

# MAKING JUSTICE WORK FOR WOMEN

*Summary of  
Kenya Country Report*

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Making Transitional Justice Work for Women:  
Rights, Resilience, and Responses to Violence  
Against Women in Democratic Republic of the  
Congo, Northern Uganda, and Kenya



THE UNIVERSITY OF  
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IN CONJUNCTION WITH



# **MAKING JUSTICE WORK FOR WOMEN**

## **Kenya Country Report**

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## **SUMMARY REPORT**

# CHAPTER 1: INTRODUCTION AND BACKGROUND

## 1.1 Background to the project

In a series of reports,<sup>1</sup> we present the findings of the project, *Making Transitional Justice Work for Women: Rights, Resilience and Responses to Violence Against Women in Democratic Republic of Congo, Northern Uganda and Kenya* (Grant ID: G160214). This is a summary report of the findings from Kenya. The full report provides a significantly more detailed discussion.<sup>2</sup> Funding for this project was granted by the Australian Department of Foreign Affairs and Trade (DFAT), under the now discontinued Australian Development Research Awards Scheme (ADRAS) 2012.

The research was designed to investigate transitional justice processes for addressing women's rights and justice priorities in three countries in sub-Saharan Africa: Democratic Republic of Congo (DRC), Uganda, and Kenya. This regional focus reflects the priority accorded by the international community to transitional justice, as a means to address past human rights violations experienced during civil war and other mass violence, and to promote lasting peace and stability. The countries for study were selected because: each has transitional justice processes in place; Gender Based Violence (GBV) is significantly prevalent in each conflict; and the researchers had existing partners on the ground who could facilitate a logistically feasible, meaningful, and culturally- and gender-sensitive research process.

## 1.2 Project methodology

### 1.2.1 Introduction

This research sought to identify women's priorities for justice, their experiences when seeking justice, and both enabling factors and obstacles in justice processes, in the three focus countries. Justice was defined in a fluid, broad, and holistic way to include legal, health, economic, social, and psychological elements (Olsen et al. 2010b, 983; Fischer 2011, 412; Szablewska and Bradley 2015, 261). The project has developed a rigorous, reliable, and substantive evidence base of the experiences, views, and opinions of women affected by violence in the research sites. The project entailed researchers travelling to multiple locations within each country, including major regional towns and villages in remote and difficult to access areas. This was done to enable women who are rarely, if ever, able to participate in research, consultations, and decision-making processes to contribute to this project.

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<sup>1</sup> Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Democratic Republic of Congo Country Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5332962~S4>; Lucy Fiske and Rita Shackel, "Making Justice Work for Women: Uganda Country Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5336181~S4>; Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Democratic Republic of Congo Summary Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5365440~S4>; Lucy Fiske and Rita Shackel, "Making Justice Work for Women: Uganda Summary Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5365444~S4>; Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Kenya Summary Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5365443~S4>.

<sup>2</sup> Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Kenya Country Report" (August 2016) <http://opac.library.usyd.edu.au:80/record=b5334992~S4>. Please see the full Uganda Country Report for references cited in this summary report.

The extensive fieldwork, conducted over a two-year period and engaging 274 women affected by violence, provides unique insights into women's access to justice, and the efficacy of different justice strategies and mechanisms in conflict and post-conflict sites. Fieldwork in Kenya was conducted in multiple sites in Bungoma, Nairobi, Marafa/Tana Delta, and Kisumu; a total of 63 women impacted by violence in Kenya participated in the research – 8 through individual interviews, and 55 through focus group discussions. Women participants were married, cohabiting, never married, separated, divorced, and widowed, and most also had children (ranging from 1–11 births); their education levels were also varied (ranging from no education to university graduate), but the majority had at least some primary school level education. These insights are extended further by individual, semi-structured interviews with 68 key informants (26 in Kenya), including local community leaders, prosecutors, judges, health and welfare workers, policy workers, and development workers, as well as those working in transitional justice, human rights, and women's rights internationally.

### *1.2.2 The research questions*

The research addressed the following key research questions:

1. What do women in northern Uganda, Kenya, and eastern DRC identify as their priorities in relation to justice?
2. What efforts have been made to provide justice and rights protection for women who have experienced violence in northern Uganda, Kenya, and eastern DRC?
3. How have women responded to these justice interventions, and what impact have these had on addressing women's rights and justice priorities?
4. How can transitional justice interventions be adapted to better address women's rights and justice priorities, build resilience, and prevent violence against women?

### *1.2.3 Key methodological issues*

In terms of its epistemology and paradigm, the research is qualitative, feminist, and phenomenological. The methodology recognises that the voices of women are often muted by social, economic, and political factors (which are further enlivened during war), and then systemically embedded in justice processes; thus, the phenomenological method employed for this project combines inquiries into individuals' accounts of a shared experience with key informant perspectives, existing literature addressing the histories and justice reforms of each country, and other thematic research into gender, human rights, development, poverty, and violence. Initially identified themes in the interviews included: legal, economic, social, political, and health justice; psycho-social and emotional well-being; traditional and/or informal justice mechanisms; roles of women in justice processes; and the effects of justice. By melding these insights with secondary research and analysis, a phenomenological enquiry can mediate the transition of private experience to public political concern, and thus enable the generation of knowledge with relevance beyond the anecdotal.

Furthermore, multidisciplinary and multi-country collaboration enhanced the quality of the research. It enabled us to draw on expertise in several different fields, including social and legal theory; legal frameworks; qualitative research methods; development work; and country- and culture-specific knowledge.

## **1.3 History and context of the conflict and transitional justice in Kenya**

### *1.3.1 A snapshot of Kenya*

Kenya lies across the equator in East Africa, with a coastline of 536 kilometres along the Indian Ocean. It has a land area of 582,646 square kilometres (National Council for Population and Development 2012), an estimated life expectancy of 63.8 years (with 62.3 years for men, and 65.3 years for women), and a birth rate of 26.4 births per 1000 population (CIA 2016). Kenya has 42 tribes regionally distributed across the country; the five biggest tribes are the Kikuyus (constituting 22 percent of the total population), the Luhyatas (14 percent), the Luos (13 percent), the Kalenjins (12 percent), and the Kambas (11 percent) (CIA 2016).

In a recent Economic Update on Kenya, the World Bank reported that Kenya is poised to become one of the fastest growing economies in East Africa over the next three years; with an increasing growth projection of up to 7 percent by 2017, it is currently positioned as the ninth largest economy in Africa, and the fifth largest in sub-Saharan Africa (2014, 22). With a GDP per capita of US\$1,246, Kenya is now classified as a lower-middle-income country (2014, 2). However, one cannot ignore the fact that 42 percent of Kenyans live below the poverty line, with women generally being poorer than men; furthermore, 54 percent of rural women and 63 percent of urban women live below the poverty line (World Bank 2007, 10). A majority of the population also does not have access to basic services, such as clean water, proper sanitation, and health care; as of 2015, only 63 percent of the population have access to improved water supply sources, with 22 percent subsisting on surface water (UNICEF and WHO 2015, 65).

Kenya has enjoyed relative peace since its independence in 1963. However, this peace was threatened by the events of 2007/2008, when, soon after the general elections of 2007, the country was engulfed in internal conflict. The announcement by the Electoral Commission of Kenya (ECK) that the incumbent president, Mwai Kibaki, had won the presidential elections was met with protest by the opposition, who claimed that the elections were not free and fair. Violence erupted following the announcement and lasted for three months between 2007 and 2008; during which 1,500 people were killed, more than 3,000 women were raped, and over 300,000 were displaced (Press 2009, 141). The worst affected areas were the Rift Valley, Kisumu, Nairobi and Mombasa. Although the conflicts seemed to have been triggered by highly contested presidential election results, earlier studies and analysis have argued that multiple historical events and contextual factors played a role (Lafergue and Katumanga 2009). To understand Kenya's internal conflicts, it is important to understand the history of land demarcation, settlements, economic activities, and the role of politics and tribal alignments in fueling inter-ethnic conflict.

### *1.3.2 Colonisation and post-colonial politics*

Questions of access and control of land in Kenya date back to colonial times. Land is central to Kenyan conflicts, due to the fact that Kenya's social and economic systems are traditionally agrarian, making land the most coveted resource. The KHRC (2011, 11) reports that 75 percent of Kenyans depend on land, but only 20 percent of Kenyan land is arable (the most attractive of which is the previous "White Highlands"). During colonial rule, the British

demarcated land and controlled access based on race and ethnicity. The Crown Lands Ordinance of 1915 arguably paved the way for the alienation of land into “land for Africans” and “land for the Whites” (Okoth-Ogendo cited in Kanyinga 2009, 327). The land for the Whites (which came to be known as the “White Highlands”) contained most of the fertile land, ideal for cash crop farming. The land allocated to Africans (referred to as “native reserves”) was divided along tribal units, and each unit was only accessible by a controlling ethnic group. This was part of the larger ploy by the British to divide and rule (Kinyanjui 2013); the colonisers simultaneously used tribal loyalties to preference certain groups over others, while at the same time ensuring a divided and therefore weaker body of subjects to govern. Boundaries set up by the colonial government have continued to define each ethnic group’s space, with little tolerance for “others” from different ethnic groups.

Distribution of land is a highly emotive issue in Kenya, heightening social, political, and economic tensions among different groups of people. After Kenya’s independence in 1963, communities have continued to claim the redistribution and ownership of this land; of particular note is the former White Highlands in the Rift Valley, over which various ethnic groups (particularly the Kalenjin, the Kikuyu and the Luhya) have been competing (Kanyinga 2009).

Post-colonial politics in Kenya have continued to capitalise on this differentiation, as it provides fodder for clientele politics. Control of government resources became the preserve of the political elites; leading to marginalisation and inequality based on ethnic differentiation. Such was the case in the 2007/2008 elections, in which the two most popular political parties, the Orange Democratic Party (ODM) and the Party of National Unity (PNU), were ethnically aligned with the party leader’s ethnic background. The ODM was primarily associated with the Luo, the Lugha, the Kalenjins, and the Kambas;<sup>3</sup> the PNU, led by Kibaki, was pre-dominantly composed of Kikuyus, the Meru, and the Embu (Rutten and Owuor 2009, 316). Mobilising the local community is essential for political success, but voters (i.e. the tribesmen) expect to receive superior jobs and other favours in return for their support. In this cycle, it becomes evident that holding political office translates into benefits for the particular politician’s tribe. A sense of obligation results; when an individual from a particular ethnic identity group ascends to power, the onus is placed on him or her to ensure that they share resources with fellow tribal mates (Roberts 2009). Such a mutual arrangement generates inter-tribal antagonism, as well as tensions resulting from favouritism within the tribe (2009, 144).

### *1.3.3 Ethnic identity versus national identity*

The Kenyan experience has been one in which ethnic identity does not always sit comfortably with a national identity. The above practices and attitudes are further evident in the fact that Kenyans have a tendency to identify with one’s ethnic group more strongly than with their Kenyan nationality.<sup>4</sup> Ndegwa (1997) argues that ethnic identity undermines national identity due to the former’s ability to “extract obligations” through social relationships – something

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<sup>3</sup> Although located in a different region, the Kambas were aligned to the ODM by virtue of the fact that one of the ODM’s leaders, Kalonzo Musyoka, was of the Kamba tribe.

<sup>4</sup> In the 2009 Population and Housing Census conducted by the Kenya National Bureau of Statistics (KNBS), respondents were asked to name their ethnic or national identification. In their responses, only 1.6 percent of the population identified as “Kenyan,” with all other respondents identifying their tribal affiliation (KNBS 2009, 397–398).

the nation-state is unable to do as a whole. Thus, when the two come into conflict, ethnic identity is often favoured.

Politicians have taken advantage of this strong ethnic identification to interpret and present all types of conflicts as ethnic conflicts, in order to promote their purposes. They have continued to lay claim to their tribal roots, and have created a symbiotic relationship with their tribe's people; they use these divisions as political mileage, depending on ethnic backing for their own political gain by appealing to the group's collectivity, common origin, destiny, and social responsibility for their own political success (Bjork and Goebertus 2011; Katumanga 2013).

#### *1.3.4 Inequalities: Land and socio-economic status*

Skewed access to resources favouring a few, a high rate of unemployment, and the growing gap between the rich and the poor, add fuel to the existing tensions between different groups, and triggers the inter-tribal and inter-clan conflicts experienced in post-colonial Kenya. Land allocation is also steeped in corruption and inequality. Allocation of public land has been used for political patronage, to reward "politically correct" individuals (Kamungi 2009, 347). According to a KHRC status report (2011), the groups most affected by these land injustices include: squatters or landless poor; the unemployed; women; children, youth and orphans; the aged; subsistence farmers; pastoralists; hunters and gatherers; minority communities; forest dwellers; persons with disabilities (e.g. HIV/AIDS); and people living in informal settlements (slums). Political violence witnessed in Nairobi, especially in slum areas, is closely related to the status of squatters or landless poor, as well as the unemployed.

A relationship exists between violence and socioeconomic status. Violent crime is said to have greatly increased in Nairobi in the 1980s and peaked in the 1990s – a period characterised by political instability and hard economic times, especially as a result of the IMF's structural adjustment programmes (Omenya and Lubaale 2012). Of particular note in this period was the rise of militia groups, frequently co-opted by politicians to serve their political interests by harassing political opponents. Similarly, high rates of unemployment and poverty can potentially increase conflicts; many unemployed youth are willing to take up "arms as mercenaries," on behalf of anyone who can afford to pay them (Bjork and Goebertus 2011, 206). The situation is further exacerbated by the poor-rich gap, creating a situation in which the poor sometimes use violent means to acquire resources from the rich, and the rich use violent means to keep the poor at bay.

#### *1.3.5 Influx of firearms and formation of militia groups*

The availability of firearms among warring communities in Kenya is an important factor to consider in this context of violence. There has been an increased availability of firearms, both legal and illegal, among some of the communities involved in inter-ethnic conflicts. For example, the counter-ethnic clashes on the Kenya-Uganda border have over time led to the state's deliberate arming of quasi-formal groups, as well as security and vigilante groups, for self-defence purposes (Mkutu 2006). Firearms find their way into the hands of the community through many illegal channels. Mkutu notes that some of the pastoralist communities engaging in the counter-ethnic conflicts along the Kenya-Uganda border occasionally acquire arms during raids on counter groups. Some may even have gun-making skills (Mkutu 2006, 52). Porous borders between conflict-prone countries in the Horn of

Africa (e.g. Somalia) have also contributed to an increase in firearm possession within communities in those regions.

