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## Does Justice Have a Gender?
## Redressing Massive Human Rights Violations against Women in the Aftermath of Violent Political Crisis: The Kenya's Case

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# DOES JUSTICE HAVE A GENDER?
# REDRESSING MASSIVE HUMAN RIGHTS VIOLATIONS AGAINST WOMEN IN THE AFTERMATH OF VIOLENT POLITICAL CRISIS: THE KENYA'S CASE*

Isabella Castrogiovanni**

**Abstract**

In the wake of the disputed political elections of December 2007, Kenya was engulfed in a spiral of violence which led the country almost to the brink of a civil war. This was arguably the most severe human rights crisis in Kenya's independent history. Over 1,300 people were killed and some 600,000 displaced. Violence against women, mainly sexual violence, was particularly widespread and massive. This paper examines the complex issue of seeking justice for serious and widespread violations of human rights from the perspective of women victims. The central argument discussed is that in situations of massive violations of human rights and subsequent massive victimization, a focus on prosecutorial approaches may leave unanswered women's multiple quests for justice and redress. On the contrary, the paper posits that investing in gender-sensitive reparative venues may be the most effective and tangible remedy to redress the harms caused by the post-election violence and, in the longer run, to start addressing the many historical injustices suffered by Kenyan women. From this perspective, it is argued that "justice" ought to be understood in a broader sense as part and parcel of a wider political discourse beyond the realms of law and courts. The paper argues that, thus conceived, the dispensation of justice becomes, also, an exercise of good governance: it is about ensuring that the State has the capacity and the commitment to fulfill its obligations to protect and promote the rights of women, both in times of peace and conflicts, and to foster a political, social and economic order where women can leave in peace and dignity as equal citizens of a society free from violence, fear and impunity.

** Paper for the Gender Issues and International Legal Standards Project*

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*What happens to the voices of women once they find their day in court or a truth commission, and what happens to the women who speak and to the truncated lives that they talk about? More importantly, what happens to the thousands of others who will never have a chance to access a court or a truth commission and whose lives have nevertheless been equally disrupted by violent conflict or years of political repressions?*

(R. Rubio-Marin, *What Happened to the Women? Gender and Reparations for Human Rights Violations*, 2006)

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## I. Introduction

Since gaining independence in 1963, Kenya has been considered as a relative "island of stability" in the African continent. Despite this good reputation, though, the country's recent political history has been characterized by recurring cycles of widespread political violence. Indeed, from the time when multi-party politics was reintroduced in 1991, violence has been a constant feature of all pre-electoral and post-electoral processes.

Yet, the violence that shook the country during and after the 2007 general elections was by far the most deadly and destructive ever experienced in Kenya's independent history. The violence started on December 30, 2007 moments after Mr. Mwai Kibaki was declared President. The main opposition party, the Orange Democratic Movement had disputed the elections results alleging that its candidate, now Prime Minister Raila Odinga, had been robbed of victory. While the sentiment that elections results were rigged was the immediate trigger of the violence, its underlying and root causes go much beyond the dynamics of electoral politics and run centuries-deep in the history of the country.

Pervasive corruption, systematic abuse of power by public officials for personal gains, mishandling of public resources, denied access to land and unbroken impunity are, probably, amongst the key contributing factors to Kenya's systematic and unremitting failures of governance.[1]

Moreover, historical grievances arising from perceived long-standing inequities in access to land and other public resources among different ethnic groups have also contributed to creating a generalized climate of hate, tension and mistrusts within the population. Because of the nature of the 2007 post-election violence, ethnic hatred has further deepened into the societal fabric and could represent, if not effectively addressed, a significant threat to peace and stability in the country.[2] All these factors need

[1] See Human Rights Watch (HRW) Report, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, Volume 20, No.1 (A), March 2008. See also International Crisis Group (ICG), *Kenya in Crisis,* Africa Report No. 137, February 2008.

[2] For a comprehensive analysis of the ethnic dimension of political violence in Kenya and its potential to fuel violent conflict, see Koigi Wa Wamwere, *Towards Genocide in Kenya. The Curse of Negative Ethnicity,* MvuleAfrica Publishers, Nairobi, 2008.

to be taken into account to understand the level of violence which shook the country in 2007.

After the parties had failed to go to the negotiating table, the former UN Secretary General and chair of the Panel of African Eminent Personalities Mr. Kofi Annan, was chosen by the African Union to lead a mediation team. By end of January 2008, the Annan team had developed a peace agenda and obtained that both sides commit to the negotiating process, later to be known as the Kenya National Dialogue and Reconciliation (hereafter KNDR) framework. The KNDR framework identified four main agenda items for the purpose of ending the crisis, addressing its root causes, preventing future violent conflict in the country and achieve sustainable peace and justice through the rule of law and respect for human rights. The final power sharing accord, known as the National Accord and Reconciliation Act, was signed in Nairobi on February 28, 2008.[3]

Addressing impunity and achieving justice are central goals of the KNDR framework. Regrettably, though, for several decades since independence Kenya seems to have perfected the art of not addressing impunity, sweeping the past under the carpet and indefinitely postponing truth and justice. Indeed, starting from the colonial times succeeding governments have established commissions of inquiry to investigate countless issues of public interest, but all with very little concrete achievements.[4] The KNDR framework, on the other hand, could represent a defining moment in Kenya's history. For the first time, under the close supervision

[3] The four KNDR agenda items are: *Agenda 1* "Immediate actions to stop violence and restore fundamental rights and liberties; *Agenda 2*, "Immediate measures to address the humanitarian crisis, promote reconciliation and healing; *Agenda 3*, "How to overcome the political crisis"; and *Agenda 4*, "Address long-term issues, including constitutional, legal and institutional reforms; land reforms, youth unemployment; poverty; addressing impunity, transparency and accountability. All the documents related to the KNDR framework can be found at www.rescuekenya.org (a post-election information hub)

[4] Starting with the Native Labour Commission of 1913 Kenya has had 31 Commissions of Inquiry. In the six years of Mr. Kibaki Presidency only, six commissions of inquiry were appointed, which are known to have absorbed close to 700 million Kenyan Shillings of public funds (nearly nine million USD). A common thread of all these commissions is that their findings have either remained secret or no action has been taken by the government on their recommendations. See article by N. Kihuria in the *Sunday Nation*, December 21, 2008. See also, *Postponing the Truth - How Commissions of Inquiry are used to circumvent justice in* Kenya (2008), a paper prepared by the Africa Center for Open Governance (AfriCOG), available at www.africacog.org.

of the African Union, a comprehensive and time-bound roadmap was laid down to end impunity and address historical grievances and long-standing human rights issues in the country. This is perhaps the single most important outcome of the report produced by the Commission of Inquiry into the Post-election Violence (hereafter CIPEV), which was set up within the KNDR frame.[5]

Sexual and gender-based violence are among those enduring human rights issues that the country has so far failed or deliberately neglected to address. Thus, from a "gender" perspective too, the Waki report is a landmark document.[6] For the first time in Kenya's history, a commission of inquiry took the decision to give special attention to the issue of violence against women by dedicating an entire section of its report to the serious human rights violations suffered by Kenyan women during the 2007 post-election crisis and by providing a set of specific recommendations to end impunity, including for gender-based crimes.

Within this context, this paper discusses the complexities around the search for justice for women victims of massive violence and gross human rights violations by debating the following questions: first, is a prosecutorial approach the most effective way to respond to women collective demand for justice in situations of massive and systematic human rights violations? Secondly, what kind of reparative venues may be considered to redress the harms suffered by women and what critical factors should be taken into account in the design of gender-sensitive reparation programmes? Thirdly, what lessons can Kenya learn from other countries which have experienced systematic and widespread human rights violations, in terms of engendering their transitional justice processes and mechanisms? And lastly, is the current national debate on post-election violence on the right track in terms of its capacity to address the specific needs of women victims?

Most significantly, what drives and motivates this paper is the conviction that despite women play a major role in Kenyan society by bearing most of the social responsibilities within the family and the community,

[5] The full text of the CIPEV report can be downloaded from www.kenyalaw.org

[6] While it is understood that the term "gender" normally refers to the two sexes, male and female, and does not imply necessarily greater attention to the needs of women, for the purpose of this paper it will be used in this latter sense of the term.

they are still by and large unequal citizens. It is against a heavy backdrop of structural injustices, a well rooted patriarchal culture and an historical legacy of centuries of gender discrimination, that the whole justice discourse for the violence and gross human rights abuses suffered by Kenyan women during the 2007 crisis ought to be framed.

While undoubtedly no compensation can restore these women to what they were, the paper argues that at this important juncture in the history of the country the opportunity for justice does exit. With the right combination of political will, closed monitoring by the African Union, sustained pressure by the international community, continuous engagement of women rights groups and unremitting scrutiny by the civil society, important gender-sensitive institutional reforms could be implemented and reparative measures could be devised to offer some redress to post-election victims and restore their dignity as equal citizens as well as to prevent massive gender-based violence from happening in the future.

## II. Qualifying Violence Against Women in the Post-Election Crisis: Implications for Accountability and Justice

During times of violent conflict or civil unrest, violence against women, particularly sexual violence, has become a recurring strategy to instil fear within the civil population, commit acts of vengeance and brutalize the enemy. Women's body are turned into battlegrounds and the multiple physical, sexual and psychological harms inflicted to them a distinct and particularly dreadful weapon of war.[7] The Kenyan post-election crisis too witnessed an extensive use of violence against women, especially sexual violence.[8] While there can be no doubt about the widespread and systematic nature of the human rights violations suffered by women during the political mayhem that followed the contested presidential elections, their

[7] While it is understood that children too, both girls and boys, are specifically targeted in times of conflicts or civil unrest, including for the purpose of sexual abuse and exploitation, this paper deliberately focuses on women only. An analysis of violence against children would constitute the subject of a separate research.

