... this violence continues to aggravate the discrimination of women and girls in post-conflict situations”. This perspective is supported by the evidence that very high levels of domestic abuse characterise post-conflict settings, and may even increase, as has been the case in Rwanda, Liberia and South Africa. The apparent rise in

post-conflict domestic violence may result from a number of interrelated processes but it is increasingly acknowledged that transitional justice has a potential role in creating mechanisms to ensure that violence does not simply move from the war front into the home. The extent to which the potential of transitional justice processes are actually advancing gender justice remains compromised, but these processes have nonetheless shown their potential as an important site for the pursuit of women’s basic human rights in transitioning societies.\textsuperscript{108}

\textsuperscript{108} Militarization, Gender and Transitional Justice in Africa. Helen Scanlon
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“When we empower women, we empower communities, nations and the entire human family”

United Nations Secretary General Ban Ki Moon.
Gender and Transitional Justice in Kenya: Guidelines for Engendering the Process