Of additional significance is the formation of militia groups in the wake of accusations of the state security agencies' inability to offer adequate protection to different communities. Unfortunately, most of the militia groups have been formed along ethnic lines.<sup>5</sup>

### *1.3.6 Description of conflict in the research sites*

While the 2007/2008 post-election violence (PEV) in Kenya was experienced across different parts of the country, each area experienced types of violence that were partly similar, and in other ways different and unique to their specific context. While some of the root causes of the conflicts can be traced back to the historical events discussed above (i.e. Kenya's colonial and post-colonial history and legacy), the events and circumstances that have triggered more recent conflicts differ for each research site, and are nuanced by both the uniqueness of the groups involved, and the circumstances triggering the conflict. The role of the political class in inciting and exacerbating conflict, however, is of particular note in all conflicts described.

#### Bungoma

Bungoma County is in Western Kenya. It is situated on the slopes of Mt. Elgon, and shares a border with Uganda to the west.

Conflicts in Bungoma have a long history. Over time, they have endured ethnic clashes, mostly in the form of cattle rustling with the Sebei, Pokot, and Karamojong of Uganda. However, in the post-colonial era, the conflicts have been primarily based around issues of land and boundary disputes with neighbouring communities (Psiwa et al. 2014). Some of these land-related issues can be traced back to the land policies of the British government, which involved the movement of communities from their ancestral land to make room for British settlers (Wachura et al. 2010). Even in post-independence Kenya, the Sabaot (the dominant community in Bungoma, and a subgroup of Kalenjins) lost more of their land to non-Sabaot communities, who moved into their region in search of fertile land for farming. Over time, the conflict shifted, from one between the Sabaots and Bukusu (a subgroup of the Luhya) to one between two Sabaot clans – the Mosop and the Soy (Lynch and Anderson 2014, 83); this occurred due to perceived favouritism by the government in the allocation of land. Furthermore, conflicts in this area have been further exacerbated by the proliferation of small arms and light weapons (SALWs), and the formation of militia groups (e.g. the Soy-dominated Sabaot Land Defence Force), enabled by the region's porous borders with conflict-ridden Uganda.

The Human Rights Watch, in its *Divide and Rule* report (1993), records the first post-colonial conflict in this region as having taken place in November 1991. In relation to the 2007/2008 PEV, Lynch and Anderson (2014) recorded that, as the 2007 general elections approached, the violence in the area escalated. The SLDF began making political statements and demands (MSF 2008). Furthermore, there were intimidations and assassinations of politicians and their family members, especially those politicians who were supportive of the Kibaki government.

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<sup>5</sup> In addition to the previously mentioned Mungiki (associated with the Kikuyus) and Kamjesh (associated with the Luos) groups, such groups include the Chinkororo (associated with the Kisii), the Baghdad Boys and Talibans (associated with the Luos), and the People's Liberation Army (associated with the Kalenjins).

There was extensive destruction of property, including burning houses, leading thousands to flee their homes. After initial denials by Michuki, then Minister for Internal Security, about the extent of atrocities taking place in Mt. Elgon, the government did finally start responding to the crisis. There was a heavy security presence in Mt. Elgon during the December 2007 parliamentary and presidential elections, and in the aftermath of the 2007/2008 violence, the Kenyan army launched an assault in the region as a state of emergency was declared over the area; the Kenya Air Force bombed suspected SLDF hideouts, and young men were rounded up and interrogated for any information that they might have about the militia group.

### Kisumu

Kisumu is the third largest city in Kenya, located in Kisumu County within the larger Nyanza region. The dominant ethnic group in Kisumu is the Luo, with significant Kisii, Luhya, Nubian, and Asian populations (KIRA 2014, 2).

Kisumu is described as a politically volatile area. Conflicts in Kisumu are usually triggered by politics, marginalisation, and land issues (Safeworld 2013). Given its strong support for the opposition party (ODM), it was considered a stronghold of Raila Odinga, Kibaki's closest competitor during the 2007 parliamentary and presidential elections; it was therefore unsurprising that protests broke out in Kisumu as soon as the presidential results were announced in favour of Kibaki. In Kisumu, this PEV involved ethnic cleansing, mainly targeting communities who were presumed to be supportive of PNU and Kibaki. This included Kikuyus, Amerus, and Kisiis; Asians were also targeted because they were perceived to support the status quo, the government of the day. Businesses and property belonging to these communities were destroyed, looted, or set on fire (KNCHR 2008, 88–89; Shackle 2015). KNCHR further reports that the minority communities also launched retaliatory attacks, thereby escalating the violence; many others fled Kisumu out of fear for their lives (2008, 64).

A second wave of protests occurred in Kisumu in March 2013, following the ruling by the Supreme Court upholding the 2013 election results. The ethnic alignments in Kisumu present a unique situation. The Luo and Kalenjin have a history of inter-ethnic rivalry; however, in the run up to the 2007 elections, both communities supported the ODM, which provided a period of unity between the two communities. After the elections, however, there was a fall-out between Raila Odinga and William Ruto, as a result of which the rivalry resumed (CRECO 2012). Following the Supreme Court ruling, youth reacted violently; just as in earlier riots, they barricaded roads, burned tiles, and looted businesses.

### Nairobi

Nairobi is the capital city of Kenya, named by the Maasai, the original settlers of the area in pre-colonial Kenya, with their word for “the place of cool waters.” Founded in 1899, it reflects the national ethnic composition – the Kikuyu people constitute the majority, followed by the Lugha, Kalenjin, Luo, and Kamba peoples (Omenya and Lubaale 2012).

While the city has its own unique conflicts, other conflicts experienced in other parts of the country have also been played out in Nairobi, often agitated by the same ethnic divisions and contestations over land (Omenya and Lubaale 2012). Most 2007/2008 PEV took place in the slum areas of Nairobi. The factions involved in the conflict were split both ethnically and politically (Global Communities 2013), and sides were taken depending on the political party

that one's tribe primarily supported – Mwai Kibaki's Kikuyu-dominated PNU, against Raila Odinga's Luo-dominated ODM. Conflicts were not limited to the slum areas, though, as the opposition, led by Raila Odinga, organised large demonstrations across the city. Furthermore, ethnic militia (the most popular of which were the Mungiki for the Kikuyus, the Taliban for the Luo, and the Chinkororo for the Kisii) organised to conduct attacks and counterattacks against their opponents (KNCHR 2008).

The conflicts in Nairobi also took on a socio-economic dimension, played out particularly between landlords and tenants in lower socio-economic areas. Over the years, those living in slums have engaged in housing and land related conflicts, exacerbated by ethnic affiliations, and in most cases, these conflicts escalate during political campaigns. Populations were evicted from their homes; in slum areas such as Kibera, there were claims of tenants evicting landlords (who were mostly Kikuyus), and either taking ownership of their homes or renting them out at cheaper rates (Omenya and Lubaale 2012, 16). It is of significant note that some of the atrocities experienced during the 2007/2008 PEV in Nairobi were not unique to this period.

### Tana River

Tana River County was part of the former Coast Province, which was dissolved after the separatist Mombasa Republican Council initiated attempts to secede from Kenya (IRIN 2012). It is named after the longest river in Kenya, the Tana River.

The River Tana being an important natural resource in the county, it inevitably became central to decades old conflicts over access to land, mainly between two communities: the Pokomos (mostly farmers engaged in small-scale farming along the river) and the Orma (mainly nomadic pastoralists). But the elections of 2013, while generally calm compared to the earlier 2007 elections, nonetheless generated pockets of violence characterised by ethnic conflicts based not only on tensions between the Orma and Pokomos, but also between indigenous communities and those not originally from the region. From a political perspective, new alignments were formed leading up to the March 2013 elections. Both the Pokomos and Ormas feared that losing power to the other party might catalyse the loss of their influence in the area, or might lead to them being driven out of the region altogether; consequently, both groups mobilised other communities, forming alliances to ensure that they gained power (Mohamed 2015, 69–70, 80–81). As a result of the violence, hundreds of people were killed, houses were set on fire, cattle were stolen, and approximately 1000 people were displaced. It has since been described as the deadliest massacre in Kenya since the 2007/2008 PEV (HRW 2013).

The conflicts in Tana River persist up to the time of writing this report. As recently as mid-2015, new conflicts erupted between two ethnic villages on the boundaries of Tana Delta and Kilifi County. Women and children have been most affected; displacement and rape have been widespread, and many families have lost fathers and husbands (Amin 2015). Other fights erupted between Giriama farmers and the Wardei over grazing land, which led to more deaths and many more fleeing to Kilifi country for refuge (Kenya Red Cross 2015).

### *1.3.8 Gendered violence*

The history of discrimination against, and subordination of, Kenyan women dates back to pre-colonial days, and was somewhat reinforced during the processes of colonisation

(Nyokabi 2013, 23). Omondi (1988, 4) notes that in the traditionally patriarchal societies of Kenya, violence against women was both expected and excused; a man could beat a woman and be excused with the simple reason that “they are men.” On the other hand, women were expected to persevere, for the equally simple reason that they were women. Such attitudes remain prevalent today; in the most recent Kenyan Demographic and Health Survey (KDHS), 40.7 percent of ever-married (i.e. married, divorced or separated) women aged 15 to 49 years reported having been physically or sexually violated by their husbands or partners, with 14.0 percent having experienced sexual violence specifically (2014, 59). A recent study by the Kenyan National Crime Research Centre reported that 94.5 percent of women and 95.7 percent of men believe that “Men are heads of families and must control their families” (NCRC 2015, 49). The same study reported that 52.4 percent of women and 58.3 percent of men believe that it is a man’s right to discipline a woman (NCRC 2015, 49).

Another crucial issue is the subjection of women to sexual and gender based violence (SGBV). While there are credible reports of sexual violence against men and boys during the PEV, including allegations that Kikuyu men forcibly circumcised Luo men (HRW 2008, 50–51), women are overwhelming the victims of such violence. During periods of political upheaval, in addition to the loss of land, property, and loved ones, women are also often the targets of rape and sexual crimes. Spangaro et al. (2013, 2) posit that perpetrators of such crimes take advantage of both the fact that individuals are unprotected by family or authorities during such incidences, and the environment of impunity that characterise conflict periods. There was also a clear increase in sexual assaults during the PEV of 2007/2008, with the Nairobi Women’s Hospital Gender Violence Recovery Centre attending over 650 cases of gender-based violence related to this conflict, and observing a threefold increase in the number of cases of women who had suffered sexual crimes (Thomas et al. 2013, 525). These attacks have been connected to ethnic affiliations, with political opponents seeking to humiliate and punish men as failed protectors, and to punish women for their particular political or ethnic affiliation (2013, 526–528). Cases of sexual violence were reported almost everywhere that violence occurred, but after the PEV conflicts had subsided, women living as IDPs continued to experience gender based violence through rape and other sexual violations (Atanda and John-Mark 2011, 178); many women also continue to live in fear of sexual violations due to prior lived experiences.

### *1.3.9 Justice or culture of impunity*

The state machinery’s apathy in addressing incidences of violence was evident in almost every period of violence experienced during or after the general election. Human Rights Watch noted that successive governments “have failed to end widespread impunity for past crimes” (2013, 15); this was so even after individuals directly involved in inciting the violence had been named. What responses there were have also been described as uneven; following the 2007/2008 conflict, this was most evident in Kisumu, Nairobi, and Mt. Elgon, where the police were said to have responded with excessive force; they failed altogether to intervene in places such as Naivasha, Nakuru, and Eldoret. This report concludes that such discrepancies in police responses have led to perceptions of “corruption, political interference, or [police] collusion with criminal gangs” (HRW 2013, 17).

Following the outbreak of violence in 2007/2008, there was an internationally mediated effort, led by the former Secretary-General of the UN, Kofi Annan. This mediation resulted in a power sharing agreement between the two conflicting political parties, as well as an agreement to establish three commissions – namely, the Commission of Inquiry on Post-

Election Violence (“Waki Commission”, chaired by Judge Philip Waki); the Truth, Justice and Reconciliation Commission; and the Independent Review Commission on the General Elections held in Kenya on 27 December 2007. The Waki Commission, in particular, compiled a list comprised of high profile politicians, permanent secretaries, top police officials, and high-ranking opposition leaders, all suspected to have been instigators of the PEV. However, upon the ICC’s receipt of that list, it initiated only four prosecutions, and as of January 2016, only two (the joint trial of Deputy President William Samoei Ruto and journalist Joshua Arap Sang) continued, but this trial has now also been terminated on the basis of “no case to answer” (ICC 2016).

Some of the efforts in addressing the conflicts in Kenya have included traditional or local strategies. For example, the Pokomo and Orma of Tana River have frequently used the Gasa and Matadeda Councils of Elders to resolve disputes between the two groups. However, growing differences between communities jeopardises these traditional forms (Muriithi 2013, 24; Cuppen 2013, 85–86). These processes have also occasionally being hijacked by political cadres to influence outcomes (Muriithi 2013). There have also been collaborative government and local initiatives in addressing the conflicts; among these, the Witu Convention of 2009 was an agreement between three warring communities (the Orma, Pokomo, and Wardei) on some issues of common interest – e.g. the sharing of common resources, the restriction of movement of animals, and limitations on the number of herds during droughts (Muriithi 2013, 25).

Against this background, processes to ensure justice for victims of SGBV are particularly weak. Barriers to women’s access to justice are not limited to issues of sexual violence, but extend more broadly across a spectrum of injustices; this includes the denial of rights to property, and especially to land. These issues form the core of the discussion in the rest of this report.

## **CHAPTER 2: WOMEN IN KENYA SPEAK TO JUSTICE**

*You know, if justice is done to you, you will remove that wound from your heart. But when you stay like this and nothing is being done, there is no way you will remove that wound from your heart.*<sup>6</sup>

### **2.1 The research focus**

In examining the efficacy of transitional justice approaches for women in Kenya, this research project asked women participants some broad questions about what constitutes justice, and how it works for women within their communities. Understanding how women see justice – its role, and how they experience different justice processes – is important for informing the development of justice mechanisms and strategies that are responsive to women’s needs and priorities for justice.

This chapter presents women participants’ voices, alone, so that they are clearly heard and not muted by the voices and views of others. The following chapters situate their voices

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<sup>6</sup> Woman impacted by violence, interviewed June 22, 2015.

within broader discourses on justice, by drawing also on the views of key informants, the opinions of other commentators, and the findings of other research studies.