[8] For the purpose of this paper, violence against women is understood as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life". See, article 1 *Declaration on the Elimination of Violence Against Women*, UN GA Resolution 48/104 of 20 December 1993.

specific categorization from a legal point of view is still being debated in the country.[9]

Indeed, different categories have been used to qualify the post-election violence, including the human rights violations committed against women, namely: "ethnic cleansing", "crimes against humanity", "gross human rights violations" and, even, "genocide". Each of these terms has a very precise legal meaning under international law and gives rise to different legal consequences and accountability systems.[10] In this respect, the issue of qualifying violence against women is not a pure theoretical one but one that has concrete implications for the pursuit of justice for women.

This section looks at those different definitions and considers the diverse remedies that are available within the framework of international human rights law and international criminal law to redress the harms suffered by women victims of human rights abuses. The intent here is to highlight that there are indeed many "paths" to justice and that different judicial and non-judicial avenues may need to be explored to achieve meaningful and tangible justice for women victims and cater for their specific needs. The intention is also to call attention to the limitations of the

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[9] In March 2008 in Nairobi, the Kenya Human Rights Institute organized a forum on the post-election violence. The outcomes of that debate are summarized in the Special Brief titled *Clarifying Human Rights Violations in the Kenyan Post-Election Crisis,* April 2008. The analysis in this section is largely inspired by those discussions.

[10] For a legal definition of "crimes against humanity" and "genocide", see the Statute of the International Criminal Court (ICC), articles 6 ("Genocide") and 7 ("Crimes against humanity") and the ICC Elements of Crime. The ICC Statute appears especially significant in this regard as much of the definitions of the crimes under its jurisdiction are largely viewed as a codification of existing statutory and customary international law. Notably, under the ICC Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity may qualify as "crimes against humanity" if committed as part of a systematic attack against civilians and pursuant to or in furtherance of a State or organizational policy to commit such attack. As far as "gross violations of human rights" are concerned, whilst they are not formally defined in international law, they denote types of violations affecting the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person, when perpetrated on a systematic and wide scale. So, the elements that define this category are the scale of the violations and the nature of the violation. It is generally understood that torture and other inhuman and degrading treatments, disappearances of political opponents, extra-judicial killings and other similar practices represent gross human rights violations. See Redress, *Implementing Victims' Rights. A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation,* 2006, p. 14.

"law", being it the international or national legal framework, in addressing and resolving complex social and political issues such as the ones which are behind the most severe human rights crisis in Kenya's history.

Before moving further into this analysis, it is useful to briefly go over some of the main findings of the report produced by the CIPEV (hereafter Waki report) as this constitutes, arguably, the most authoritative source of information on the post-election violence.[11] For the purpose of this analysis, only findings related to violence against women are considered.

Based on accounts - as reported by media and civil society groups - of individual and gang rapes, female and male sexual mutilations, loss of body parts, victims contracting HIV-AIDS after being sexually assaulted, the CIPEV decided from its inception to make its inquiries into the sexual and gender-based violence a central focus of its investigation into the 2007 post-election violence. By doing so, the Commission was the first investigation of electoral disorders to focus on violence against women, especially sexual violence.[12]

Despite private hearings and a safe environment were offered to women victims willing to come forward and tell their stories of the vio-

[11] As indicated earlier, the CIPEV was established within the frame of the KNDR process. Its mandate was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters. The Commission was chaired by Mr. Justice Philip Waki, a judge of Kenya's Court of Appeal, and two international commissioners. The Commission operated with funds made available by both the Government of Kenya and the UN. The CIPEV began its work in May 2007 with an initial three months mandate, which was eventually extended until September. The Commission sought information from government institutions and political leaders as well as from Kenyan civil society and human rights organizations. Women's groups were also actively involved in the work of the Commission.

[12] Acknowledging the multiple difficulties associated with investing and probing comprehensively crimes of such a nature, the Commission recruited two female investigators and a psychologist to provide counselling to victims willing to testify before the Commission. The Commission also received assistance from various UN, government agencies, and NGOs specialized in this area. These gathered under the auspices of the Inter-Agency Gender-Based Violence (GBV) sub-cluster co-chaired by the United Nations Fund for Population Activities (UNFPA) and the Kenya National Commission on Gender and Development. At the time of this writing, the GBV sub-cluster is still active within the government Commission on Gender and Development. For an overview and update of the work of the Commission and the sub-cluster see www.gendercommission.com

lence suffered, a total of 31 women only testified before the Commission or submitted statements. This is unsurprising given the customary shame associated to sexual violence in patriarchal societies, such as the Kenyan one, the victims' fear of retaliation by perpetrators and a deep distrust in law enforcement and state security agencies. Even with these limitations, though, the Commission was able to gather abundant evidence, from various women's groups, medical institutions and other witnesses, of the violence perpetrated against women and was, thus, in a position to make some conclusive statements in its final report about the nature, extent and manifestations of the human rights violations suffered by women.[13]

Based on the above evidence, the Commission concluded that violence against women, particularly of a sexual nature, was rampant and systematic during the post-election chaos and followed, to a large extent, the same patterns of the overall post-electoral violence in terms of the motivations that triggered it and the profile of the perpetrators. More specifically, it was determined that, overall, violence against women had a distinct ethnic dimension. In some instances, abuses were perpetrated as isolated criminal acts by individuals taking advantage of the general anarchy and total breakdown of law and order. In some geographical areas, though, sexual violence was more the result of planned activities and was used with the specific intention of humiliating and spreading terror among civilians, forcing people to leave their households or get revenge against a whole community for having voted for the wrong candidate or for its allegiance to a certain ethnic group. In this sense, violence against women seemed to be instrumental to the overall post-electoral violence.[14]

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[13] An entire chapter of the final CIPEV's report is dedicated to violence against women. See Chapter Six ("Sexual Violence"), pp. 237-268 and also Chapter Ten, pp. 348-351 ("Findings in relation to sexual violence). For a focused analysis of the scope and nature of sexual and gender-based violence during the post-election crisis see also *A Rapid Assessment of Gender-Based Violence during the Post-election Violence in Kenya*, a UN inter-agency study conducted in mid-January 2008 in selected country sites. The assessment looked also at the incidence of sexual violence within the Internally Displaced Persons (IDP) camps.

[14] This was particularly the case in the Rift Valley and in Nairobi slum areas where it is known that criminal gangs were organized along ethnic lines and mobilized by politicians, businessman or community leaders to unleash violence against certain ethnic groups. For a detailed account and analysis of the patterns of violence in those areas see chapters three and four of the Waki report. See also HRW report *Ballots to Bullets: Organized Violence and Kenya's Crisis of Governance,* op. cit, which also suggests that some of the violence, including violence against women, in the Rift Valley was planned, financed, coordinated and possibly an outcome of a plan or policy conceived by local politicians

In terms of who carried out the violence, the Commission found that perpetrators of sexual violence were not only ordinary citizens and members of criminal gangs but also, and to a significant extent, members of state security forces. These included members of the General Service Unit (special police units) as well as regular and administration police. The Waki report unambiguously blames state security agencies both for acts of omissions, having failed to anticipate, plan for and contain the violence as well as for systematic acts of violence against civilians, including women.[15]

The Commission was cautious in the use of specific juridical terms to qualify the overall post-election violence, including the widespread human rights violations suffered by women. Interestingly, while the terminology gross violations of human rights is recurrent in the report, the term "genocide" is never used, while "ethnic cleansing" is only used to describe the patterns of violence in one specific district of the Central Rift Valley Province.[16] Lastly, the terms "crimes against humanity" is used few times all along the report but with the following explicit reservation:

"The evidence the Commission has gathered so far is not, in our assessment, sufficient to meet the threshold of proof required for criminal matters in this country: that it be 'beyond reasonable doubt'. It may even

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and prominent entrepreneurs. Similar conclusions were reached by a UN fact-finding mission deployed to Kenya by the Office of the High Commissioner for Human Rights (OHCHR) from 6 to 28 February 2008. The OHCHR also observed that actual patterns of violence varied from one region to another depending on region-specific dynamics. On the specific issue of violence against women, the OHCHR report suggests, though, that sexual violence was largely opportunistic and does not appear "to have been used as a systematic tool to target specific victims on the basis of their political allegiance or ethnic background". *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, p. 13.

[15] More in general, on the responsibility of Kenyan police in the commission of serious human rights violations, namely its systematic involvement in extra-judicial killings including in the context of the post-election violence, see the preliminary report of the UN Special Rapporteur on extra-judicial killings, summary or arbitrary executions, Professor Philip Alston, who visited Kenya from 16 to 25 February 2009 at the invitation of the Kenyan Government. At a press conference held on 25 February at the UN headquarters in Nairobi at the end of his mission, Professor Alston explicitly stated that "killings by police in Kenya are systematic, widespread and carefully planned. They are committed at will and with utter impunity". He also called for the Government to established compensation programmes for the victims of those unlawfully killed. The full text of the Special Rapporteur's statement is available at www.extrajudicialexections.org

[16] See Waki report, chapter three, "Koibatek District: Attempted Ethnic Cleansing", p. 102

fall short of the proof required for *international crimes against humanity* [emphasis added]. We believe, however, that the Commission's evidence forms a firm basis for further investigations of alleged perpetrators, especially concerning those who bore the greatest responsibility for the post-election violence".[17]

On the other hand, in his testimony to the Commission, Kenya's Attorney General, Amos Wako stated that in his opinion "the recent post-election violence was coming very close to crimes against humanity", while the Kenya National Commission on Human Rights argued before the Commission that,

"the violence following the 2007 General Election meets the criteria of *crimes against humanity* [emphasis added] under Customary International Law in so far as it involved conduct including the multiple commission of acts of inhumanity against civilian populations, pursuant to or in furtherance of an organizational policy to commit such attacks in the theatres of violence".[18]

Similarly, a well established Kenyan women rights organization stated in its official report to the CIPEV that,

"The acts that were perpetrated against women in the post-election period doubtless constitute *crimes against humanity* [emphasis added]. The question is who should be held liable for their commission"[19].

Although there is no definite conclusion yet on how the Kenyan post-election violence, including violence against women, ought to be qualified in legal terms - notably whether some patterns of the human rights violations committed against women may qualify as international crimes - it can unquestionably be asserted that serious criminal offences were committed under the laws of the country as well as grave and massive breaches of human rights under international human rights law.

Kenya is a state party to several universal and regional human rights treaties, many of which are directly relevant to the protection of women's

[17] See Waki report, p. 28

[18] See Waki report, p. 314

[19] Report on Sexual and Gender-Based Violence submitted to the CIPEV by the Federation of Women Lawyers –Kenya, 5th September 2008, p. 7.

rights, including protection from violence, and is thus under the obligation to ensure that these rights are enforced within its territory.[20] The obligation to respect, ensure respect for and implement international human rights law as provided for under these different treaties would entail, inter alia, the following duties: a) to take all appropriate legislative, administrative or other measures to prevent violations from occurring within the territory of the state; b) to investigate violations effectively and promptly and to take alleged perpetrators of human rights violations to justice according to domestic and international law; c) to provide those who claim to be victims of human rights violations with *equal and effective access to justice* and to provide *effective remedies*, including *reparations* [emphasis added].[21]The latter point sets a dual obligation on the state towards victims of human rights violations: first, to genuinely make it possible for them to access justice and seek redress for the harm suffered (procedural remedy – judicial, administrative or other); and second, to provide concrete relief to address the actual harm (substantive reparation).

While the right to an effective remedy and adequate form of reparation applies to any breach of international human rights law, in cases of gross human rights violations or crimes against humanity the state obligation to provide redress to victims would be even more stringent and would include inter alia the duty to: a) investigate, prosecute and punish (right of a victim to judicial remedy); b) provide adequate, effective and prompt

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[20] This includes: the International Covenants on Civil and Political Rights (ICCPR) and Social, Economic and Cultural Rights (ICSECR), both ratified in 1972; the Convention on the Elimination of Discrimination Against Women (CEDAW, ratified in 1984); the African Charter on Human and People's Rights (ACHPR) and its Optional Protocol on the Rights of Women in Africa (ratified in 1992); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT ratified in 1997). The latter is also pertinent to the analysis of violence against women insofar as some acts of sexual violence of particular gravity may also qualify as torture. In light of the evidence made available by the CIPEV, grave breaches of several articles of these human rights treaties would have been committed during the post-election violence, including the right to life; the right to physical integrity and security; the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment; the right to be free from all forms of discrimination; the right to equal protection under the law; the right to dignity.

[21] See *The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of international Humanitarian Law* (hereafter *The UN Basic Principles*) , General Assembly Resolution 60/147 of 16 December 2005.

reparation for the harm suffered; and c) provide victims with access to relevant information concerning violations and reparation mechanisms.[22]

International human rights law is, thus, concerned with the responsibility of the state only. Under the respective bodies of law, there are specific provisions requiring state parties to establish effective domestic remedies to redress victims of human rights violations.[23] Nonetheless, while the right of individuals to seek redress for alleged violations of their human rights, as codified in relevant treaties, is increasingly being recognized under international human rights law – based on the general principle that each violation of international law gives rise to some responsibility - the boundaries of the corresponding state obligation to provide reparation are still to some extent vague.[24] This is especially true when reparations are intended to redress a large number of victims of human rights violations.[25]

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[22] See "Victims' Right to Remedies" under *The UN Basic Principles*

[23] See, for instance, article 8 of the Universal Declaration of Human Rights; article 2.3 of the ICCPR; article 14 of the CAT; article 7 of the ACHPR, article 25 of the Protocol to the ACHRP on the Rights of Women in Africa. Surprisingly, CEDAW does not contain a similar general provision on the right to remedy. Typically, human rights treaties that include mechanisms for the enforcement of rights contain also a provision establishing that no action may be undertaken by the competent treaty-based monitoring body to seek redress for human rights violations unless it has been ascertained that all available domestic remedies have been invoked and exhausted or unless it has been proven that the application of such remedies was unreasonably prolonged or unlikely to bring effective relief to the victim. See, for instance: article 41(c) of the ICCPR and art. 5.2 of the ICCPR Option Protocol; article 21(c) of the CAT; article 56 of the ACHPR; article 4 of CEDAW Optional Protocol.

[24] See R. Rubio-Marin (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations,* The Social Science Research Council, 2006, p. 24.

[25] See P. De Greiff (ed.), *The Handbook of Reparations*, The International Center for Transitional Justice, Oxford University Press, 2008. The book provides a comprehensive analysis of reparations for human rights violations, particularly in the context of massive abuses. In his chapter on "Justice and Reparations" (pp.451-477), the editor notes that while most human rights treaties do explicitly refer to the right to reparation, the terminology typically used does not provide a clear indication of what concretely the state ought to do to redress victims, especially in scenarios of massive and systematic abuses . As appropriately questioned by the author, what do expressions such as "effective remedy", "fair and adequate compensation" or "just satisfaction" mean in the context of massive victimization? The author argues that while in isolated cases of human rights abuses the general principle of *restitution in integrum* or compensation in proportion to the harm suffered is indisputable, in cases of reparation programmes designed to reach a large universe of victims, typically within countries with a history of systematic and widespread human rights violations and old injustices, an interest in justice would call for the

Having briefly looked at what are Kenya general obligations to protect human rights, and women's rights as an integral part of them, under international human rights law, the question then arises as to which extent "effective remedies" would be actually available to women victims of human rights violations in Kenya, particularly in scenarios of massive violence as it was the case during the 2007 post-election crisis.

A detailed analysis of the monitoring and enforcement mechanisms established under each universal human rights treaty Kenya is a party to and which would be relevant to the protection of women's rights, is beyond the scope of this paper. It suffices here to highlight that a common thread of these treaty-based mechanisms is the lack of a proper judicial enforcement function. Instead, the supervision of the treaty's implementation is typically left to a non-judicial body whose mandate is to receive and examine periodic reports submitted by each State party on the progress made in national implementation of the treaty's obligations and to make recommendations and observations to the submitting government. In some cases, these bodies may also consider communications from individuals who claim that their rights, as enshrined in the treaty, have been violated without domestic remedy.

Interestingly, Kenya has not ratified any of the Optional Protocols to universal human rights treaties that recognize the right to individual claims for alleged human rights violations.[26] Yet, as part of the African human rights system, individual communications alleging violations of human rights may be considered by the African Commission on Human and People's Rights, a bland supervisory mechanism of the African Charter on Human and People's Rights and its Optional Protocol on the Rights of Women in Africa. Regrettably, the Commission has so far largely failed its mandate to promote and protect human rights in Africa and has been unable to provide genuine redress to victims of human rights violations. Even in cases of gross human rights violations, the mandate of the Commission is simply to bring them to the attention of the Assembly of Heads

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articulation of a more complex notion of reparations where the focus should be on the collective wellbeing as opposed to the individual harm.

[26] Neither the Optional Protocol to the ICCPR nor the CEDAW Optional Protocol have been ratified by Kenya. The Optional Protocol to the ICSECR will be opened to signature in the course of 2009 only, so it remains to be seen whether Kenya will ratify it.

of State and Government, the primary political organ of the Organization of the African Union, who can then solely decide whether to act or not on such matters. Predictably, the Assembly has decided not to act in all the cases referred to it by the Commission.[27]

Thus, for human rights victims in Kenya the only means to seek redress is to pursue their claims before the national judicial system, which is notoriously affected by corruption, lack of independence and gender-sensitiveness, something that would be critical, for instance, to respond promptly and effectively to serious crimes of a sexual nature as the ones committed, on a large scale, during the post-election crisis.[28] Moreover, it is unlikely that the most vulnerable women, especially from rural and impoverished areas, would have the material and educational means to engage in criminal and civil proceedings for seeking judicial redress. Indeed, and regrettably, access to courts is normally a prerogative of better-educated, richer and urban victims.

Simply put, in present-day Kenya, where access to justice, in general, is a major concern for women, seeking redress through national judicial venues may not be, for the majority of Kenyan women, the most realistic and viable way to pursue justice and seek meaningful compensation for the severe human rights violations suffered during the post-election violence.

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[27] See Gina Bekker, "The African Court on Human and People's Rights: Safeguarding the Interest of African States", in *Journal of African Law,* 51, 1 (2007), pp. 151-172. As noted by the author, the newly created African Court on Human and People's Rights is also unlikely to make the whole African human rights system more effective from the perspective of redressing human rights violations. Its subservience to the Assembly of Heads of States and Governments, the lack of independence of judges, lack of funding and, most importantly, the ban on individuals to access the Court to seek remedy, unless a declaration accepting the right to individual petition has been made by the state concerned, all contribute to make this body inoffensive to the sovereign interest of African States.