## **2.2 Post-election violence: A continuum of violence against women**

This research project sought to examine the effects of the Post-Election Violence of 2007/08 (PEV) on women in Kenya, and their experiences of both violence and justice. However, in discussions with women across four principal research sites (Bungoma, the Tana River region, Nairobi, and Kisumu), it became clear that drawing a neat line around the PEV was neither possible nor helpful to understanding women's access to justice. Women spoke of a continuum of violence and subjugation which, while erupting dramatically following the election, had been present to varying degrees for many years before, and it continues to be present today.

Each research site has quite different populations and dynamics between groups, making it difficult to present a unified account of "Kenyan women's experiences." However, while women described a range of diverse drivers and experiences of violence, and of attempts to access justice, there were commonalities in the gender dynamics with regards to both violence and justice. In particular, women identified shared experiences of grief and intense emotional distress; sexual and gender based violence (SGBV) both during and after the post-election period; internal displacement and its deep social, economic, and emotional effects; the very low social and political status of women; and other profound gender based barriers to justice. The inequality and violence faced by many women with whom we spoke has left them despairing and feeling hopeless, and yet also able to articulate a social and political critique which is at times striking in its insight: *"I think that many of our problems are really social justice issues, but if we address the social justice issues, the cohesion and everything else will fall into place."*<sup>7</sup>

## **2.3 Gender in context in Kenya: The very low status of women**

Gender relations in Kenya are complex and filled with dualities. Women are simultaneously making important advances in gender equality, *and* remaining very much second-class citizens. There is a strong women's movement in Kenya, with a long-standing and proud history; however, there remain serious threats to women's well-being within their daily lived realities, particularly for those women living in poverty and with little access to power.

The women with whom we spoke in all four sites described lives shaped by misogyny and a dangerously low status in their communities, especially against widows. This deeply embedded misogyny is not limited to perpetrators, but extends to officers of the state and community leaders, who often do not take reports of sexual assault seriously. One woman in Nairobi described being abducted and repeatedly raped and tortured by a policeman as "payback" for helping another woman who was fleeing violence from her husband. Other women also spoke of how the low status of women makes their job as a parent difficult, because their sons, who are likely to reflect the same attitudes towards women as they perceive in society, do not respect them. Furthermore, women feel they are not seen as a "person" in their own right before the community, and instead require a husband to speak on their behalf.

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<sup>7</sup> Interviewed in Nairobi, October 1, 2014.

## 2.4 Psychological aftermath of violence

Most women participants spoke of a deep despair and hopelessness in the aftermath of violence (especially sexual), due both to the violence itself and the lack of justice. Women in Bungoma, Kisumu, and Nairobi expressed profound emotional distress and existential pain, sometimes rising to the level of feeling suicidal (ranging from wishing they would simply die, through to contemplating possible ways to die). Others described a deep physical depression, manifesting in chronic tiredness and with long-lasting effect. When women from different research sites came together to discuss their experiences, one group reported that “*we realised that in our group our challenges are not the same ... but the trauma is the same.*”<sup>8</sup>

Little formal assistance, however, is available to women attempting to recover psychologically after violence. While medical help for post-assault physical injuries and illnesses is becoming increasingly available, without counselling, “*You remain half way.*”<sup>9</sup> Those women who were able to access counselling urged that it be included in post-rape care services as an essential, rather than additional, form of treatment. Additionally, the standard of existing post-violence treatment should be improved; much care was provided by church and voluntary organisations and consisted primarily of ineffectually “*telling us to just persevere in all that happened because God is with you. So they talked to us and told us to persevere and move on... That we (should) just forget and get a way of healing from the pain.*”<sup>10</sup> Hospital attendees were also sometimes attended to by different people on each visit, creating a feeling of “*double-traumatisation*”; others spoke of confidentiality breaches by staff. However, despite several bad experiences, women still recognised that talking helps recovery from trauma and grief.

## 2.5 Displacement

Many of the women that we met had been forced to flee their homes due to violence; in policy and academic circles, this experience is captured in the term “IDP” (or “Internally Displaced Persons”). Such bureaucratic shorthand, however, fails to adequately capture the implications of being displaced; as one woman in Nairobi explained, “*We have nothing to say because we are poor IDPs. I. D. P. I – Ignorant. D – Disease. P – Poverty.*”<sup>11</sup> Broadly, displacement from homes meant a dramatic drop in political status and recognition, entrenched poverty, ill health, loss of social networks (and thus support), and a loss of political voice. Women also spoke of being thrust into a cash economy, often precisely at the time they had lost all their capital; this brought the additional burdens of long hours every day seeking jobs, or making small food items to sell on the street. A loss of political status for women may also manifest in not being able register as an IDP, because they originated from a different tribe to the other IDPs in that area. Failure to register meant exclusion from later assistance to help IDPs return home; for many, this meant that they have still been unable to return home eight years later.

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<sup>8</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>9</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>10</sup> Interviewed in Bungoma, April 15, 2014.

<sup>11</sup> Interviewed in Nairobi, September 29, 2014.

## 2.6 Widows

Women told us of the particularly low status of widows, and how the death of one's husband often precipitates a calamitous drop in economic and social well-being. Several women told us of being evicted from their homes and stripped of all property by their in-laws, upon the death of their husbands. Others who were not evicted were "inherited" by a brother-in-law, or are pressured to re-marry regardless of their wishes.

From a social perspective, widowhood can precipitate both discrimination and stigmatisation by, and exclusion from, the community; it is "*as if you are disabled, but it's because you don't have a husband.*"<sup>12</sup> The women with whom we spoke told us that their communities need to rethink their attitudes towards widows, pointing out that widowers do not face the same rejection, and that "*death is for everyone ... They should love the one who remains, just the same way they loved them when they were a couple.*"<sup>13</sup>

## 2.7 Children

All women participants told us very clearly that their own well-being and justice needs cannot be separated from their children's. While concerns for their children included access to food, health care, and safety and security, two issues emerged as overwhelmingly dominant in women's minds – healing from trauma, and their children's education. Most immediately, amid the chaos of conflict, women had largely been unable to prevent their children from witnessing traumatic events and attacks on family and community members. Some women spoke of the trauma experienced by children who had been raped, or who had witnessed their mothers being raped in front of them. Others had children who witnessed the murder of their fathers.

Additionally, women told us that they were struggling to ensure their children receive an education. Women told us of going without meals, selling the last of their livestock, and taking out loans in order to pay their children's school fees, because their own and their children's futures were dependent on their children obtaining a good education. Those that were unable to find enough money for all their children to go to school had to choose which child(ren) to send – a decision which often carried gender implications, as boys remain with their natal families after marriage: "*The girl remains at home and the boy continues with his education.*"<sup>14</sup> The importance of education is therefore paramount; when women were asked about what would help them feel a sense of justice had been achieved, the most common answer was for their children to be educated. One woman simply said, "*School is all. There is nothing as important as that one.*"<sup>15</sup>

## 2.8 Accessing justice

When asked about obtaining any kind of justice for their experiences, women expressed almost universal despair, repeating in various formulations that "*there is no justice.*" They identified a plethora of obstacles to justice, including the low status of women; ignorant and misogynistic attitudes within both formal and traditional structures; the prohibitively high

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<sup>12</sup> Interviewed in Bungoma, April 14, 2014.

<sup>13</sup> Interviewed in Bungoma, April 14, 2014.

<sup>14</sup> Interviewed in Marafa, March 27, 2013.

<sup>15</sup> Interviewed during Validation Workshop, June 22, 2015.

costs associated with seeking justice; a lack of knowledge about justice systems and processes; widespread bribery and corruption; and a lack of confidence that justice can ever be attained by women.

Most prominently, women cited a lack of confidence in authorities' willingness and ability to protect them as a major deterrent in seeking justice, especially from threatened reprisals if they reported. When they did report, they observed consistently poor police responses, including informing the alleged perpetrator of the report. Those who sought justice through traditional mechanisms also noted that traditional leaders did not take complaints by women seriously, and too often saw violence against women, particularly domestic violence, as a "private matter" to be dealt with from within the family. Furthermore, widespread corruption and women's weaker economic position relative to men meant that they were less able to pay bribes, which disproportionately affected their ability to seek and obtain justice. Eventually, many women felt they had exhausted all avenues, and were left to ask, "*Where will we get our rights? Maybe we look for it from God?*"<sup>16</sup>

## **2.9 Resistance**

Notwithstanding their ongoing distress and their despair at the belief that justice is beyond their reach, we also met women in each of the research sites who are determined to overcome their low status, and who are willing to engage in justice systems, community-based women's empowerment groups (e.g. financial and emotional mutual support groups), and in political lobbying for improvements to women's lives. Despite serious risks to their personal safety, some had testified to commissions of inquiry (such as the Truth, Justice and Reconciliation Commission), and expressed a willingness to testify in legal proceedings; when asked what gave her the strength to testify, one woman responded by stating, "*First, I have pain, there are people who died when I was seeing. Secondly, I am now using medicine, which I was not using ... I was doing business and now I have gone backwards. ... So I have pain in my heart and such issues are the ones which can drive me to go, stand and speak the truth.*"<sup>17</sup> There are also strong foundations among the women themselves for building movements which seek to raise women's status across regional, ethnic, and class differences; for all the failings of justice mechanisms, many continue to see justice as a goal worth striving for.

## **CHAPTER 3: WOMEN'S NEEDS AND PRIORITIES FOR JUSTICE IDENTIFIED**

While there were a range of views and experiences of justice, there was also significant coherence across the views of women interviewed. Justice is universally held as highly important, with a high level of agreement about the constitution and objectives of justice. Overwhelmingly, these reached far beyond legal and political rights, and firmly centred economic, social, and cultural justice – measures that would help them re-establish a sustainable economic base for themselves and their children, and support mechanisms to enable them to attain an acceptable level of physical and emotional health. These have been broken down for discussion into the following categories:

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<sup>16</sup> Interviewed in Marafa, March 27, 2014.

<sup>17</sup> Interviewed in Nairobi, September 30, 2014.

- Safety and security;
- Health;
- Education;
- Economic justice; and
- Legal justice (addressed in Chapter 4).

### 3.1 Safety and security

Women in this research shared with us harrowing stories of violence, including: sexual assault; domestic violence; attacks using guns, pangas and other weapons; violent home invasions; and sexual and physical attacks on their children, siblings and husbands, many of which resulted in serious injury/illness or permanent disability, and even death. Women identified a wide range of perpetrators of this violence, including rival ethnic groups and clans, militia (often youth) associated with different political parties, policemen, the GSU, army personnel, employers, neighbours, husbands, sons, and other civilians. While some of this violence occurred during the 2007/2008 PEV, violence is directed against Kenyan women on a daily basis and severely curtails their ability to gain an education; earn an income; participate in social, cultural, and political processes; raise their children; enjoy good health; and lead peaceful, fulfilling lives. Most women interviewed said that they had never received justice for any of the attacks; as one woman stated, “*There is no prosecution in Kenya.*”<sup>18</sup>

These accounts are supported by other studies into physical and sexual violence in Kenya, both during the PEV and more broadly. There is an abundance of qualitative and quantitative data which points to extraordinarily high levels of physical and sexual violence directed against women and girls on a daily basis. Among these, McEvoy (2012, 10) reports that 45 percent of Kenyan women have experienced sexual or physical violence, and, concerningly, that 72 percent of 240 participants surveyed thought that “rape, defilement and battering were not serious crimes.” There is a broad consensus that the incidence of rape rose dramatically during the PEV (Johnson et al. 2014, 5; McEvoy 2012, 11; CIPEV 2008, 237), with Amnesty International and CSI Nairobi estimating that some 40,000 rapes were committed between December 2007 and June 2008 (CSI 2008, 3; Amnesty International 2014a). Furthermore, Johnson et al. (2014, 6) found that, while incidents of violence have decreased after spiking during the PEV, they have not returned to pre-PEV levels, and now occur at a rate of 42.0 incidents per 1000 persons per day. This elevated new “norm” is of particular concern, as there is a positive correlation between normalisation of violence in society and rates of violence against women (McEvoy 2012, 11).

Against this epidemic of sexual and physical violence, the women interviewed stated that they needed safety as a basic right, as a prerequisite to being able to earn an income, access healthcare, move freely, and raise their children. Several women, particularly in Bungoma, Kisumu, and Nairobi, said that an acute lack of security during the PEV (and preceding violence in Bungoma) prevented them from accessing medical help after being attacked; consequently, some women were unable to access Post-Exposure Prophylaxis (PEP)<sup>19</sup>

<sup>18</sup> Interviewed in Nairobi, September 30, 2014.

<sup>19</sup> PEP (Post-Exposure Prophylaxis) is a medical treatment programme involving a range of medications aimed at preventing unwanted pregnancies, and reducing the chances of a sexual assault survivor contracting HIV (or

treatments within 72 hours of a sexual assault, and thus contracted HIV. Furthermore, women from the Tana Delta region reported that *“our biggest challenge is security. If there was security our properties would not have been destroyed, people would not have been killed and the women would not have been raped, some lost.”*<sup>20</sup>

However, there was a widespread lack of confidence in the government making their safety a priority. One woman in Kibera, Nairobi, explained that *“[w]hen you are raped and report the case, you seem to be responsible for your own predicament.”*<sup>21</sup> Key informants, ranging from conflict prevention and peace-building consultants, to community workers and lawyers with government agencies, confirmed that violence against women is not taken seriously, and recognised the need for comprehensive action to ensure women’s safety. Furthermore, there remains no central database recording typologies or trends in violence against women, nor any central agency with the mandate and responsibility to coordinate and drive multi-sectoral reform and intervention to reduce violence against women (NCRC 2014, 69); such gaps present serious issues in targeting violence through policy and law.

## 3.2 Health

Women in Bungoma, Kisumu, and Nairobi told us of catastrophic health consequences resulting from violence, particularly from sexual violence. The health needs reported by women participants in this study primarily relate to needs arising from sexual assaults, physical assaults, and the mental health consequences of violence. It emphasises that access to holistic and effective healthcare services following violence is critical for women’s legal, economic, and social justice.