[28] Victims of human rights violations in Kenya have also the option of addressing complaints for alleged infringement of their rights under the Constitution or any human rights treaty Kenya is a party to, before the Kenya National Human Rights Commission. The Commission, if satisfied that there has been an infringement of any human right or freedom, may inter alia order the payment of compensation or any other lawful remedy or redress. On a more general level, the Commission has also the power to recommend to Parliament effective measures to compensate victims of human rights violations and their families. See *The Kenya National Commission on Human Rights Act*, 2002.

In addition to the principle of state responsibility for redressing human rights violations under international human rights law, as discussed so far, legal obligations arise also from international criminal law. Kenya is a signatory to the Genocide Convention and the Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes against Humanity. Kenya is also a party to the International Criminal Court (ICC) having ratified the Rome Statute in 2005. Moreover, the International Crimes Bill was passed in Parliament in 2008 to domesticate the ICC Statute.[29] Hence, should the evidence be found that serious crimes of an international nature, such as crimes against humanity, were committed during the post-election crisis, the principle of individual criminal responsibility, in addition to that of state responsibility may also arise.[30] In this scenario, the prosecutorial effort to hold perpetrators accountable, either before the International Criminal Court or before a special Tribunal set up within the country - an option that is currently being debated following the recommendations contained in the Waki report – may become the central element in the search for justice for victims of these crimes, including women.

Whilst prosecution is unquestionably an indispensable building block of justice and an essential means to fight against impunity - as well as a duty in case of international crimes - the punishment of a limited number of perpetrators of the post-election violence, may still largely fail women victims' right to remedy if not accompanied by an effective state effort to positively redress them through inter alia the implementation of gender-sensitive reparative justice measures. Moreover, prosecution is unlikely to provide the kind of justice many of these women are seeking. As stated by a Kenyan women rights advocate, "justice for the great majority of Kenyan women victims of human rights abuses may simply mean whatever can

[29] The International Crimes Bill and other relevant national legislation can be found at www.kenyalaw.org

[30] Interestingly, in January 2008, the ODM (the opposition party who had contested the elections' results) had filed a complaint to the International Criminal Court to request an investigation into the Kenyan situation based on the belief that serious crimes of international nature were being committed in the country. The ICC is intended only as a court of last resort, acting when the country is unwilling or unable to genuinely carry out investigations and prosecutions. By taking such an action, government officials were, in essence, acknowledging that they had no trust in the national judicial system. See *Clarifying Human Rights Violations in the Kenyan Post-Election Crisis*, op. cit., p. 5.

make their life easier and they would expect the state to help them achieving this goal".[31]

Linking prosecutorial efforts focusing on perpetrators to efforts for compensating the harms endured by victims of severe human rights violations is ultimately about promoting a more comprehensive conception of justice. In this respect, it is encouraging to see that this approach is also upheld by the International Criminal Court whose Statute also provides for the establishment of a special fund for reparation of victims of crimes under its jurisdiction.[32]

In the next section it will be argued that state-sponsored gender-sensitive reparation measures may well represent the most effective, tangible and direct remedy to redress women victims of gross human rights violations, especially in light of the *de facto* absence of effective judicial redress. Experience from different countries shows that such measures, if properly designed and effectively implemented, may serve the double purpose of providing short-term redress to women victims while contributing to the longer-term goal of redressing historical injustices and the long-standing discrimination suffered by women. In this sense, repara-

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[31] Author's note. Interview with Grace Maingi Kimani, Deputy Executive Director, Federation of Women Lawyers – Kenya. Nairobi, 24 March 2009.

[32] See articles 75 ("Reparations to Victims") and 79 ("Trust Fund") of the ICC Statute. Pursuant to article 75, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. In case of collective reparations, the Court may order that reparations be made through the Trust Fund for Victims (TFV); the reparations may then also be paid to an inter-governmental, international or national organisation. The Trust Fund for Victims was set up by the Assembly of States Parties in September 2002 and became operational in early 2007. In 2007/08, there were 42 proposals submitted to the TFV for consideration. It is estimated that these projects will reach at least 380,000 direct and indirect victims. Source: ICC website (accessed February 24th, 2009). While this is an important step forward in the direction of promoting international justice from a victims' perspective, it remains to be seen whether these programmes will be fully implemented and what impact they will have on the lives of victims. For an analysis of reparations and the ICC, see P. de Greiff and M. Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparations for Victims of Gross Human Rights Violations*, M. Bossuyt, P.Lemmens, K. de Feyter and S. Parmentier (eds.) (Antwerp: Intersentia, 2005). See also R. Falk, "Reparations, International Law and Global Justice: A New Frontier", in P. De Greiff (ed.), *The Handbook of Reparations*, op. cit., pp. 478- 503.

tions can also be a valuable contribution to the pursuit of a broader gender justice agenda.[33]

## III. Gender Justice and Reparations: From a Victim to a Rights Holders' Perspective

As put by a Kenyan human rights activist, achieving justice for women victims of the post-election violence is not that much about punishing one particular perpetrator, but more about answering the following questions: "When will violence against women end in our society? When will I feel safe as a woman? When will I feel respected as an equal human being?"[34]

This view captures well the key argument that the paper intends to put forward here: that is, that the whole discourse around reparative justice to redress the grave human rights violations suffered by Kenyan women during the post-election violence cannot be separated from a serious consideration of the root causes behind this violence and the historical grievances suffered by women as a result of well entrenched societal gender biases. Indeed, an analysis of the state of women's rights in Kenya clearly indicates that these rights are observed more in breach and that the state has largely failed, both in times of peace and civil unrest, to protect the human rights of women as provided for, among others, under the Convention on the Elimination of all Forms of Discrimination against Women and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.[35]

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[33] The reflections in the next section are largely inspired by the thinking of two gender specialists as conceptualized in a recent article focusing on reparations for sexual violence. See C. Duggan and A. Abusharaf, "Reparations of Sexual Violence in Democratic Transitions: The Search for Gender Justice", in P. De Greiff (ed.), *The Handbook o f Reparations*, op. cit., pp. 623-649

[34] Author's notes. Interview with Mary Njeri Gichuru, member of the National Coalition to Combat Violence against Women (COVAW), Nairobi, 17 February 2009.

[35] For an in-depth analysis of the performance of the government of Kenya in protecting and promoting women's rights, see *A Shadow Report to the 5th and 6th Combined Report of the Government of Kenya on the International Convention on the Elimination of All Forms of Violence Against Women (CEDAW*), prepared by the Federation of Women Lawyers (FIDA) – Kenya and presented in New York at the 39th session of the CEDAW Committee, 23 July-10 August 2007. See also *the Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and*

Regrettably, though, the ongoing national debate on the post-election violence does not seem to adequately address the issue of justice for women. Indeed, the debate is largely focused on the prosecution of perpetrators and more specifically on the possible trial of a list of 11 suspects who allegedly bear the greatest responsibility for organizing, instigating and supporting the violence.[36]

To be sure, this is not typical of the Kenyan's case only. In many countries which have undergone transitional justice programmes after a violent conflict or major political crisis and social turmoil, the specific needs of victims of political violence, and notably women victims, have too often remained in the shadow. The overall lack of gender mainstreaming in transitional justice discourses represents a significant deficit and undermines the whole struggle for justice. On the contrary, greater and more systematic attention to the specific needs of women victims in the aftermath of conflicts or violent political crisis can not only ensure justice for all in an equal way, but can also help in laying the ground for structural changes and social transformations that can, in the long run, enhance women's overall access to justice and promote equity, equality and non-discrimination.[37]

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*Cultural Rights*, prepared by the Kenyan Civil Society Coalition on Economic, Social and Cultural Rights, October 2008.

[36] This is known as the "Waki secret list". Although it has not been made public yet, it is believed to include the names of prominent political leaders, including six current ministers and five MPs from both sides of the coalition divide. As indicated in the Waki report, should the country fail to set up a special tribunal to seek accountability against persons who bear the greatest responsibility for the post-election violence, the list shall be forwarded to the Special Prosecutor of the International Criminal Court.

[37] Acknowledging the need for gender justice, the International Center for Transitional Justice - a human rights institution which assists countries in pursuing accountability for past atrocities and human rights abuses - has embarked on a specific programme on transitional justice and gender. A major outcome of this programme is the publication of the book, *What Happened to the Women? Gender and Reparations for Human Rights Violations,* edited by R. Rubio-Marin often cited in this paper. Relevant material on transitional justice and gender, including chapters of the book, can be found on the Center's website www.ictj.org Another essential reference is the more recent book by R. Rubio-Martin (ed.), *Gender and Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations,* Cambridge University Press, 2009. For a more focused discussion on transitional justice and women's rights in Africa see *Compensating an Assault on Dignity: Ending Impunity for Sexual and Gender-based Violence,* A Pan African Conference report, July 21-23, 2008, Nairobi; and *Unfinished Business: Transitional Justice and Women's Rights in Africa,*

Before examining the potential reparations have to concretely contribute to gender justice, a conceptual clarification is due. Since the focus of this paper is on how to redress grave human rights violations in scenarios of massive and widespread violence, reparations will be discussed only with reference to out-of-court state-sponsored programmes, as opposed to reparation litigations in civil courts aiming at redressing sporadic cases of individual human rights abuses.

As mentioned earlier, reparations are one element of the right to remedy for victims of human rights violations, including of gross human rights violations, and in this sense are essential instruments of justice along with prosecution and judicial redress, truth-telling initiatives, or institutional reforms. It is also argued that, from a victim's perspective, they may actually be "the most" significant form of remedy insofar as they specifically, directly and concretely reach victims.

Under international law, reparations can take the following forms: a) restitution; b) compensation; c) rehabilitation; d) satisfaction; and e) guarantee of non-repetition. These categories need not to be spelled out in details here as a comprehensive definition of what each of them entails is provided for in international law.[38] What would be useful, though, for the purpose of this analysis, is to look at the main challenges that are typically associated to the design and subsequent implementation of massive administrative reparation programmes and, more specifically, to some of the factors that should be considered when attempting to develop gender-sensitive reparation initiatives.[39]

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Occasional paper no. 1, 2008, published by ACORD – Agency for Cooperation and Research in Development (both papers are available at www.acordinternational.org). For a comprehensive definition of transitional justice see L. Bickford, "Transitional Justice" in *Encyclopaedia of Genocide and Crimes Against Humanity*, (Macmillan Reference, USA, 2004), vol. 3, pp. 1045-1047.

[38] See *The UN Basic Principles,* principles 19-23

[39] The terms reparation "programmes", "measures", "schemes" or "initiatives" are used interchangeably here. However, as rightly noted by some commentators, there are substantive differences among them: a reparation programme or policy would entail a comprehensive, holistic and interlinked package of reparation initiatives; whereas the other terms should be used to designate more discrete and self-standing interventions conceptualized outside of a deliberately designed policy and plan. The latter are the most common practice. See UN Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States. Reparations Programmes,* New York and Geneva, 2008, p. 3

Normally, the debate on reparation programmes aiming at reaching a vast universe of human rights victims turns around the following fundamental set of questions: What should be the broad aim of reparations? Who should benefit from reparations? (this question relates to how the categories of "victims" and "beneficiaries" are defined and to the selection of a catalogue of rights whose violation can trigger reparation benefits). How should reparations be delivered? (this relates to the definition of benefits – material, including financial, *versus* symbolic, individual *versus* collective). Another critical factor that can have a major impact on the capacity of reparation programmes to effectively reach its intended beneficiaries, especially women, is that of access to reparations.

A review of some of the most significant and large-scale reparation programmes implemented in the context of massive human rights violations, indicates that a gender approach to the issues identified above from the onset of the their design, may have a significant impact on the overall capacity of the programme to make a real difference in the life of women victims of gross human rights violations and, in the long run, to lay the ground for more systemic and long-term social reforms on behalf of women. On the contrary, in the absence of explicit gender guidelines women's specific experience of violence and conflict and their particular needs for redress get too often lost in national justice debates.[40]

In this respect, the South African experience is, in many instances, particularly instructive for Kenya insofar as it provides both some positive and negative lessons from the perspective of "engendering" reparations. Indeed, the case of South Africa is often cited in public debates and workshops in the country as main model for Kenya's transitional justice agenda. Whilst it will not be possible here to review this case in-depth, an attempt will be made to draw attention to some of the key elements of the South African experience that could be especially relevant to the transi-

[40] The brief review of countries' cases presented in this section is largely based on the case studies published in R. Rubio-Martin (ed.), *What Happened to the Women*, op. cit. The intent here is just to summarize the key elements of those in-depth studies with the aim of extracting some lessons for Kenya.

tional justice process Kenya is embarking in to respond to the post-election violence.[41]

One of the main features of the state-sponsored reparation programme developed in South Africa was its direct link to the work of the Truth and Reconciliation Commission (hereafter TRC). Linking reparations to the TRC work is a problematic choice from the perspective of ensuring access to women. For instance, women who suffered sexual abuse and who did not feel at easy in coming forward to tell their stories to the TRC missed out entirely on the opportunity of being redressed for the harms suffered. This is likely to be the case in any other country where access to reparations is linked to a truth-telling or similar process, including in Kenya.

The TRC operated through three Committees one of which was dedicated to reparation issues. Although women were not central to the initial process which led to the creation of the TRC and the drafting of its legislative constituting act, their subsequent participation in the TRC work resulted in some positive gender-sensitive initiatives such as the organization of broad consultations to inform and influence the work of the TRC reparation committee and the elaboration of its final recommendations to the Government; the holding of special hearings on women; the inclusion of symbolic reparations in the policy recommendations (although these were not in the end gender specific). The overall impact of these efforts was, though, negligible. Thus, the opportunity to affirmatively bring forward women's issue during the post-apartheid transition was largely missed in the South Africa's experience.

As mentioned earlier, one of the most controversial issues in debates on reparation, notably in relation to women, is the way victims are defined. In South Africa, reparations were provided to those defined as "victims" by the TRC.[42] The TRC act did not make any distinction between direct and indirect victims; however, the TRC reparation committee did eventu-

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[41] See B. Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa", in R. Rubio-Martin (ed.), *What Happened to the Women*, op. cit., pp. 49-91; and C.J. Colvin, "Overview of the Reparation Program in South Africa", in P. de Greiff (ed.), *The Handbook*, op. cit., pp. 176-214.

[42] A victim was anyone who had suffered harms as a consequence of gross human rights violations or other acts associated with a political objective for which amnesty was granted; or any person who had suffered harms as a result of having intervened to assist victims of gross human rights violations.

ally acknowledge such differentiation by accepting to grant reparation benefits also to relatives or dependents of primary victims, only, though, when and if they had died. This implied that the specific harms suffered by women whose husbands or sons had been tortured or imprisoned were not recognized for the purpose of reparations.

In terms of the definition of the harms or nature of crime that would trigger reparation benefits, the TRC also largely failed to recognize and appreciate women specific experience of the apartheid political violence. The TRC did not make, for instance, any specific reference to sexual violence as a distinct gross human rights violation. Instead, sexual violence (including rape, genital mutilation and other grave forms of sexual abuse) was mentioned in the list defining torture and severe ill treatment. This also implied that the final reparation programme (which included financial benefits, symbolic reparations and community reparations) was not specific to the needs of women victims.

Another critical issue in the South Africa's experience that negatively impacted on the overall capacity of the reparation programme to make a real difference in the life of women, particularly the most vulnerable and socially excluded ones, was that of access to reparation benefits. The whole South African's scheme was largely about financial grants. Indeed, complying with formal requirements in order to access those grants, first and foremost opening a bank account, was very problematic for many women due to illiteracy, linguist barriers, geographical distance from the state agencies in charge to deliver the reparation grants, lack of general awareness and knowledge about the work of the TRC and the same existence of a reparation scheme and even customary restrictions. This meant that the most vulnerable women victims, those without education, coming from rural, remote and impoverished areas were most probably left out completely from the TRC reparation programme. Again, these kinds of issues are common to many other countries and should thus figure prominently in discussions around the design of any massive administrative reparation programme. Kenya is likely to face these challenges too as the vast majority of women victims of the 2007 violence were from the most vulnerable and marginalized groups.

Many of the weaknesses identified above could have been possibly prevented had gender issues been mainstreamed in the work of the South

African TRC from the onset of its establishment, including the drafting of its mandate.

In this sense, the experience of another country, Timor-Leste, is particularly useful.[43] While, overall, women's participation in the final design of a reparation programme was limited, their contribution to the whole process initiated by the Commission for Reception, Truth and Reconciliation (hereafter CAVR, according to its known Portuguese acronym) was significant and resulted in a number of important and innovative gender-sensitive initiatives that may inspire other countries trying to respond to massive human rights victimization.

As a start, a gender perspective was integrated into all aspects of the Commission's work, as explicitly requested by UNTET regulation 2001/10, which established the Commission. As a result, women played a very active role in the CAVR's work from its inception, both as commissioners and as staff.[44] The needs of victims were from the beginning at the heart of the Commission's mandate and a victim support unit was established to ensure the effective operationalization of this priority. Women were also very active in the implementation of several Commissions' activities, including the execution of the urgent reparation programme, which included inter alia monetary compensation, referral of victims to social services and self-help groups; and delivery of grants to local community-based organizations.

Special CAVR sessions were organized to bring out women specific experience of the 25 years of violent conflict. During the statements-taking process, women were especially encouraged to give recommendations on reparations, which were eventually used for the formulation of the final CAVR recommendations on a reparation policy submitted to the Parlia-

[43] See G. Wandita, K. Campbell-Nelson, and M. Leong Pereira, "Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims", in R. Rubio-Martin, *What Happened to the Women*, op. cit, pp. 284-334.

[44] Interestingly, women active participation in the CAVR work did not happen in a vacuum. During the whole transitional process following the withdrawal of the Indonesian army, women were highly mobilized at political level to demand acknowledgment of the specific role played during the fight for independence and recognition of their political rights. This shows that the discourse around the need for redressing human rights violations suffered by women cannot be de-linked from a broader consideration of their role in society.

ment and the Government. Other pioneering work included: the setting up of a training unit within the commission targeting staff and commissioners, covering also gender topics; the organization of "healing workshops" at community level which gave victims, particularly women, the opportunity to come forward in a safe environment and talk about their experiences of the conflict; the implementation of a pilot collective reparation programme delivered in conjunction with local non-governmental organizations and which was designed with specific inputs from women.

Probably, the single most creative feature of the CAVR's experience was precisely its out-reach work, which pushed the commission to involve more women beyond the formal statement-taking process. Noteworthy, is also the CAVR's decision to set a target of 30 percent of statements from women. So, while similarly to many other countries, including South Africa, the identification of victims and beneficiaries for the purpose of granting reparations was depended on their coming forward before the commission, the CAVR acknowledged the necessity to reach out to a larger number of victims so as to ensure greater accessibility to redress and reparations, especially for women. For this purpose, the CAVR in its final recommendations to the Government suggested that the final reparation programme should allow a two-year period to identify additional beneficiaries who had not participated in the CAVR activities during its 18 months of operation. Furthermore, the CAVR recommended that a quota of 50 per cent of reparation resources be set aside for women victims only.