### 3.2.1 Health needs after sexual assault

The impacts of sexual violence on women are well documented (WHO 2003; WHO 2002, 147–74; Liebling et al. 2012). Health impacts associated with sexual violence are wide ranging, and include: HIV-AIDS; reproductive and gynaecological health problems, such as unwanted pregnancies, unsafe abortions (and pregnancies carried to term); fistulas; infertility; genital injuries; vaginal bleeding and infection; physical injuries, most commonly urinary tract infections; pelvic pain and pelvic inflammatory disease; bruising following blunt-force trauma; incised and stab wounds; abrasions (e.g. grazes and scratches); bruises and contusions; lacerations; ligature marks on ankles, wrists and neck; pattern injuries (e.g. hand prints, finger marks, belt marks, and bite marks); anal or rectal trauma; and sexual dysfunction (WHO 2003, 12–13, 39–44, 51–52; WHO 2002, 101, 162–68; Ohambe et al. 2005, 39). Sexual assault can also cause cardiopulmonary and neurologic symptoms, including “shortness of breath, palpitations, cardiac arrhythmias, chest pain, asthma, hyperventilation, choking sensation, numbness, weakness or faintness, insomnia and fatigue” (Jina and Thomas 2013, 18).

A significant number of women participating in this study had been raped, sometimes multiple times. Several women reported that their assailants used severe violence during the rape, including weapons such as pangas and guns, while many others reported gang rapes.

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other STIs). To be effective, PEP treatment must begin within 72 hours of the assault. For more information about the treatment, see Chacko et al. (2012).

<sup>20</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>21</sup> Interviewed in Nairobi, September 30, 2014.

The Gender Violence Recovery Centre in Nairobi has also observed an increase in the number of gang rapes reported to it by patients (GVRC 2012, 11), and an increase in the number of children needing its services. Women attested to wide ranging and severe harms, including many of those mentioned above; worryingly, however, many told us that they either had not sought treatment for injuries, or that there had been a long delay (several months, or even years) before they accessed medical treatment. One woman in Nairobi even spoke of becoming pregnant from rape and not having the money to attend hospital; as a result, she attempted to abort the pregnancy herself, but “*all [her] methods refused and I now attempted suicide you know, because it is cheaper than doing an abortion.*”<sup>22</sup>

### 3.2.2 HIV

Kenya has a “high burden of HIV infection,” and is among 22 priority countries targeted for assistance from UNAIDS (UNAIDS 2013, 16). The Government of Kenya recognises that there is a strong link between violence against women and women’s over-representation in the nation’s HIV statistics (NACC 2014, 30), and identifies women, girls and displaced people as particularly vulnerable groups (NACC 2014, 17). Accordingly, it noted that “structural interventions” to reduce SGBV are needed, as part of HIV prevention policy, and specifically set a goal to “[p]romote the use of Internal Security as an important contributor to an integrated response to HIV and AIDS by addressing the dangerous interaction between AIDS, drug and alcohol abuse, sex and child trafficking and sexual violence” (NACC 2014, 20).

Several women reported that their child(ren) had also been infected with HIV, contracted either through mother-to-baby transmission, or through being sexually assaulted themselves. Some women were able to access PEP treatment within the 72-hour window in which it is effective; more commonly, however, women were unable to do so for a number of reasons, including the absence of any medical facilities within a reasonable distance; lack of money; fear of stigmatisation if it became known that she had been raped; and concern for the safety and whereabouts of children, husbands, or other family members, whose location was a higher priority than accessing medical treatment. HIV infection has profound impacts on women’s lives, and is both affected by and affects other aspects of women’s lives; this includes their relationships with family members, the raising of their children, their capacity to work, housing security, income, and other physical and psychological health matters. The cost of the antiretroviral drug treatment for HIV, and the requirement that the medication be taken with food to avoid side-effects, can also trigger a negative spiral of ill-health and poverty; if women were unsuccessful in making enough money to buy food, they would become unwell from the medication, making work more difficult.

### 3.2.3 Psychological effects of sexual violence

In addition to the physical health impacts outlined above, sexual assault has profound psychological (and sometimes psychiatric) effects. Commonly reported psychological responses to rape include: anxiety, depression, sleep disturbances, numbing, detachment, fearfulness, poor concentration, anger, irritability, heightened startle response, suicide, self-harm, high risk behaviours, feelings of shame, guilt, worthlessness, and humiliation (Mason and Lodrick 2013, 31; Jina and Thomas 2013, 19; GVRC 2012, 19). Among the women with whom we spoke, shame was a particularly prominent response, leading them to conceal the

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<sup>22</sup> Interviewed in Nairobi, September 30, 2014.

rape from husbands, children, friends, and even health professionals: *“the first thing you feel ashamed, you feel ashamed... That thing is something shameful, you cannot just go and start speaking about it.”*<sup>23</sup> Women also reported symptoms that are consistent with post-traumatic stress disorder, including hypervigilance, sleep disorders, and dissociative responses.

### 3.2.4 Psychological health needs

Women in all research sites in Kenya explicitly asked for more (and better) counselling and psychosocial care. Most women outside Nairobi said they had not received any counselling; several in Nairobi told us that they had received some counselling, particularly if they attended a hospital after sexual assault, but that it was mostly short-term. Women were encouraged (and sometimes assisted) to form mutual support groups, but while this was described as being useful, they are unlikely to be sufficient for women with particularly acute trauma responses. A small number of women told us that they continue to experience symptoms consistent with post-traumatic stress disorder, and, in the case of publicly (as opposed to privately) available services, some women were also critical of the lack of continuity of care and confidentiality in the public system: *“In government hospital counselling, you go today and you get this one and tomorrow it is a different person. Then you keep starting your story everyday and I feel that is like traumatizing someone two times. And sometimes ... you hear them (counsellors) talk about your issue outside and it was not something making me happy.”*<sup>24</sup>

Mental health care in Kenya is significantly under-resourced and almost exclusively focused on acute psychosis, administered through in-patient hospital-based services. In 2012, the Kenyan government allocated less than 0.5 percent of its health budget to mental health services; most mental health needs are untreated, referred to informal supports (such as self-help groups or church services), or attended to by traditional or religious healers (Gibson 2013). A UNICEF study conducted in 2010 found that only 3 percent of sexually abused girls received professional help of any kind (UNICEF 2010, 32, 61). Key informants also spoke about how such lack of treatment impacts on the ability of women to engage in legal proceedings.

## 3.3 Barriers to accessing healthcare

Women identified several barriers which either delayed or prevented them from accessing healthcare after violence. Delayed access to healthcare very often meant living with pain and discomfort for extended periods of time, and, in the case of sexual assault, sometimes resulted in preventable infections (including HIV) and unwanted pregnancies. Three major barriers to accessing healthcare were identified by women: security, cost, and shame and stigma.

### 3.3.1 Security

As mentioned above, security concerns often prevented women from accessing health care during periods of conflict (especially the PEV, and the Bungoma and Tana River clashes), while a lack of security routinely prevented women in informal settlements in Nairobi from being able to move freely. Several women from Bungoma reported that militia groups

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<sup>23</sup> Interviewed in Nairobi, September 30, 2014.

<sup>24</sup> Interviewed during Validation Workshop, June 22, 2015.

prevented women from attending hospitals, for fear that they would report the offences against them; it was only after the Kenyan government sent security forces that they were able to access healthcare. However, the Kenyan government itself has been criticised both for its slow response to violence in Mount Elgon, and for allowing its agents (e.g. police and state security forces) to perpetrate extensive human rights violations in its responses to violence (HRW 2008, 5–7; KNCHR 2008; OMCT 2008b).

### 3.3.2 Cost

Health care in public facilities in Kenya is officially free. From 2007, Kenyan public health facilities transitioned from a user-pays system with fee waivers for particular groups, to a public healthcare system with all fees abolished. Despite this, medical practitioners interviewed in this research confirmed that, due to cash shortages, fees continue to be charged by the institution, particularly for services beyond consultation and counselling (e.g. laboratory tests, medications, and surgery).

Several women in this study identified fees and other costs as prohibitive, and the principal barrier stopping them from accessing healthcare. They reported strong links between their poverty and their inability to access healthcare, both because the costs of healthcare are such that they do not access care when needed, and because consequent poor health pushes them further into poverty: *“When we go to the hospital, the Doctor needs money and we don’t have money, when you go home you don’t have anything to eat.”*<sup>25</sup> Empirical studies into Kenyan household attitudes and spending on healthcare substantiate these statements; in particular, the Ministry of Health reported that women spent an average of KES 1,869 on health services in 2013, compared to men’s average expenditure of KES 1,329 (Ministry of Health 2014b, 44), thereby indicating that the costs of healthcare may fall disproportionately on women.

### 3.3.3 Shame, cultural and emotional barriers

A significant number of women said that shame and fear of stigmatisation prevented them from accessing medical care after violence; indeed, one study reported that “cultural factors and stigma ... [were] the single most important obstacle for low utilisation of health services” (Njuki et al. 2012, 6). Some women feared that the simple fact of attending a hospital or health facility would alert their husbands, children, or neighbours to their sexual assault; others spoke of not trusting medical staff to be understanding and to maintain confidentiality.

*And then it is also embarrassing, you know issues of sexual violence. How would you go and how would you go and tell the doctor that you were violated sexually? Because they are issues that are shameful. And sometimes you know the village is a small place. Maybe the doctor is your neighbour, the nurse maybe treats you then you hear him tell others outside that that one was raped. And you know the stigma that surrounds the issue of rape.*<sup>26</sup>

This shame and stigma is complex and multi-faceted. Most prominently, women spoke of fearing social rejection by their communities, including abandonment by their husbands. A key informant explained that “many men value women for their purity,” and that many

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<sup>25</sup> Interviewed in Nairobi, September 29, 2014.

<sup>26</sup> Interviewed during Validation Workshop, June 22, 2015.

women have regard to this in deciding whether to report a condition, especially sexual violence, to a health service.<sup>27</sup>

### **3.4 Education**

Women interviewed saw education, both for their children and for women collectively, as critical for long-term and sustainable improvement in their lives.

#### *3.4.1 Education for children*

As mentioned above, education for their children was identified by many women as their most important justice priority. However, despite the introduction of a Free Primary Education Programme in 2003, there are several expenses parents must meet, including the provision of uniforms, a one-time “signing on” payment of US\$35, and further fees for sitting exams, access to resources, and purchasing books (Economist 2014). Paying fees has proven difficult, particularly for single mothers, widows, families with health and/or disability problems, and women who have been displaced. It was emphasised that poverty, health, and education needs interact in mutually reinforcing ways, with disadvantage on one axis (especially HIV infection, which imposes additional financial burdens and yet makes it more difficult to work) creating or compounding disadvantage on the other axes. For example, some women were forced to make the awful decision of whether to provide food or education for their children, and others (especially displaced, women-headed households with health problems) are in such dire poverty that children are required to work to help ensure basic needs are met.

Women fear that lacking or disrupted education for their children will ensure trans-generational entrapment in poverty. Interviews with those displaced by the PEV suggest that one of its under-recognised effects is the creation of a group of severely disadvantaged children, who will be further disadvantaged in all areas of civic and economic participation later in life due to disruption to and/or exclusion from education, as a result of violence against their mothers. More study needs to be conducted to establish the precise demographics and locations of this group, with a view to their recognition as a vulnerable group, and subsequent targeting in policy and programming.

Successive Kenyan governments have identified improving education as a key priority, and the Kenyan government is among the highest spending governments on education (17 percent of the national budget in 2014/15) in sub-Saharan Africa (and globally). Gender parity has also been achieved in all but the north-west region however, enrolment in secondary education was still low, with only 51 percent of boys and 48 percent of girls enrolling in 2011; low school enrolment figures create a ripple effect, with 16 percent of women lacking basic literacy skills, compared to 9 percent of men (UNESCO 2012). Additionally, free primary education has not led to expected improvements in learning, as evidenced in very poor learning outcomes in general knowledge and basic literacy and numeracy tests (Uwezo 2014); in 2013, less than 50 percent of students who sat the test for the Kenya Certificate of Primary Education (KCPE) passed (CEI 2014, 2). The Centre for Education Initiative (2014, 2) also identified several key challenges for Kenya’s education system, including that the expanded enrolments following free primary education have not been matched by expanded infrastructure or resourcing, and that access to education is uneven across the country, with

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<sup>27</sup> KI, interviewed in Nairobi, October 1, 2014.

children living in poverty and children from marginalised communities (i.e. those living in non-formal urban settlements, and those from nomadic pastoralist communities) most disadvantaged (CEI 2014, 2–3).

### 3.4.2 Education for women

While women recognise the importance of education for their children, a significant number of women also said that education should be made available for adult women as a key strategy in women’s empowerment and access to justice. As one Nairobi woman eloquently explained, “[I]t is only education which always helps women. If you have education in your brain, you cannot fail to get support. Those who are helping themselves are those who are educated.”<sup>28</sup>

Instead, a lack of education was linked by women to subsequent limited options, and thus reliance on abusive relationships to survive. Women further recognised that their safety, income earning capacity, ability to secure an education for their children, and ability to participate in local governance (such as through committees), would all be greatly enhanced through better education. As women participants noted, this is a missed opportunity, because women are hungry for learning opportunities, and will attend because “they are interested in knowing” and want the opportunity to “open your mind.”<sup>29</sup>

## 3.5 Economic justice

Women in Kenya have suffered significant and material economic harm from violence. Many of the women we interviewed were small-scale farmers or small entrepreneurs; only one stated she was employed for a wage in the formal economy. Several women lost their capacity to generate income as a result of the violence, either through being widowed or displaced and losing access to land (including their homes and possessions), or having the capital of her small business destroyed or stolen during the conflict. The loss of the ability to generate an income has, for many women, meant resorting to highly precarious labour, doing physically demanding, insecure, and low-paid work such as washing other people’s clothes, looking through rubbish for items to recycle and sell, or making food items to sell by the roadside. With the loss of a secure economic base, women are less able to pay their children’s school fees, household health expenses, and other essential goods and services; some spoke of frequent periods of homelessness, and/or housing in deplorable conditions. Other women also stated that a lack of money forced them to remain in violent relationships.

Given the many ways in which poverty impacts on women’s ability to access food, safe housing, healthcare, and education for their children, it is unsurprising that many women expressed their need for justice in economic terms. Every woman interviewed for this research identified that being compensated for their losses and restored to a position in which they could meet their basic needs, while feeling secure that this capacity is sustainable, is core to them feeling a sense of justice. Women told us that they needed land, housing, livestock, capital for re-starting small business, and other agricultural inputs to be replaced. Whatever the form of compensation preferred by individual women, however, the ultimate

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<sup>28</sup> Interviewed in Nairobi, September 30, 2014.