While it remains to be seen how the government will act upon all these recommendations, the experience of Timor-Leste shows the importance of assertively bringing gender concerns into the reparation debate from the onset and the potential impact these efforts can have on advancing the rights of women beyond the immediate goal of redressing the harms they suffered as direct or indirect victims of political violence and gross human rights violations. [45]

Whilst the South African experience is helpful to understand some of the key gender-related challenges in the implementation of large scale reparation programmes, and that of Timor-Leste is interesting for its gen-

[45] The implementation of the final reparation programme in Timor-Leste has not started yet although the CAVR submitted its final report, including also recommendations for a reparation policy, to the Parliament in 2005.

der-focused innovative aspects, the case of Rwanda is worth mentioning for its attempt to respond to mass victimization by combining judicial approaches to reparations with victims' compensation trough delivery of social services programmes, including by making recourse to traditional justice mechanisms.[46] The Rwanda's case is also pertinent to the Kenya's situation in light of the fact that the Kenya's government too is debating both the establishment of a Special Tribunal to try the suspects of the post-election violence, which would also provide victims with a judicial venue to claim compensation, and the launch of a national truth telling process to which reparations may be also linked.[47] Likewise the discussion on South Africa and Timor-Leste, only some features of the Rwanda's case will be presented here in an attempt to draw some general lessons.

While the International Criminal Tribunal for Rwanda (ICTR) cannot astonishingly award compensation to genocide victims on the basis of its Statute and Rules of Procedures, Rwandan courts, operating under the ad-hoc 1996 Genocide Organic Law, have awarded compensations to victims in several cases, including cases of rape, although no compensation award seems to have been paid to victims so far. The Organic Law also provided for the establishment of an Indemnification Fund to award reparations to unidentified genocide victims in the form of a financial lump sum grant or equivalent access to social services. Regrettably, the law establishing the fund has never been adopted. In any case, as argued in other sections of this paper, it is questionable that a strict juridical approach to reparations, in the presence of a huge caseload of victims, is the most effective strategy to fulfil victims' right to remedy and redress.

A special Assistance Fund for Genocide Survivors was eventually set up by law in 1998. The Fund is intended to provide reparations in the form of access to a package of basic social services in the areas of education, health, housing and income generation for the most vulnerable among the genocide survivors. Once again, the Rwanda's case shows that the way beneficiaries and victims are defined is critical to promote gender-

[46] See H. Rombouts, "Women and Reparations in Rwanda", in R. Rubio-Martin (ed.), *What Happened to the Women*, op. cit., pp. 195-245.

[47] See article 55 "Compensation of Victims", The Special Tribunal for Kenya Bill (2009). At the time of this writing, the bill has not been enacted yet by the Parliament of Kenya. See also Part IV "Reparations and Rehabilitation", Section 42 of the Truth, Justice and Reconciliation Commission Act, 2008, Kenya Gazette Supplement No. 84 (Acts No. 6), 2nd December, 2008.

sensitive reparation initiatives. In Rwanda, two criteria are used to define a victim for the purpose of granting reparations: i) being a survivor of the genocide and ii) being in need. While the first criterion is insensitive to the gender-specific nature of the harms suffered by Rwandan women during the genocide and is also arbitrary in that no clear guidelines on the interpretation of the notion of genocide survivors are available; the second one is largely at the advantage of women as they are generally the poorer amongst the genocide victims.

The specific form of benefits provided by the Rwandan Fund raises also another important, controversial issue, that is the risk of blurring reparations, intended for victims of gross human rights violations, with broader development measures that should be targeting wider vulnerable sectors of the population. While it is understood that societies emerging from violent conflict situations and having to confront massive human rights abuses may need both levels of interventions, affirmative action measures are still necessary to respond to the specific needs and experiences of human rights victims, including women. Yet, the experience of various countries shows that victims in general, and especially women, tend to prioritize access to basic services as form of reparation benefit, which should be seen instead as a basic entitlement.[48]

Lastly, the Rwanda's case is also interesting for its attempt to use traditional justice mechanisms for the delivery of reparations to victims. According to the 2001 Gacaca law (subsequently amended in 2004), the Gacaca tribunals - traditional grass-roots mechanisms for dispute resolution at community level - were mandated to deal with part of the genocide caseload. This included also the responsibility to determine the scale of the

[48] For instance, South Africa TRC final report noted that 90 percent of victims who were asked during the human rights violations hearings how they would like to be assisted by the TRC, mentioned basic services such as health, education and housing (unfortunately, though, the data was not disaggregated by gender). See B. Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa", op. cit., p.59. Also, in Timor-Leste, a review of recommendations on reparations taken from a sample of women victims across the country showed that almost 50 percent of them asked for material support, especially to sustain their children's education. Again this may be an indicator of women overall powerlessness in society and their weak awareness of their human rights, such as the right to enjoy equal access to basic social services. See G. Wandita, K. Campbell-Nelson, and M. Leong Pereira, "Learning to Engender Reparations in Timor-Leste", op. cit, p.299.

damage suffered by victims and the amounts to be awarded as compensation. While the attempt to make recourse to alternative justice mechanisms is in principle an interesting one - especially in situations of massive human rights atrocities where the formal criminal justice system is usually unfit to respond effectively to collective demands for justice - its gender implications should be very cautiously analyzed. It is sensible to think that traditional justice mechanisms functioning in the context of patriarchal societies with well entrenched gender bias may not necessarily work in the best interest of women victims, particularly when dealing with crimes of a sexual nature.[49]

To sum up, some key lessons can be drawn for this cursory review of selected country experiences. The list is neither exhaustive nor prescriptive. It is just intended to highlight some of the most critical features of administrative large scale reparation programmes that seem to be especially relevant to the achievement of gender justice in the aftermath of massive violence.[50]

First, the definitions of victims and beneficiaries for the purpose of granting reparations must be gender sensitive, that is it must recognize the specific way women experience political violence and conflict. This is particular important in relation to sexual violence, which is undoubtedly

[49] An appeal to make recourse to traditional justice mechanisms as an alternative way to address Kenya's post-election violence was made by one of the female participants to the workshop "Transitional Justice in Kenya. Taking Stock of the Gender Responsive Transitional Justice Approaches: Progress, Challenges and Opportunities for Best Practice Interventions", organized by the Federation of Women Lawyers in Kenya (FIDA – Kenya) in partnership with the United Nations Office of the High Commissioner for Human Rights and Urgent Action Fund –Africa. The workshop took place in Nairobi on 19-20 February 2009. A recent report on traditional justice systems carried out by FIDA-Kenya found that local communities tend indeed to prefer these systems as they are more accessible, cheaper and easier to understand than the formal justice system. However, the study also found that these systems are largely biased against women, lack knowledge of women's rights and make in some cases recourse to degrading forms of punishments. These alternative justice venues should be more thoroughly analyzed from a gender perspective before being considered as a possible means to respond to the post-election violence. Also, their interaction and possible integration with the formal justice system should be further researched.

[50] For a comprehensive analysis of gender justice within the work of truth commissions, see Vasuki Nesiah et al., *Truth Commissions and Gender: Principles, Policies and Procedures*, a publication of the International Center for Transitional Justice/Gender Series, 2006 (see especially pp. 34-39 on reparations).

among the most common, widespread and hideous form of violence against women in times of conflict or violent political crisis. This is one of the issue common to all countries.

Second, active, sustained and informed participation of women, particularly victims, in national processes leading to the formulation of massive reparation programmes, including by ensuring adequate female representation in transitional justice bodies (both judicial and non-judicial), is critical to ensure that crimes suffered by women are adequately identified and addressed and that gender-sensitive mechanisms are used to encourage women to come forward and testify in a safe and supportive environment. The experience of countries such as Timor-Leste is particularly useful in this respect.

Third, massive reparation programmes must be designed and implemented with an eye to ensure accessibility for women by recognizing their special needs and socio-economic and cultural vulnerabilities, which are too often a major impediment for women to come forward and seek redress, both before judicial and non-judicial bodies. As the South Africa's case clearly indicates, linking reparations to truth-telling or similar processes alone risks to leave aside a big number of women, especially from amongst the most vulnerable groups. The incorporation of out-reach work in truth-telling processes, instead, can be instrumental in increasing women overall understanding of the process and, most importantly, their subsequent access to reparations, as it was, to a certain extent, the case in Timor-Leste.

Fourth, reparation benefits should be thought of and designed in a way that is sensitive to the specific needs of women victims of massive and systematic human rights violations. In particular, reparations should not be a substitute of development and should not free the government from its responsibility to ensure adequate access to basic social services to all its citizens without discrimination of any kind, including based on gender. Also, a diversified package of reparation benefits, beyond the granting of financial allowances, is more likely to respond to the multiple needs of women victims and to make a tangible contribution to the quality of their lives. For instance, collective reparations are particularly important as they recognize the collective patterns of human rights abuses. Symbolic reparations, too, such as public disclosure of the truth, public apology, com-

memorations and tributes to victims to mention only a few, are especially important from a gender perspective as they may offer recognition and acknowledgement of the silent crimes suffered by women, first and foremost sexual crimes. Of particular importance, from a rights' perspective, is also the issue of linking reparations to broad institutional reforms that can promote women trust in state institutions and in their capacity to protect and enforce women rights.

Fifth, earmarking a quota of reparation resources to female victims can be a practical way to ensure more gender-focused redress. And lastly, reparation policies should make clear how access to large scale out-of-court reparation programmes may be linked to access to judicial reparations before a court of law. In the absence of such clarity, the existence of a two-pronged reparation system may confuse victims and ultimately discourage them from seeking redress. This is even more important in cases where traditional justice mechanisms are also mobilized as alternative venues to seek justice, as it was the case in Rwanda.

It has been argued that reparations are instruments of justice. It has also been argued that women's right to effective remedy is not only about restitution, compensation, safeguarding of historical memory or access to judicial redress. From a women's rights perspective, redressing women victims of systematic and grave human rights violations is also about acknowledging the important role they, alike men, can play in repairing the social fabric and building anew a more just and equal society in post-conflict settings or even in established democracies with a long history of abuses, impunity and historical gender-based injustices. In this respect, reparations should go above and beyond the immediate reasons and consequences of the human rights violations that have triggered them and aim to contribute to addressing and transforming the political, structural and socio-cultural inequalities that negatively mould women's lives in many patriarchal societies around the world.[51]

[51] See *Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation*, adopted at the International Meeting on Women and Girls' Right to a Remedy and Reparation held in Nairobi from 19 to 21 March 2007 organized by the Coalition for Women's Human Rights in Conflict Situations. The meeting brought together women's rights advocates and activists, as well as survivors of sexual violence in situations of conflict, from Africa, Asia, Europe, Central, North and South America.

This being said, many actors involved in transitional justice debates have rightly expressed concerns about the risks of developing reparation programmes which are unrealistic and raise too many expectations and spoken, in this respect, of the need to "demystify" the concept of reparations.[52] Indeed, unrealistic reparation programmes are not only unworkable from a practical point of view (first and foremost because of luck of adequate funding) but also risks to reduce civic trust in state institutions and thus compromise the overall governments' efforts to gain legitimacy and rebuild a new political and social order in difficult times of political transitions.

Bearing in mind the complexity of achieving justice in cases of massive human rights abuses and the key challenges related to reparations for women victims, as one central element of a justice agenda, the next section will look more specifically at the Kenya's case and will try to assess the extent to which gender issues are adequately reflected in the government current efforts to address the post-election violence and respond to women enduring quest for justice.

## IV. The National Debate in the Post-Election Violence: A Long Journey Towards Justice for Women

Since the release of the Waki report on the post-election violence, the national political agenda has been heavily dominated by the debate on the possible prosecution of a handful of suspects in the Waki secret list, either before a Special Tribunal to be set up in Kenya or before the International Criminal Court in the Hague. Both the international community and the civil society in Kenya have been pushing for a local tribunal claiming that this would be the only way to ensure quick and visible justice for Kenyans and to restore faith in the national judicial system. At the time of this writing, though, the law on the establishment of the Special Tribunal for Kenya has not been passed yet, despite a significant internal and international pressure on the Government to respect the timeline put forward in the Waki report.[53] Hence, in the current situation, and in line with the recommendations in the Waki report, the Hague option remains open.[54]

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[52] This issue was debated at the workshop "Transitional Justice in Kenya. See note 49.

[53] According to the timeline set in the Waki report, after the President and the Prime Minister of Kenya signed the agreement to establish a local tribunal on December 17th 2008, the Parliament was required to enact the law for the Special Tribunal and entrench it in

For gross human rights violations which constitute international crimes, the state has the duty to prosecute. This mans that by unreasonably delaying the setting up of the Special Tribunal, the Government of Kenya is also failing to meet its obligations under international law, including those related to victims' right to remedy.

It is also worth noting that the Special Tribunal for Kenya Bill, in its current version, is deeply flawed in many respects, including from a gender perspective.[55] For instance, while there are general provisions calling for gender equity in the appointment of judges and other Tribunal staff, there is no specific provision on the establishment of special units with personnel expert in gender-related crimes, such as crimes of sexual violence. This insufficient gender focus risks being replicated at the implementation stage. As recognized at international level, strong policies both on prosecuting gender crimes and on gender equality in employment may bring about a culture shift in societies where women may enjoy a lower social status and thus contribute to a broader gender justice agenda.[56] On a positive note, the bill does recognize the victim's rights to compensation.[57]

As far as the capacity of the ordinary criminal justice system to deliver justice to victims of the post-election violence is concerned, there are still a number of substantive challenges, particularly from a gender perspective.

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the Constitution by January 30th 2009. The Tribunal was supposed to be operational by March 1st, 2009. After weeks of parliamentary debates and lobbying, the Constitution of Kenya (amendment) Bill, which was supposed to protect the Special Tribunal from possible constitutional challenges, and the Special Tribunal for Kenya Bill were defeated in Parliament on 13 February 2009.

[54] Following the Parliament failure to establish the Special Tribunal, Kenya human rights organizations are collecting information and evidence on the post-election violence for the purpose of engaging the International Criminal Court in the Kenyan situation.

[55] Several Kenyan civil society organizations and human rights groups have been vocal in asking further consultations and a complete redrafting of the bill to withstand constitutional challenges and to ensure that the tribunal will be truly independent, credible and effective. For a detailed legal analysis of the possible constitutional challenges related to the bill, see the paper "The Proposed Establishment of the Special Tribunal for Kenya" prepared by the Kenya National Commission on Human Rights, available at www.knchr.org The full texts of the Special Tribunal for Kenya Bill, 2009 and the related Constitution of Kenya (Amendment) Bill, 2009 are available at www.kenyalaw.org

[56] See Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States. Maximizing the Legacy of Hybrid Courts*, 2008, p. 18.

[57] See article 55, Special Tribunal for Kenya Bill, 2009.

Indeed, despite some progress made in the implementation of reforms in the legal sector, notably the adoption of the Sexual Offence Act 2008, access to judicial redress for women victims of severe human rights abuses is restrained by several factors, including: lack of trained professionals; victims' fear of retaliation from alleged perpetrators; cultural barriers related to the stigma associated to reporting crimes of a sexual nature; costs of initiating legal proceedings; restricted access to legal aid; a general lack of trust in the capacity of the judicial system and state enforcement agencies to deliver justice effectively and impartially. Thus, the overall judicial environment is very hostile to women and to pursue a case in court does not seem to be, in the present situation, a real option for the majority of Kenyan women, particularly in rural areas.[58] From this perspective, it is not surprising that thus far no prosecution for gender-based crimes committed during the post-election crisis is reported to have taken place in the country. Significantly, too, 50 cases of rape perpetrated against women during the post-election crisis were closed recently for lack of evidence.[59]

Within this context, is it justifiable, to still put the judicial response at the top of the hierarchy in the national debate on justice for the post-election violence? As frequently argued in this paper, a focus on prosecutorial venues to pursue legal justice risks being an insufficient and ineffective way to satisfy women victims' right to remedy, especially in view of the scale and nature of the human rights violations perpetrated in the wave of the post-election crisis.

In fact, prosecution is not the only measure recommended by the Kenyan Commission of Inquiry into the Post-election Violence. The Waki report contains a specific set of recommendations to respond to the post-election violence, in general, and to violence against women in particular. In relation to the latter, this includes inter alia: provision of free medical services to victims of sexual violence; the establishment of specialized departments within each public hospital to deal with victims of sexual violence with their own staff, facilities and budget; the creation of specialized

[58] View expressed by officials from the National Commission on Gender and Development, Gender-Based Violence sub-cluster. Author's notes. Nairobi, 16 March 2009. Indeed, the general lack of trust in the national judicial system, especially in relation to women actual possibility to seek judicial redress for sexual crimes, was shared by all women interviewed during the course of the research that has informed this paper.

[59] Information reported on the *Daily Nation*, 16th March, 2009 and confirmed by officials of the National Commission on Gender and Development.

gender units in each police station with trained staff; the establishment under Kenyan law of the office of the special rapporteur on sexual violence.[60]

More in general, the Waki report puts forward a detailed list of recommendations that relate to state security agencies and the issue of impunity, including: the setting up of a Special Tribunal for Kenya as a court that will seek accountability against persons that bear the greatest responsibility for crimes related to the 2007 general election; the speedy enactment by the Parliament of the International Crimes Bill to facilitate investigation and prosecution of crimes against humanity; the full utilization of the Witness protection Act 2008 in the course of investigation, prosecution and adjudication of all post-election violence cases; and last but not least, comprehensive institutional reforms of the Kenya Police service and administration police.[61]

It is sensible to argue that a timely, effective and full implementation of the Waki report recommendations, especially those related to institutional reforms within the judiciary and the security sector, would be already a meaningful contribution to the victims' right to redress, including women, as they would represent a guarantee of non-repetition, which is one important element of the right to remedy for victims of gross human rights violations under international law.[62] These measures would also contribute to prevention of human rights violations in the future and to restore civic trust and public confidence in the government.

Regrettably, though, the pace of institutional reforms in the country is still very slow and the government has been repeatedly criticized, both internally and externally, for the lack of leadership and sustained political commitment to push forward the agreed upon national reform agenda, particularly the measures related to justice and the fight against impunity and corruption.[63]

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[60] See Chapter VI Waki report, pp. 268-270.

[61] See Chapter XIII Waki report, pp. 471-481

[62] See *The UN Basic Principles*, principle 23

[63]See reports produced in January 2009 by the Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project. The project seeks to track progress in the implementation of the four agenda items agreed upon within the KNDR frame. The Waki recommendations would largely fall within Agenda 4. The project found that although progress has been made in some areas, it is not sufficient to prevent another crisis. The reports can

In addition to institutional reforms, as recommended in the Waki report, the parties to the KNDR framework committed themselves to the setting up of a Truth, Justice and Reconciliation Commission (hereafter TJRC). The TJRC is another critical element of the justice agenda to address the post-election violence and is especially important from the perspective of women victims' right to remedy and reparations, including for redressing past abuses and historical injustices. It thus warrants some consideration here.