<sup>29</sup> Interviewed in Malindi, June 12, 2015.

aim was the same, as expressed by a woman from Tana Delta: “Getting justice is eliminating this poverty. It is necessary that we are supported in that.”<sup>30</sup>

### *3.5.1 Reparations and compensation*

Reparations are a critical element of post-conflict justice, serving multiple purposes in post-conflict situations. Reparations help people to rebuild economically after conflict; to access medical and psychological treatment for injuries, illness, and traumas sustained during the war (which often inhibit the most vulnerable individuals and groups in society from participating equally in post-conflict social, economic, and political life); and, importantly, can have a restorative effect, helping in “restoring victims’ confidence in the State” (UNSG 2004, [54]).

The importance of compensation to victims has been recognised by the Kenyan Government. Kenya’s Truth, Justice and Reconciliation Commission (TJRC) recommended reparations as a key remedy in its Final Report, specifically identifying sexual violence committed during the PEV as a particular target for reparations (2013, 36). The report identifies individual and group monetary compensation as the priority mode of reparation (TJRC 2013d, 106), and noted that almost six times as many people nominated this as their preferred remedy, than for any other single remedy (TJRC 2013d, 100). Furthermore, the Government of Kenya has also recognised the need for restorative justice. This is most notable in President Uhuru Kenyatta’s apology, delivered as part of the March 26, 2015 State of the Nation address, to the Kenyan Parliament and the nation for historical wrongs (Hansard 2015, 13). In this speech, the President announced the establishment of a KES 10 billion “restorative justice fund,” to be expended over the next three years (Hansard 2015, 13), as well as compensation for IDPs. However, while the announcements are encouraging, little, if any, progress has been made on establishing or dispensing either fund as of December 2015.

Women participants doubted whether survivors of sexual violence would be able to access any funds. In particular, they pointed to the evidentiary requirements for proving eligibility for reparations, which may disadvantage widowed and/or displaced women who have experienced difficulty in obtaining birth and death certificates. The absence of such documents is already disadvantaging them in accessing material benefits, such as bursaries to assist their children to attend school; these women are at risk of being disadvantaged again. Women also expressed doubt about the likelihood of them receiving reparations arising out of earlier ad hoc compensation schemes. IDPs in Nairobi told us that they believed they would never receive any compensation, as those who have received assistance to return and reclaim lands, or who have been compensated for their losses, received assistance due to political favours rather than an objective assessment of harm done.

The Government of Kenya has the opportunity to make significant gains in the restoration of Kenyan women’s trust in the State. While all aspects of transitional justice will have an effect on civic confidence, reparations are particularly important; as Laplante and Theidon (2007) noted, the justice needs of people living in poverty are often expressed primarily in economic terms. The ability of reparations to contribute to restoring community trust in the government requires that any prospective reparations be timely; explicitly embedded within a justice framework; transparently attached to harms suffered; and sufficiently resourced to deliver on commitments made. While individual direct payments as compensation are important, they

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<sup>30</sup> Interviewed in Malindi, June 12, 2015.

are unlikely in and of themselves to satisfy women’s justice needs for security, health, psychosocial care, and education. The Government of Kenya is urged to act on commitments made regarding reparations and compensation as a matter of urgency, and to extend reparations beyond monetary compensation to also include law, policy, and service provision.

## CHAPTER 4: JUSTICE RESPONSES

*We know where to start but there is no one listening to you from that beginning and when the beginning is destroyed, you will not get to the end. So we are saying, the beginning should be good so that the end can also be good.*<sup>31</sup>

Whilst attempts have been made to respond to the epidemic of violence against Kenyan women and its impacts, justice for women survivors remains elusive. This chapter overviews the law and justice framework (both formal and informal) in Kenya, and examines the efficacy of transitional justice strategies and mechanisms for women impacted by the PEV and its aftermath. It examines ongoing (and often systemic) barriers to women’s access to justice, and iterates both the right of women to be compensated for the injustices they have suffered as survivors of SGBV, and to be heard within justice processes as actors that shape its outcomes:

*Women also want compensation. They are losing their highness, they are losing their independence and livelihood. They want to be again acknowledged and have freedom and there should be true compensation.*<sup>32</sup>

### 4.1 Overview of law and justice framework in Kenya

The Kenyan legal system is founded on English common law. The supreme source of law is the Constitution of Kenya 2010, which binds all persons and state organs (Article 2(1)); Article 2(4) states that any laws inconsistent with the Constitution are invalid to the extent of the inconsistency. Other primary sources of law in Kenya include Acts of Parliament; international law (Article 2(5)), and international treaties or conventions ratified by Kenya (Article 2(6)); Islamic law (Kadhis’ Courts Act 1967, Chapter 11); African customary law (Judicature Act 1967, Chapter 8, s 3(2)); certain Acts of Parliament of the United Kingdom (Judicature Act 1967, Chapter 8, s 3(1)(b)); and other English statutes in force on August 12, 1897 (Judicature Act 1967, Chapter 8, s 3(1)(c)). Formal law is enforced by the Kenyan court system, which is divided into superior and subordinate courts (Chambers and Partners 2016, citing Constitution of Kenya 2010, Arts. 163(3)(a)–(b)); the Supreme Court sits at the top of the hierarchy and binds all other courts.

Of particular importance to this report is that, in addition to containing a bill of rights, the 2010 Constitution also seeks to enable greater representation of women in more leadership positions through the “two-thirds gender principle”. Article 27(8) of the Kenyan Constitution requires the State to take legislative and other measures to ensure that not more than two-thirds of the members of elected or appointed bodies are of the same gender; this principle is reiterated in Article 81 with respect to public bodies (Article 81(b)). However, although the

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<sup>31</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>32</sup> Interviewed during Validation Workshop, June 22, 2015.

President met the gender requirement by naming six women (out of 18 members) in his Cabinet, Parliament itself still fell short of this requirement, with men comprising 81 percent of the National Assembly, and 73 percent of the Senate (Association of Media Women in Kenya 2015, 7). In 2012, the Attorney-General of Kenya filed for an Advisory Opinion from the Supreme Court regarding whether the two-thirds gender principle had to be realised in the 2013 elections; by majority, the Supreme Court ruled that, whilst the principle is progressive, Parliament was obliged to implement legislation giving it effect (FIDA 2015).

In other domains of public office, specifically in the justice sector, women's representation is still lacking, but the two-thirds principle has had a positive impact on women's participation in public life and leadership roles. In 2012, of the 73,000 members of the Kenyan police force, only 11 percent were women (UN Women 2012). The overall gender ratio in the Kenyan judiciary now stands at 45 percent women to 55 percent men (Justice Leadership Group n.d.); however, as one moves up the court hierarchy, there are fewer and fewer women; 29 out of 69 High Court judges, eight out of 26 Court of Appeal appellate judges, and only two of the seven members of the Supreme Court bench, are women (Rawal 2015a, 9). Outside of public office, broader employment data suggests that women generally continue to be underrepresented in the labour force, and overrepresented in lower paid, unskilled, and lower status positions (UN Data 2013; Budlender 2011); in 2013, the labour force participation of adult females in Kenya was approximately 62 percent, compared to 72 percent for males (UN Data 2013).

#### *4.1.1 Criminal justice*

The main players in the criminal justice system in Kenya are the community, the police, the judiciary, the probation and aftercare service,<sup>33</sup> and the prison service (Onyango-Israel 2012b). However, there are obvious deficits with the effectiveness of the system in its protection of the Kenyan public, and in particular women. The judicial system has been plagued by inefficiency, corruption, and political bias, which has resulted in the public's loss of trust in the system (Gainer 2015); notably, *"it just so happens that those who have been identified as bearing the highest responsibility also happened to be the people who hold very seriously high positions in this country."*<sup>34</sup> Courts have also suffered from enormous backlogs, estimated at one million cases (Gainer 2015), possibly due to having a comparatively low number of judges serving the entire population, compared to the rest of the world (Ndungu 2012).

The Kenyan Police Service was cited as the weakest link in the chain of support for GBV victims in most Kenyan counties (IRC 2014, 12). In 2012, the Deputy Director of Public Prosecutions publicly stated that many of the 4000 police investigations relating to post-election violence could not proceed to court, given the lack of sufficient evidence (Maliti 2012); this is unsurprising, given that in investigations relating to sexual violence, there was often no preservation of DNA or forensic evidence, and witness statements were vague and recorded a year after the event (Maliti 2012). The Kenya National Crime Research Centre (NCRC) found that, of those that did report, 13.9 percent of women said the perpetrator was "arrested, prosecuted and convicted" (compared to 29.4 percent of men) (2014, 64). Twenty-

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<sup>33</sup> The probation and aftercare services in Kenya are mandated by key Government agencies, to rehabilitate offenders in the community by implementing supervised non-custodial correctional services. This contributes to crime reduction (UNAFEI 2014).

<sup>34</sup> Interviewed in Nairobi, 1 October 2015.

nine percent of women said “no action” was taken; and 11.8 percent of women did not know what had happened in their case (2014, 64). Both the IRC and NCRC reports found very low levels of reporting to police, and very poor outcomes when matters were reported (NCRC 2014, 60; IRC 2014, 12). Many of the women participants in our research highlighted police corruption and ineffectiveness as a key barrier to women accessing justice (see further discussion below):

*What we really deserve is for these policemen to give us our rights. If someone goes and reports, they should stop considering it as a joke or they look at you and despise you. So the first thing is about those policemen. Let them stop despising us, you go there to seek help and they don't provide any.*<sup>35</sup>

*Police sometimes just compromise, and they don't record the evidence, they don't record the evidence well, they don't take the matters to their logical conclusions. So they appear in court without the evidence and definitely then one would be acquitted for lack of evidence.*<sup>36</sup>

A further indication of Kenya's troubled criminal justice system is reflected in the state of its prisons. Most of the facilities remain in the same state as when they were first constructed in colonial, pre-independence times (Mnyamwezi et al. 2015), and suffer from harsh conditions, including overcrowding and congestion, unhygienic conditions, lack of clean water, spread of infectious diseases, and a lack of basic resources such as food and clothing (Nyaura and Ngugi 2014, 9–11). Prisoners' rights and freedoms are also often infringed, with the use of torture being widespread, and corporal punishment permitted (Nyaura and Ngugi 2014, 9). Women prisoners are also not permitted easy access to their children after the age of four, and many mothers never see their children after this age (Njeru 2012); for children, seeing their mothers in a prison environment is also traumatic, and some children whose mothers die in custody never get the chance to interact with their mothers in a non-prison context (Njeru 2012).

#### *4.1.2 Land and property rights*

Women participants in this study identified lack of access to, and ownership of, land as a major justice issue for women in urgent need of redress.

*I noticed that women suffer unique violations. And for example, issues related ... to property violations... and you find that in most instances those issues are not brought up... most communities do not consider them as consequential.*<sup>37</sup>

Though often overlooked by the community, women's land and property rights are recognised and protected by a progressive constitutional framework (Gaafar 2015); this framework centres on a Bill of Rights which recognises the right of women to equal treatment under the law (Article 27). Additionally, the National Land Policy 2009 specifically recognises the need to protect women's rights to inherit land (s 223(c)), both in and outside of marriage (respectively, s 223(d) and s 225); however, the inheritance rights of married and unmarried women are distinguished (s 223(e)). As men are traditionally considered the

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<sup>35</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>36</sup> Winifred Lichuma, National Gender and Equality Commission, interviewed in Nairobi, October 2, 2014.

<sup>37</sup> KI, interviewed in Kisumu, January 21, 2014.

owners of land – an attitude borne of their status as heads of the household – women are consequently disadvantaged in land dealings, and often excluded from decision-making pertaining to the use and management of family land (including income generated from land) (Gaafar 2015). Moreover, as nearly all communities in Kenya are patrilineal, women rarely inherit customary land rights from their fathers or husbands (Gaafar 2015); widows, especially young ones, may be particularly vulnerable to land tenure insecurity (Aliber et al. 2004, 143), and may be forced into unwanted sexual relationships in order to retain marital property: “*Yes, wife inheritance and you find most of them if they refuse to be inherited, they are snatched their property.*”<sup>38</sup>

Women’s access to land in Kenya is impeded by poor implementation of existing laws and policies; biased and discriminatory customary law practices (FIDA Kenya 2009); and the gaps that exist between customary and formal law (Gaafar 2015). The lack of women on the bench, and within other land institutions, has also been identified as a critical issue (Gaafar 2015). Furthermore, the cost of a formal succession claim may cost in excess of KES 60,000 (Harrington and Chopra 2010, 16); to put this cost into perspective, the average monthly earnings of a Kenyan woman is KES 6,390 (Nyaga 2010, 10).

#### *4.1.3 International obligations*

Kenya is a party to various treaties that impose both international humanitarian and human rights obligations, including, inter alia: the Geneva Conventions; International Covenant on Civil and Political Rights (ICCPR); and the Convention Eliminating Discrimination against Women (CEDAW). Kenya is also a party to various regional human rights instruments, including several of which specifically recognise and seek to protect the rights of women and survivors of sexual violence; these include the African Charter on Human and People’s Rights, and the Protocol to the African Charter on Human and People’s Rights for Women in Africa.<sup>39</sup>

Pursuant to the Kenyan Constitution, international treaties form part of the domestic law of Kenya (Articles 2(5)–(6)), but the provisions of the Constitution fail to establish a hierarchy of prevailing law, so as to enable clear resolution of conflicts between local legislation and rules of international law. This has resulted in case-by-case interpretive confusion in Kenyan courts (Oduor 2014, 97). Greater clarity would facilitate adherence to international human rights standards in the protection of women’s rights, and enable breaches to be pursued more readily through legal channels.

#### *4.1.4 Customary law and traditional justice mechanisms*

As previously noted, customary and traditional dispute resolution mechanisms are recognised under Kenyan law and entrenched in the Kenyan Constitution (Article 159). At Independence, a large number of African citizens, including Kenyans, still relied on these mechanisms to resolve disputes (Kimathi 2005, 7). While it was expected that these mechanisms would fade from use as countries modernised, the inaccessibility of formal justice systems (especially in rural areas, the arid lands districts, coastal provinces, and informal urban settlements) has contributed to their continued relevance (FIDA 2008, 3); the

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<sup>38</sup> KI, interviewed in Kisumu, November 7, 2013.

<sup>39</sup> See Appendix D for a summary of key international and regional instruments and efforts relevant to women’s rights in Kenya.

majority of disputes in Kenya are still resolved outside the courts, but recourse can be made to the formal court system if informal dispute resolution fails. Moreover, customary law plays an additional role in that its norms and practices have shaped, and continue to shape, Kenyan society and culture (Kamau 2010, 1). However, participants highlighted that the importance of, and extent of reliance on, customary and traditional justice mechanisms varies between ethnic groups. As one key informant told us:

*In Kenya, I think it is a bit more complex because a lot of our ethnic communities do not have those traditional justice mechanisms in existence. So it would literally mean that you are literally reviving something that hasn't existed for perhaps decades, I don't know how viable that would be. Whether there is, and you would actually need a traditional leadership system that would be able to carry on with that so that it is embedded in that. And then, in contextualising it, you can contextualise it and make it more gender sensitive. And again, in a lot of the cultures you have a traditional leadership that doesn't really exist or [is] respected. I think it is in very few communities; the Meru where the elders system is still very strong and still respected and that could be a place where you could embed traditional justice mechanism[s]. Amongst the pastoral communities in Kenya, it is still very strong and then perhaps with the coast it would be more the religious leaders, the Imams.*<sup>40</sup>

Different locations also have different definitions of crime; for example, according to a respondent in the ACORD study, the community of Kaptirio does not consider rape a crime (2010, 38).

Women in these areas may find the formal justice system particularly inaccessible, for reasons such as distance and cost (see discussion below); by contrast, such barriers are more easily avoided by recourse to community justice mechanisms (Chopra 2008a, 11–12). Traditional systems will use the local language, have less impenetrable procedures, and are “enforced by people who are socially important to litigants” (ACORD International 2010, 36); as one woman explained, “[Women] grew up within the [traditional] system ... People don't think, when people are violated they don't think I am going to the police; I am going to seek a lawyer. They will go to the elders you know.”<sup>41</sup> The cases most commonly brought through such channels include disputes over land or livestock, marital and domestic matters, and domestic violence matters, but crimes such as assault and sexual violence are also sometimes referred to elders in informal justice systems (Kameri-Mbote and Akech 2011, 174).

A study of various communities in selected districts within the Coast Province (Mombasa, Kilifi, Kwale, Kinangop, and Tana River) found that the traditional justice systems used varied from community to community (FIDA 2008, 8). Most communities in the study had a hierarchy of systems, ranging through the district, divisional, locational, and village levels (2008, 8). However, the members involved in making decisions within most of these systems were exclusively men, with a few communities where both men and women comprised the membership of the traditional justice system; even in the latter situation, men still formed the majority (8). In many of these systems, membership was not even open to women (10). There were, however, two cases in which the traditional justice system was made up entirely of women – the *Had Gasa* of the Orma community, and the *Kijo* of the Pokomo community.

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<sup>40</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>41</sup> Interviewed in Nairobi, October 1, 2014.

Access for participants is generally equal for both men and women, and women interviewed as part of the FIDA study highlighted the availability, affordability, timeliness, and proximity of informal justice. However, there are cultural factors that may affect women's access to informal justice, such as lack of self-confidence, and fear of stigma. One woman participant provides the following poignant example:

*You know, here in Africa, being married is a big thing. So to lose that social status or maybe for the community to go see how you don't satisfy your husband, that is why he is going to your child. So they choose to defend the man at the cost of the child... And many women do that, many just defend the man... They will always defend the man and silence the child, they tell them never to talk about that again and all that. And it is sad, very, very sad.*<sup>42</sup>

Further barriers include women's perceptions that informal justice can be biased against them due to patriarchal beliefs on the part of members (especially in sexual violence cases and land claims); recourse to remedies that will not materially assist survivors (e.g. in Turkana, the victim's clan is allowed to kill the assailant of a married woman); and exclusion from the decision-making process: "[T]he men will sit, they will negotiate and you know the woman is not even part of the negotiation."<sup>43</sup>

Participants in this research project most often spoke about traditional justice processes involving negotiation and mediation. In informal negotiation proceedings, parties will meet to identify and discuss the issues at dispute, until they arrive at a mutually acceptable solution. The goal is to avoid emphasis on how the dispute arose, but rather create options for solutions that satisfy both parties (Muigua n.d., 9). However, in practice, the unequal power between women and men meant negotiations more often favour the interests of men over women, and thus bias outcomes against women (Wojkowska 2006, 20; ACORD International 2010, 39). With mediation, "[t]he goal often is not just to punish the perpetrator, but to compensate the victim for their loss" (Wojkowska 2006, 17); however, if compensation is not forthcoming to a victim (as is the case with many sexual violence cases), mediation may seem futile. Widows, in particular, also reported that, without a male relative to speak on their behalf, there was no chance of being heard in any community-based mediation process:

*Like us widows there is none who will listen to you even if you disagree with someone in the village, because you do not have a husband. An example is our government elder, they will listen to someone who has a husband but they will not listen to you because their men will stand up for them but you do not have yours. And you as a woman if you are faced with a problem who will stand up with you? They see you as if you are not a person in front of other people.*<sup>44</sup>

Customary and traditional law and justice mechanisms in Kenya thus play a key role in the preservation of cultural norms, particularly in undermining the rights and interests of women, and reinforcing existing power hierarchies and structures (Wojkowska 2006, 17). Despite these weaknesses and dangers, customary law and traditional dispute resolution mechanisms have been shown to be effective in managing conflicts, since the link with communities is often a strong one. The potential benefits of traditional justice for women have been noted;

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<sup>42</sup> Interviewed in Nairobi, September 30, 2014.

<sup>43</sup> Interviewed in Nairobi, April 29, 2014.

<sup>44</sup> Interviewed in Bungoma, April 15, 2014.

these need to be recognised and leveraged in favour of women's interests. Women can use their particular role or authority to "influence the development of customary law in a way that is more responsive to women" (Kamau 2010, 32), for example by ensuring that the use of traditional justice mechanisms is properly circumscribed only to appropriate cases bearing women's needs in mind, and are not utilised in cases of defilement, rape, or sexual violence

## 4.2 Access to formal and legal justice

Women and key informants spoke of a pervasive culture of corruption and "lawlessness" that prevails in both formal and informal justice processes, processes which sometimes run in tandem, intersect, or converge, and therefore cross-permeate in both culture and form. Women may move between formal and traditional or informal justice processes as their circumstances warrant or dictate; these processes' interactive and open nature is important to note when it comes to thinking about the sensitisation of justice actors and reform strategies and options. But, discouragingly, participants in this study consistently described processes of justice of *all* kinds, and at *all* levels, that are plagued by corrupt officials, inefficiencies in practice and procedure, and an overwhelming patriarchal, discriminatory, and gender insensitive culture. As one key informant in Nairobi explained:

*Yes there is stigma but poor people in Kenya just have poor access to justice whether they are women or men...So I think that the legal system and mechanisms are just not accessible to people who cannot afford to pay a bribe, who cannot afford to get a lawyer to push their things through. So I guess corruption also comes into that as well and there is just a culture that is permissively very patriarchal and does not take women's need seriously.<sup>45</sup>*

### 4.2.1 Corruption, bribery, and the cost of justice

According to the 2014 Transparency International Index, Kenya is considered one of the most corrupt countries in the world, ranking 145th from 175 countries (Transparency International 2014a). Their 2014 survey revealed that 70 percent of respondents had paid a bribe to a public sector official in the preceding year, most commonly to the police, judiciary, and those working in registry and permit granting capacities (Transparency International 2014a, 3). This deep culture of corruption also implicates more peripheral justice actors, such as village Chiefs and doctors: "[I]f you lack money you again don't succeed. You will report and they write and it will be the issue of go, come back, and the person who did that to you goes there with a lot of money and bribes the doctor and the issue ends there. It ends without having a lawyer."<sup>46</sup> Executive Director of Transparency International, Samuel Kimeu, has described the corruption in Kenya as attaining "a sense of normalcy" (Wanjala 2013), so widespread as to no longer be treated as illegal or unusual (Wanjala 2013).

Transparency International determined that the National Police Service Commission was the most corrupt Kenyan institution (Transparency International 2014b, 17). In one of its 2013 surveys, it found that 95 percent of Kenyan respondents perceived the police as corrupt or extremely corrupt, while a staggering 77 percent of respondents indicated that they had paid a bribe to police (Transparency International 2013). It has been suggested that a key contributing factor in police corruption is the low salaries that police officers are paid.

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<sup>45</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>46</sup> Interviewed during Validation Workshop, June 22, 2015.

However, in 2013, constables (the lowest pay grade) were paid KES 32,880 a month (Maina 2015); among public servants, although judicial officers earn significantly more than police officers, the pay level of prosecutors and police are comparable. Police corruption, then, is likely to also be partly attributable to broader cultural influences and inadequate training of police (ICTJ 2014, 3–5).

Like police corruption, widespread judicial corruption, coupled with judicial inefficiencies, is well recognised as inhibiting women’s access to justice (Republic of Kenya 2010, 35). Women spoke of acquittals even where they were sure of having incriminating evidence.<sup>47</sup> In 2014, the Kenyan Judiciary was ranked as the country’s third most corrupt institution; Transparency International recorded that 11.6 percent of the bribes in Kenya were paid to the Judiciary, only preceded in ranking by the police and land services (Transparency International 2014b, 20). Confidence in the Judiciary also remains a problem, with only 12 percent of respondents stating that they had “a lot” of confidence in “Other Courts” (i.e. than the Supreme Court) (Ipsos 2015, 22). Lack of judicial accountability, poor judicial training, and the under-resourcing of courts, are likely contributing factors to judicial corruption and underperformance.

Such rampant corruption at all levels of the justice system creates a general sense of impunity and undermines confidence in the justice system (Wanjala 2013). Recent UNDP data found that 49 percent of people did not feel confident in the justice system, and 48 percent did not feel safe (UNDP 2015, 268). Moreover, a situation which demands that people must pay bribes at every turn inevitably impacts most those that are economically disadvantaged (which are more often women), and renders them unable to access any form of justice. This was a regular theme in interviews with women participants: *“The reason why I did not go to the hospital, our hands were empty (had no money) and we thought that even if we went to the Police, they would demand some money.”*<sup>48</sup> Such widespread corruption exacerbates a pervasive culture of impunity more generally, which some women described as a state of lawlessness: *“[T]he reason why we have laws, and penalties for breaking the law, is that it is supposed to serve as a deterrent to breaking the law. But if the law is not enforced, and I know that they are not going to enforce the law, then I am not deterred. ... [W]hen you talk about the culture of lawlessness that you see in Kenya, you wouldn’t believe it ... that we actually have any laws. And the people in the forefront of breaking the laws are the leaders.”*<sup>49</sup>

Finally, women spoke of corruption as an impediment to truth telling – a pillar of transitional justice. One woman recounted that *“there was a time I heard a witness giving testimony on the side of Ruto... please forgive me, I heard him say that he was forced to go and give false statements so that he can be taken outside the country where he will be given a good life together with his children. ... You see that is not right, he did not use truth, the truth is in the community, now it is people like us who can tell the truth.”*<sup>50</sup>

### Cost of justice, inefficiencies, and resource allocation

Corruption not only acts as a direct impediment to access to justice, but widespread systemic corruption in the justice system inevitably inflates the cost of justice, adding to systemic

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<sup>47</sup> Winifred Lichuma, National Gender and Equality Commission, interviewed in Nairobi, October 2, 2014.

<sup>48</sup> Interviewed in Kisumu, March 20, 2014.

<sup>49</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>50</sup> Interviewed in Nairobi, September 30, 2014.

inefficiencies. Women participants in this research project repeatedly identified the cost of justice as a key barrier to accessing justice for women:

*Many cases regarding women just get stuck in the air because they are weak people who do not have money.*<sup>51</sup>

*Most of the women in this country we, we're very, we're not well off to afford lawyers compared to our male, I can't afford a lawyer... So we couldn't have [an] equal stepping stone.*<sup>52</sup>

*The amount of money she has to pay to access Justice is just too much. The government claims that yes they are able to pay that, but the follow up to get yourself to be given free services, I am yet to see even a woman who has been provided free services free legal service by the government. So affordability becomes another issue.*<sup>53</sup>

*It is just the fact that women are always the poorer people. So more often than not it is women who are unrepresented.*<sup>54</sup>

In all rape cases in Kenya, the attack must be recorded on a P3 form,<sup>55</sup> which can often be inaccessible, and which must be filled out by an examining doctor who charges KES 1500 to complete them (Wanjala 2013). A sexual assault complainant who seeks access to criminal justice is also not only confronted by having to pay bribes in order to have her case investigated, but also by overly complicated and expensive administrative structures and costs. The typical expenses she will need to meet, just in court-related costs, include (Hlimi 2013):

- Hearing fee in the High Court: KES 2000 per day
- Origination summons: minimum KES 1500
- Issue of witness summons: KES 50
- Issue of execution (e.g. warrant of attachment or a sale of property): KES 50
- Affidavit/declaration: KES 50
- For each exhibit: KES 10

In addition to these costs, other inefficiencies often prove prohibitive to accessing justice. *“One of the biggest challenges we have now is the delays in the execution of justice. It makes many women give up and lack confidence in the system.”*<sup>56</sup> Some key informants, as actors within the justice system, expressed frustration at the inadequate allocation of resources to justice processes, which often crippled their capacity to do their job;<sup>57</sup> these frustrations range from lacking funding to produce and photocopy witness statements, to issues transporting witnesses to court.<sup>58</sup> It is very clear that more resources must be allocated to the justice sector

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<sup>51</sup> Interviewed during Validation Workshop, June 22, 2015.

<sup>52</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>53</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>54</sup> KI, interviewed in Nairobi, April 30, 2014.

<sup>55</sup> A P3 form is a medical examination report, obtained from the police station and to be completed by a police officer and a medical professional. It is a legal document used as evidence in cases involving bodily harm.

<sup>56</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>57</sup> KI, interviewed in Kisumu, January 20, 2014.

<sup>58</sup> KI, interviewed in Nairobi, April 29, 2014

in Kenya, if it is to both be more accessible to women and deliver quality outputs to them. Recent justice sector reforms are directed towards trying to do just this (see discussion below), but public funding for various justice sectors remains a highly political issue (Shiundu and Obala 2015).

One key area that requires greater resource allocation is legal aid for women impacted by violence (Kameri-Mbote 2000, 28). Legal aid is only available for those charged with murder in the High Court, and for child offenders with no other options for legal assistance (Kameri-Mbote and Akech 2011, 15); while there is the option of submitting a “pauper brief,” where those lacking means can apply for permission to sue as paupers, this is dependent on a lawyer being willing to accept the brief (Kameri-Mbote and Akech 2011, 15). Recently the Legal Aid Act 2016 was enacted in Kenya which could widen the number of people with access to state-funded legal aid. Its application to women in need is yet to be seen.