The TJRC Act was signed into law by the President in November 2008 and came into force on 6th March 2009 despite a number of serious flaws in it, little public consultation and protests by various human rights lobby groups, including women rights organizations. According to its constituting Act, the Commission's main tasks are: i) establishing the facts about human rights violations committed between 12 December 1963 and 28 February 2008, including gross human rights violations and economic crimes; ii) recommending the prosecution of suspected perpetrators; iii) determining means of redress for the victims; iv) facilitating the granting of conditional amnesty; v) and providing a forum for reconciliation (section 5).[64]

As noted in the previous section, public participation in truth telling or similar processes, right from inception, is critical to guarantee legitimacy and ownership by the people and make sure that these initiatives are seen as an effective and meaningful venue for justice and redress by victims of human rights violations. In particular, women active and informed engagement from the onset is instrumental to ensure that gender issues are adequately reflected in the mandate and work of any truth commissions

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be downloaded from the following website: www.dialoguekenya.org. Significantly, former UN Secretary General and chief mediator during the Kenyan political crisis Mr. Kofi Annan, recently summoned both the President and Prime Minister of Kenya to a meeting in Geneva at the end of March to review and assess the progress made in the implementation of the national accord and the related reforms. Special concerns have been raised on the delays in the setting up of the Special Tribunal. As stated by Mr. Annan, "failure by the Kenyan Government and the Parliament to create a Special Tribunal would constitute a major setback in the fight against impunity and may threaten the whole reform agenda in Kenya". *Daily Nation*, Nairobi, February 25th, 2009.

[64]The TJRC will have nine members: six shall be Kenyan nationals to be appointed by the Parliament based on a list of nominees prepared by a civil society panel; and three will be foreigners to be nominated by the Panel of Eminent African Personalities headed by Mr. Kofi Annan. The TJRC shall operate for two years and shall have a preparatory period of three months.

or similar body. From the mandate definition; the interpretations of the human rights violations to be addressed and the subsequent classification of victims; the appointment and training of commissioners and staff; the statement taking process; the conduct of investigations and hearings; the establishment of inclusive criteria for reparation eligibility; the design of specific reparation benefits and their actual implementation; from all these aspects, a gender sensitive approach can guarantee that the suffering of women and their specific needs for redress are duly taken into account and that adequate forms of reparations are devised to respond to their specific needs.

Despite some valuable initiatives are being taken by civil society groups in the country, including women organizations, to engage the public in discussions around the future work of the TJRC, overall Kenya's TJRC process is in essence a State-owned one. As noted by local human rights activists, Kenyans are still largely uninformed on the principles behind it. They are not clear on how the Commission would work, its recommendations be implemented, or indeed what issues the Commission would focus on.[65] There seems to be also a general sense of skepticism and lack of interest in respect to this initiative due to previous experiences with numerous past commissions of other natures whose findings were never published or final recommendations never acted upon by the government.[66]

From a more substantive perspective too, the TJRC Act, 2008 is seriously flawed.[67]The most controversial and heatedly debated aspect is the amnesty mechanism (section 34), which is likely to disadvantage victims,

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[65] A general fatigue with respect to the TJRC was evident at the first Public Forum on "Transitional Justice and the TJRC Act, 2008" organized by the International Commission of Jurists – Kenya (Nairobi, 24th March 2009)

[66] Already back in 2003, at the end of the Kenya African National Union (KANU) uninterrupted forty year rule, a Taskforce on the Establishment of a Truth, Justice and Reconciliation Commission chaired by Professor Makau Mutua was established. The Taskforce submitted its report to the then Minister for Justice and Constitutional Affairs in August 2003. Although the Makau Taskforce had found that Kenya did require a TJRC and had indeed recommended the establishment of one, it was never set up. See *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, Republic of Kenya, August 26th, 2003.

[67] See N. Waynaina, "The Inadequacies of the Truth and Justice Commission Law, article published in the *Daily Nation*, February 17th, 2009. The author is the Executive Director of the Kenyan Center for Policy and Conflict. See also Amnesty International, *Kenya: Concerns about the Truth, Justice and Reconciliation Commission Bill*, May 2008, AI Index: AFR 32/009/2008.

including women, in multiple ways and to give rise to several legal challenges. For instance, the Act states that no amnesty may be recommended in respect of gross human rights violations, including sexual assault, rape and torture (section 34.3). Then, it is stated that the Commission shall facilitate "the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations" (section 5 f). These two statements are in evident contradiction. Also, the Act does not explicitly prohibit amnesty (either conditional or unconditional) for crimes against humanity and genocide, as required by international law.

The law talks of "conditional amnesty" without clarifying what specific criteria will amnesty be "conditional" on. The Act does not clarify either the relationship between the Commission and national prosecution authorities, namely it is not clear whether in the case amnesty is granted a suspect would become immune to prosecution. Also, it is foreseen that the Commission may not recommend amnesty until it has been ascertained that the concerned victims have no reasonable objection to it. Yet again, it is not clear what process will the victims be expected to follow to submit and have her/his objections considered. Lastly, pending the consideration and disposal of an application for amnesty, the Commission will also have the power to request a suspension of any civil or criminal proceedings instituted against the person who submitted the amnesty application.

Quite significantly, the whole chapter of the Act related to the amnesty mechanism is much longer and detailed than the one devoted to reparation and rehabilitation of victims which contains only one short section recognizing the general right of a victim of gross human rights violations to apply for reparations before the Commission (section 42). The individual application process is cumbersome and likely to penalize the most vulnerable, marginalized and disadvantaged victims, notably women. On the contrary, there is no provision in the Act explicitly giving the Commission the authority to recommend the establishment of a broad national programme for reparations and other assistance to victims. The Act is also unclear as to whether reparations will be granted to victims of any human rights violation or whether they will be limited to those who have suffered gross human rights violations only. Lastly, some of the definitions of human rights violations included in the mandate of the Commission are not fully in accordance with international law and standards, including the definition of gross human rights violations (section 2).

On the positive side, the Act does give adequate recognition to the principle of gender equity in the appointment of commissioners and staff. It also provides for the establishment of special units and mechanisms to address the specific experience of vulnerable groups, including women (section 27) and gives ample acknowledgment, under different sections, to the need for addressing crimes of sexual nature committed against women.

In light of its widespread mandate spreading over some 43 years of human rights violations and economic crimes, shaky legal grounds, uncertain political back-up and, perhaps most importantly, overall lack of people's ownership and trust in it, it would be reasonable to conclude that the future Kenya's TJRC is unlikely to effectively deliver reparative justice and redress to victims of human rights violations, including women.

Paraphrasing the statement made by one prominent participant to a recent public forum on the TJRC, Kenyans have the option to completely turn down the TJRC process; or they may try to make the best out of it by, inter alia, lobbying to amend the act, creating the space for meaningful public participation, galvanizing political commitment and ensuring that adequate technical and financial resources are allocated to the TJRC.[68]

Indeed, despite all its procedural and substantive limitations and flaws, the TJRC can still be a window of opportunity to deliver the much needed justice. It may not be in the end the "perfect justice" that victims, especially women, would deserve, but it may still provide a chance to give some voice to the voiceless: above all, women.

## V. Conclusions

It has been argued that the right to remedy for women victims of serious human rights violations in situations characterized by systematic and collective patterns of abuses and historical gender injustices may best be addressed through the development of gender-sensitive out-of court reparative measures. To state this is not to argue against the importance of pursuing legal justice and judicial redress. It is rather to acknowledge that massive violence against women in the context of conflicts or violent political crisis calls for a more holistic approach to justice, where both re-

[68] Speech made by Ambassador Betwel Kiplagat, from the Africa Peace Forum, at the Public Forum on Transitional Justice and the TJRC Act, 2008. Nairobi, 24th March, 2009.

tributive and reparative avenues, before judicial and non-judicial bodies, should be evenly pursued.

The paper has also argued that reparations have the potential to contribute to the longer-term goal of gender justice if designed and implemented with sensitivity to the root causes of the societal violence and gender bias which are behind the gross human rights abuses suffered by women, both in times of conflict and peace.

Justice matters even – or especially – to those who have nothing. The most vulnerable women among victims of human rights violations may have no opportunity for redress unless the state takes positive action to reach out to them and help them pulling together the broken pieces of their lives. Financial compensations, free access to special rehabilitation services, public disclosure of the truth and public acknowledgement of women sufferings and specific experience of political violence, collective reparations and other similar measures have all the potential to tangibly help women and deliver the much-needed justice.

Kenya is at a critical juncture of its post-independence history. After the widespread violence following the 2007 elections, the country is struggling with the multiple goals of securing political stability and sustainable peace, building public confidence in state institutions, fighting impunity and achieving credible justice and reconciliation. Kenyan women who, in great numbers, have suffered unspeakable human rights abuses during the post-election crisis are still waiting for justice. While a state-sponsored reparation programme, possibly linked to the TJRC work, would still be an important venue for redress, in the present situation the full implementation of the recommendations contained in the Waki report - particularly those related to gender-based violence and institutional reforms in the justice and security sectors - may be the most immediate way to redress women victims of the post-election crisis as well as to ensure that the next generation of Kenyan women will have the chance to live in a society free from violence, gross human rights abuses and impunity. The alternative could be no justice in a failed state.