Non-government organisations thus play a key role in the provision of legal aid and pro bono assistance, particularly to women impacted by violence (Kameri-Mbote and Akech 2011, 15). FIDA Kenya is one of the key organisations that provides legal aid support to women through their “Access to Justice Programme”; between July 2014 and July 2015, FIDA Kenya provided legal advice to 8504 women, and of 105 cases filed in court, the success rate was 90 percent (FIDA n.d.). In response to the high demand for legal assistance from women, FIDA Kenya started a self-representation programme in 2002; so far, it has trained over 7000 women on court processes, how to give evidence in court, how to cross-examine a witness, and how to produce documentary evidence. The impact of such programmes for women’s access to justice is very clear, evinced by statistics that reveal that, whilst conviction rates for sexual assault or defilement of child cases sit at between 15 to 20 percent, it increases to between 80 and 90 percent where legal aid assistance is provided in prosecution (McEvoy 2014).

Finally, one NGO initiative which has worked to support women’s access to justice – this time, by attracting worldwide attention, due to its transformative potential – is the 2013 filing of a public interest litigation case, spearheaded by the Coalition on Violence against Women (COVAW). The case involves eight petitioners – six women and two men, all survivors of SGBV experienced during the 2007/08 PEV – and four Civil Society Organizations, suing the Government of Kenya (COVAW 2016). They allege that the government failed to anticipate and adequately prepare police to prevent violence and protect civilians from sexual violence while it was occurring; moreover, in its aftermath, they claim police refused and/or neglected to document and investigate claims of SGBV; the government denied emergency medical services to victims at the time; and that the government failed to provide necessary care and compensation to address their suffering and harm (COVAW 2016). The respondents have denied the petitioners’ arguments; the case is currently continuing and its outcome is eagerly awaited.

#### *4.2.2 Lack of knowledge and culture*

In relation to women specifically, many lack knowledge regarding both their legal rights, and relevant legal frameworks to access justice:

*And then the literacy level, most people don’t even know that they have rights. Even if they know those rights they say there’s no problem. You go to the communities where a 60 year old man is married to a 13 year old, and they’re having... a baby, and the*

*society feels like it's okay. So culture... ignorance of their existing rights. So I think that those are some of the things that remain for accessing justice.*<sup>59</sup>

Following the enactment of the Sexual Offences Act 2006, the government omitted to make a public announcement of the passing of the new law, and failed to train law enforcement officials about its implications (Aura 2014, 16); as a result, the majority of women are still not aware this Act exists (Aura 2014, 16), and thus are not aware that they have legal rights which can be enforced if they have been victims of sexual violence. This is compounded by cultural norms and practices, including female genital mutilation, which have been seen to foster sexual violence within most Kenyan communities (KNCHR 2012, 80); “Cutting girls is something our people have done for hundreds of years. No one can convince us that it is wrong” (Chatterjee 2014).

Furthermore, as women are generally less educated than men, they are less likely to understand the complex laws surrounding land (IWHRC 2009, 69). Local officials and elders who often adjudicate land disputes are mostly unaware that formal land statutes exist, and reliance on customary laws provides far less protection of women’s land rights (IWHRC 2009, 69). Training local leaders on existing statutes could mitigate this infringement on women’s rights.

#### *4.2.3 Physical access, distance, and time*

The physical distances that many women (particularly women living in rural and remote areas) must travel in order to access justice was identified as a significant barrier to accessing justice by women participants in this study: “*In some sites it goes beyond the notion of whether you can afford a lawyer or not, there are women who can't afford a bus fare to get to the lawyer.*”<sup>60</sup> Other research confirms that unequal distribution of courts throughout Kenya hinders access to justice; the Report of the Task Force into Judicial Reforms (Republic of Kenya 2010, 86) found that, in Northern Kenya, courts can be as far as 500 km away from those who need to use them, and rural/marginal areas have these problems magnified by impassable roads and a lack of legal service providers.

Thus, there are numerous disincentives for women to make the journey, especially factoring in the cost of transport, accommodation, and food. Women also often experience long delays and adjournments in proceedings, which multiplies these costs:

*because the process, even if you have a case it do take so long that you can give up.*<sup>61</sup>

*One may have to go to court many times for... and then there are postponements and there are... there are so many things. So the justice system itself is not user friendly to the survivors of sexual or gender based violence.*<sup>62</sup>

For criminal cases, the average time from case filing to conclusion is 498 days (1 year and 4 months), with a median of 362 days (The Judiciary, Republic of Kenya 2014, 12). Processes

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<sup>59</sup> Interviewed in Nairobi, October 1, 2014.

<sup>60</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>61</sup> Interviewed in Nairobi, September 29, 2014.

<sup>62</sup> Dr Ian Kanyanya, Kenyatta Hospital, interviewed in Nairobi, October 2, 2014.

that have been put in place to expedite cases, including Practice Directions that provide guidelines for case management, are also often ignored (Republic of Kenya 2010, 46).

The use of mobile courts seeks to attempt to overcome these problems (Chopra 2008b, 12). While the use of such courts in Kenya remains uncommon, and “the distribution of the courts in marginalised and rural areas remains highly sparse” (Republic of Kenya 2010, 86), there are now over 50 in the country, as of December 2015 (Judiciary 2015). They have also experienced some preliminary success; the mobile court programmes in Kakuma and Dadaab camps in particular have been praised for effecting reductions in crime within the camps and surrounding areas (Edwards 2013). For women specifically, these courts are not only important in terms of facilitating women’s “physical” access to formal justice, but can also serve as a means through which women can be redirected from traditional justice systems to formal justice ones (Chopra 2008b, 13). They can also serve as an important mechanism for public outreach by the judiciary, to “help increase public understanding [and thereby trust] of the law” (Chopra 2008b, 12). However, the Kenyan Judiciary “do[es] not intend to be lulled into believing that mobile courts are a permanent solution,” being rather “a temporary answer to an urgent need for physical infrastructure” (Mutunga 2012); it acknowledges that more holistic approaches must be taken towards improving access to formal justice systems.

#### *4.2.4 Stigmatisation, fear, and lack of protection*

The complexity of stigma has already been alluded to, as a factor which inhibits victims from seeking out medical treatment. This is particularly problematic for formal justice processes, which require reporting to authorities as a prerequisite to commencing investigations and prosecutions. Victims fear the rejection and ostracism that would attend their reporting, and married women particularly feared (and often subsequently experienced) abandonment by their husbands (CIPEV 2008, 267). Even if women choose to report sexual violence, formal court processes can re-expose the victim to the same fear and stigma that attended the initial disclosure; as Professor Anyang’-Nyong’o stated during a 2002 parliamentary debate on the Domestic Violence Bill,<sup>63</sup> “[W]e must recognise that some of these issues should not be heard in an open court. This is because of the kind of cultural and social stigma that is associated with forms of domestic violence. Sometimes, the victims are stigmatised after such things are made public” (Hansard 2002, 1770).

Fear and a lack of protection are further concerns. Witness intimidation often occurs in those cases where the perpetrator is socially, financially, or physically empowered relative to the victim, and thus there is greater likelihood of retaliation should the victim report (Seelinger and Freccero 2015, 60). Intimidation can even occur within the courtroom, as one woman noted: “*Say a lady has been gang raped, she is standing in court facing a crowd of hundreds of people including her five rapists, her parents, relatives, the village elders and people from where she is married, [she] will be heavily intimidated.*”<sup>64</sup> Victim-witnesses are also harassed to and from court, especially as a shortage of safe houses and shelters means that many victims are forced to return to the site of their abuse (and possibly their abuser) (OMCT 2008, 24; Seelinger and Freccero 2015, 60). Nor does this concern end with the court process itself, as one woman explained: “*And that is what pains most, if he is arrested he comes back. And the bad thing is that when he is arrested and he is released, your life is in danger.*”<sup>65</sup>

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<sup>63</sup> This Bill has since been passed into law, as The Protection Against Domestic Violence Act (2015).

<sup>64</sup> KI, interviewed in Kisumu, January 20, 2014.

<sup>65</sup> Interviewed during Validation Workshop, June 22, 2015.

#### 4.2.5 Gender-insensitive and hostile culture of justice

Gender insensitive, intimidating, and alienating formal justice processes also often discourage women from pursuing justice. In addition to the evidentiary requirement of testifying in open court, women (especially rural women) are often legally illiterate, thereby inducing feelings of intimidation and alienation. The legal system has “[a] sort of foreign nature ... compared to the everyday reality of people generally but of course especially for women,”<sup>66</sup> and the court atmosphere, difficult language, complex procedures, and technicalities all combine to render complainants spectators to a process run by judges and lawyers (FIDA Kenya 2008, 3–4; Seelinger and Freccero 2015, 61). By contrast, women complainants may find a relative degree of familiarity and control in informal justice mechanisms. This is particularly so in domestic violence disputes, as many women prefer the opportunity to tell “their side of the story,” and to preserve their family relationships in a way that is likely to be missed in an adversarial criminal trial (Muli 2004, 125).

Nonetheless, some women participants felt that women could be empowered to pursue formal justice, and have their voices strengthened in such processes, through a greater participation by women lawyers and advocates in formal justice processes. Women are more likely to feel comfortable speaking to a female lawyer about their issues.<sup>67</sup> Also, an increase in the number of women lawyers (and jurists) would be relevant to both pushing for gender sensitive policies engineered to enable women faster access to justice, as well as mainstreaming the role of women in national justice policy-making (Voice of America 2011); judicial reforms thus need to recognise that “*the Court process is in itself the process of Justice. ... Because [women] tell us that they are quite more interested on how they are treated in the Court even more than for example the speed with which the Court, the cases are heard.*”<sup>68</sup>

The need to have more gender sensitive, women focused criminal justice processes has led some justice actors and women’s advocates to start thinking about, and dialoguing on, the possibility of a specialised women’s court: “[W]hen it comes to issues of violence or gender based violence against women, we should have a specific court that deals with that and it should not be in open like that. It should be in camera, the victim and the aggressor who committed the crime against the victim. Not where everybody is listening, a public audience is not for such cases.”<sup>69</sup> Examples from other jurisdictions, most notably South Africa, can offer insights into the issues that would need to be considered in the development of such an initiative in Kenya; they also suggest that such an initiative could have promising outcomes.

#### 4.2.6 Lack of outcomes for women

Women participants frequently mentioned that the lack of tangible outcomes delivered by formal justice is a strong deterrent to pursuing justice. Even where a case reaches court and a “favourable” judgment delivered, an outcome that reflects this “success” is not guaranteed, and, as many participants in this research testified, restitution is usually absent: “*In Kenya, a case will come to an end, we say yes accused go to jail for thirty years, you, you have been*

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<sup>66</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>67</sup> Interviewed in Kisumu, March 20, 2014.

<sup>68</sup> KI, interviewed in Nairobi, April 29, 2014.

<sup>69</sup> Dorothy Muoma, Office of Attorney-General, interviewed in Kisumu, March 20, 2014.

*raped go back to your house and that is the end of the story.*"<sup>70</sup> As discussed in Chapter 3, women need and seek compensation and reparations as part of receiving justice:

*And even if they get a positive outcome... what I really need is I need some form of reparation.*<sup>71</sup>

*You know if justice is done to you, you will remove that wound from your heart but when you stay like this and nothing is being done, there is no way you will remove that wound from your heart.*<sup>72</sup>

In an ICTJ study when respondents were asked what they wanted from authorities, 56 percent stated compensation or economic support (Robins 2011, 21). Without tangible outcomes in the form of compensation and reparations, women will continue to question the value of seeking justice; for those that try, they will likely be left feeling that justice has but added to their pain, suffering, and victimisation. Women will be left impotent to rebuild their lives, and the power structures complicit in women's victimisation will thereby remain intact and undisturbed.

### **4.3 Transitional justice strategies and mechanisms**

Kenya has sought to implement a number of transitional justice strategies in response to the crimes and human rights violations perpetrated in the aftermath of the PEV. This section examines the efficacy of some of these strategies for women impacted by violence, particularly those directed towards prosecution, truth-seeking, reparations, and institutional reform.

#### *4.3.1 Criminal prosecutions*

The investigation and prosecution of mass atrocities and breaches of human rights is well recognised as a core component of transitional justice in the aftermath of conflict (UNSG 2004, 13–14). Sensitive and successful prosecutions play an important role in restoring dignity to victims and delivering them justice (UNSG 2004, 13). However, as discussed above, the criminal prosecution of violence (particularly sexual) perpetrated against women in Kenya, is marred by omnipotent barriers which impede women's access to justice at every turn and often serve to only further victimise and marginalise women survivors.

In the case of Kenya, the ICC has also achieved little to advance the prosecution of SGBV, or the protection of the rights of women who have been violated during conflict. A number of women participants were sceptical about the value of the ICC and its processes:

*I cannot go. The first thing I am a parent but if it is here in Kenya I can testify the truth. But I cannot go there, you know you can be given money and money is like a devil. You can be given money then you give false information and you know it is not good to speak the truth. For sure is that not bad and you are also a parent? That is*

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<sup>70</sup> Interviewed in Kisumu, January 20, 2014.

<sup>71</sup> Interviewed in Nairobi, October 1, 2014.

<sup>72</sup> Interviewed during Validation Workshop, June 22, 2015.

*also someone's child that you are going to testify about. Give a true testimony, even if it they think it is not right you say it is true.*<sup>73</sup>

*Now that someone goes to testify falsely, even the witness himself said that he was given money. I do not trust it myself.*<sup>74</sup>

*From my opinion, I think the voice that is missing from this conversation, is the victims, the real victims. We have not given them publicity. In fact when you talk about the ICC you're not thinking about the victims, [you're] thinking about perpetrators. ... Because nobody thinks through about what those people went through. If you could actually highlight, bring the voice of the people who are... on the table. So that it moves from being political, it moves from being... because it happened. And we can all say we still don't know who did it, but that's why we are going through all this process so that we can actually prove, if all victims were alive they would have proved. So the whole idea that the case is collapsing. We're setting a precedent.*<sup>75</sup>

Investigation by the ICC into the PEV of 2007/2008 was opened in 2010 (01/09-19-Corr, 83), and in January 2012, charges were confirmed against four accused (Francis Kirimi Muthaura; Joshua Arap Sang; Deputy President William Samoei Ruto; and President Ihuti Muigai Kenyatta). However, while significant reports of sexual violence were made during the PEV, the Prosecution only brought charges for SGBV crimes against President Kenyatta.

Nonetheless, as noted above, the key challenges in the prosecution of SGBV are “under- or non-reporting owing to societal, cultural or religious factors; stigma for victims; limited domestic investigations and the associated lack of readily available evidence, lack of forensic or other documentary evidence, owing to the passage of time” (ICC OP 2014b, 24–25). While Kenya is obligated to support ICC processes, pursuant to the Rome Statute, the importance of developing domestic systems and an institutional framework for effective national prosecutions of serious crimes is considered essential (ICTJ 2013, 6; Inder 2015, 4).

#### *4.3.2 Truth-telling, reparations, and institutional reform*

At the forefront of transitional justice in Kenya was the Commission of Inquiry on Post-election Violence (CIPEV, or “Waki Commission”), and the Independent Review of the Elections Commission (IREC, or “Kriegler Commission”), established to investigate the crisis. These commissions were followed by the Truth, Justice and Reconciliation Commission (TJRC).

##### Waki Commission

The Waki Commission (CIPEV) was established under Agenda Item 4 of the Kenya National Dialogue and Reconciliation Accord (KNDR), mediated by Kofi Annan as Chair of the Panel of Eminent African Personalities (ICTJ 2008, 1).<sup>76</sup> Its mandate, broadly, was “to investigate the facts and circumstances surrounding the violence, the conduct of state security

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<sup>73</sup> Interviewed in Nairobi, September 30, 2014.

<sup>74</sup> Interviewed in Nairobi, September 30, 2014.

<sup>75</sup> KI, interviewed in Nairobi, October 1, 2014.

<sup>76</sup> While the KNDR was concluded on February 28, 2008, Agenda Item 4 was not agreed to until March 4.

agencies in their handling of it, and to make recommendations concerning these and other matters” (CIPEV 2008, vii). To these ends, it issued a 529-page Final Report, released on October 15, 2008

The formation of the CIPEV itself constituted an important preliminary step in the development of transitional justice in Kenya. Both it and the Truth, Justice and Reconciliation Commission it recommended were important truth-seeking mechanisms designed to promote the sharing of stories of injustices suffered during the PEV. The crucial link between truth-telling, healing and reconciliation was confirmed by many women participants in this research: “[S]ince [the violence] I have not talked in front of people like you. It is my first time since the violence and I feel my heart has started opening.”<sup>77</sup> FIDA noted specifically that the CIPEV process “had notable milestones as far as gender issues are concerned,” including in listening to survivors’ testimony in private; receiving testimony and records of interviews from specialist SGBV organisations; and collecting evidence from women, men, girls, and boys who had experienced rape, sodomy, and genital mutilation (2009, 23). The Final Report also included a number of recommendations specifically addressing SGBV, including that an office of rapporteur on sexual violence be established, to work with existing government institutions that address SGBV (e.g. courts, the police, and the National Commission on Gender), and to present an annual report to the National Assembly on the handling of SGBV cases and policy-making in that year (CIPEV 2008, 269).

However, on institutional reform and the conduct of prosecutions in relation to the PEV, many of the Final Report’s recommendations remain outstanding. These include the CIPEV’s core recommendation, the establishment of the Special Tribunal (ICC OP 2013, [6]–[7]; ICTJ 2015); reforms to the Kenyan police force, such as the training of officers on how to handle SGBV cases (ICTJ 2015); and the establishment of an office of rapporteur on sexual violence (ICTJ 2014, 6; ICTJ 2015). To date, no SGBV victims have received reparations from the state (ICTJ 2014, 1; Amnesty International 2014b, 43), and a lack of accountability persists as perhaps the greatest barrier to transitional justice in the aftermath of the 2007/2008 PEV. A Kenyan police task force formed to investigate sexual offences related to the PEV has been discredited by many organisations, and no proceedings have been initiated against any police officers known to have committed acts of SGBV (ICTJ 2014, 11). Prosecutors have also had difficulty holding individuals to account for individual acts of SGBV. While a 2011 report to the Attorney General lists 47 convictions for gender-based PEV cases (Team on Update of Post-Election Violence Related Cases 2011, 15–23), the list has been described as “almost wholly inaccurate” (HRW 2011, 21, 25–27); independent organisations have found that, to date, no individuals have been convicted of sex crimes in relation to the PEV (ICTJ 2014, 1).

### Independent Review Commission

The Independent Review Commission on the 2007 General Elections held in Kenya (IREC), commonly referred to as the “Kriegler Commission,” was established by the same agreement as the Waki Commission; it was brokered by incumbent President Mwai Kibaki’s Party of National Unity and Raila Odinga’s Orange Democratic Movement (ODM). Its purpose was to investigate the conduct of the 2007 Kenyan elections, and to make recommendations.

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<sup>77</sup> Interviewed in Bungoma, April 14, 2014.

In fulfilling its mandate, the IREC noted and criticised the manner in which women's civic rights as Kenyan citizens were abused during the 2007 elections. The integrity of the final result was challenged by the exclusion of almost one-third of all eligible voters (2008, x); women were "significantly under-represented" (8), constituting 51.4 percent of the population at the time and only 47.1 percent of the voter register (79). The IREC also found that "sexist tactics and violence to keep women out of the race" (24) was widespread; this included the use of violence during party nominations, to dissuade women from running (58). In addressing women's rights, the IREC focused on improving women's representation within Parliament, recommending that the "nominated seats," whose holders are nominated by parties according to the proportion of every party in the National Assembly, be devoted to women (151). However, it rejected submissions that reserved seats for marginalised groups should also be allocated to women, on the basis that, while women are under-represented, they "cannot be considered marginalised" such that the likelihood of a woman being elected is "infinitesimal" (147).

The results of the 2013 election provide interesting insight into any progress that has been made in the arena of women's representation. Despite the IREC's recommendations, women were allocated 47 reserved seats (one from each individual county) in the National Assembly, to be filled separately from the 290 directly elected seats from the 290 constituencies (FIDA Kenya 2013, 48). Notably, in 2013, the proportion of total seats held by women in the Parliament doubled, from the previous 10 percent (UN Women 2013; Commonwealth Observer Group 2013, 15); 87 of the 416 seats in the National Assembly and Senate chambers were won by women (UN Women 2013). However, only one out of eight presidential candidates, 7 out of 237 candidates for Governor (or 2.95 percent), and 697 of 9603 candidates for the County Assemblies (or 7.26 percent), were women (Commonwealth Observer Group 2013, 15).

Women's representation, therefore, remains a pertinent issue in Kenyan political governance. While the 2010 Constitution introduced Article 27, incorporating both an affirmative action provision and the gender two-thirds rule to apply to representative bodies,<sup>78</sup> the results of the 2013 election clearly failed to meet these constitutional requirements; a constitutional crisis was only avoided by a Supreme Court Advisory Opinion (No. 2 of 2012) ruling that the quota in Article 27(8) did not apply to the 2013 election results, but rather should be implemented "progressively" by August 27, 2015 (Judiciary 2012a, [79]). Eventually, this deadline also lapsed, but not before the National Assembly requested a one-year extension to determine a formula through which the two-thirds gender rule could still be implemented (Godia 2015). With this extension, Aden Duale, the Leader of the Majority in the National Assembly, put forward the *Constitution of Kenya (Amendment) (No. 4) Bill 2015* ("Duale Bill"); the Bill, which seeks to have seats for women increased for a period of 20 years, proposes amending Articles 81, 97, 98, and 177 of the Constitution "so as to provide that the two-thirds gender rule for elective positions shall lapse twenty years from the next general election" (Republic of Kenya 2015, 2256). At the time of writing, this Bill is yet to be passed (Kenya Law 2016).

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<sup>78</sup> The referenced provisions are Art. 27(6) – "To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination" – and Art. 27(8) – "In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

## TJRC and reparations

The TJRC, on the recommendation of the CIPEV, was established in 2009. Its mandate, as spelt out in the Truth, Justice and Reconciliation Commission Act No. 6 of 2008, included:

the investigation of all of the violations on the gross human rights violations and other historical injustices in Kenya between 12 December 1963 and 28 February 2008; identification of the individuals, public institutions, bodies, organizations, public office holders, the State, state actors, or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses; identification and specification of the victims of the violations and abuses and making of appropriate recommendations for redress, including reparations; creation of a historical record of violations of human rights abuses; identification and recommendation of the prosecution of any person responsible or involved in serious violations of human rights, including socio-economic rights and to make recommendations for systemic and institutional reform to ensure that such violations do not occur in the future. (ICJ Kenya 2013)

The TJRC divided its operations into four stages – 1) statement taking; 2) research and investigation; 3) hearings; and 4) the writing of its report (TJRC 2013a, 80). In the first stage, 191 of the 304 statement takers were female (85); 42,465 statements in total were collected, with 16,503 of them coming from women (TJRC 2013a, 83). A total of 1,104 statements from adults regarding sexual violations were received, of which 103 were from men (TJRC 2013b, 712). The statements and memoranda relating to sexual violence had a victim count of 2,646 women and 346 men (TJRC 2013b, 712). Testimonies were also given in public hearings, closed hearings, and women’s hearings (TJRC 2013b, 712).

The TJRC released its report in mid-2013, with a suite of recommendations. Of particular note to present discussions is the framework recommended for a reparations programme (comprised of restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition), including for victims and survivors of sexual violence (TJRC 2013d). Reparations were also distinguished as collective and/or individual, and material and/or non-material; in particular, the framework encourages collective reparation (107), “to address structural inequalities such as identity and gender-based dimensions of individual violations” (108). Eligibility for reparations was limited to five categories of “gross violations of human rights” (TJRC 2013d, 102) occurring between December 12, 1963, and February 18, 2008 (103); SGBV fell into category 2, “violations of the right to personal integrity”.

However, as of 2015, no steps had been taken to consider the report (ICTJ 2015). Indeed, the Kenyan National Assembly “has yet to reintroduce the report to the floor for debate or adoption” (ICTJ 2015). Moreover, while President Kenyatta announced a three-year KES 10 billion restorative justice fund for victims of post-election violence (ICTJ 2015), there was no policy to implement the fund (Wangui 2015), and the government has also undermined its own promise by appealing court awards of compensation to victims by claiming it has no money to fund them (Journalists for Justice 2015b).

### *4.3.3 Institutional reform*

The police and judiciary are the two institutions most urgently in need of reform in Kenya. Women participants were resoundingly clear about this priority:

- Interviewer: *Do you think the Police can give Justice, Courts can give justice to the women?*
- Respondent: *You cannot be helped.*
- Interviewer: *Why not?*
- Respondent: *Because even if you take a case...you cannot be supported...*
- Interviewer: *Do you know of any woman who has gone to the police and has been helped by the Police?*
- Respondent: *No.*
- Interviewer: *Do you know of any women who have gone to court and has been helped by the Court?*
- Respondent: *No.*<sup>79</sup>

A range of steps are being taken to address the widespread corruption and inefficiencies that plague both these institutions; these are essential to improving women's access to justice.

### Police reform

In relation to the police, the recommendations of the National Task Force on Police Reforms were adopted in the formulation of the 2010 Constitution, bringing significant changes in policy, legislation, and institutional structures towards police reform and accountability (Mageka 2014). In particular, three important bills have been passed to ratify the Constitution's provisions in furtherance of police reform: the National Police Service Act 2011, the National Police Service Commission Act 2011, and the Independent Police Oversight Authority Act 2011. A key aim of the police reform package is to restore public confidence in the police (ICTJ 2014, 9), which, as previously noted, is low and acts as an ongoing barrier to women accessing justice; however, the rapid passage of legislation on policy reform has been disappointingly overshadowed by the delayed establishment of corresponding institutions (Amnesty International 2013, 12). The process of vetting police has also been a very slow one.

Furthermore, a new police training curriculum was implemented in 2011, as part of police reform initiatives (Momanyi 2011); it saw the inclusion of human rights issues touching on GBV (Daily Nation 2013). The Kenya Police Service Women's Association was also launched in 2012 (Obala 2012), with a view to promoting women in law enforcement and security reform (UN Women 2012). However, a major impediment to effective police reform remains the lack of awareness of the new laws by police officers. Despite the introduction of gender desks several years prior, a 2009 report indicated that many officers at those desks had received no training on gender-responsive crime management (ACORD International 2009, 20).<sup>80</sup>

### Judicial reform

The 2010 Constitution has also seen extensive judicial reforms being introduced (Bosire 2012), and the election of new Chief Justice Dr Willy Mutunga, under a more rigorous process, brought new hope for a more honest and accountable judiciary. Promisingly, an extensive strategy has also been developed for judicial reform in Kenya (Judicial

<sup>79</sup> Interviewed in Nairobi, September 29, 2014.

<sup>80</sup> Gender and children's desks were introduced in some of the Kenyan government's earlier attempts at police reform; however, many of the desks in Nairobi were no longer operating by 2010 (Capital FM News 2010).

Transformation Framework 2012–2016). This strategy is built on four key pillars: (i) People-focused delivery of justice; (ii) Transformative leadership, organisational culture, and professional and motivated staff; (iii) Adequate financial resources and physical infrastructure; and (iv) Harnessing technology as an enabler of justice (Judiciary 2012b, 3).

Some outcomes in judicial reform have been produced, including the establishment of a national case-tracking tool in 2015, and finalisation of court manuals for different level courts (although implementation of these varies between courts) (Gainer 2015, 16). Extensive backlogs in court cases have been tackled, with gains being made (Gainer 2015, 17). Furthermore, there has been recruitment and vetting in the judiciary, and training for judges has also been implemented. In the area of SGBV, the Judicial Training Institute is in the process of developing a curriculum and training manual on SGBV for judicial officers (Rawal 2015b, 10). A sexual harassment policy has also been put in place by the judiciary; the Sexual Offences Rules of Court were recently published by the judiciary in 2014, under the auspices of the Sexual Offences Act, and make provisions for the protection of victims and witnesses in sexual offence cases.

#### Other institutional reforms

Broader institutional reforms in Kenya are also needed to facilitate justice for women impacted by violence. As discussed in Chapter 3, SGBV impacts women in multiple, complex, and intersecting ways; therefore, survivors need to be supported by strategies that are holistic, multi-dimensional, and coordinated, including addressing women's needs and priorities in education, health, housing, and poverty alleviation (Republic of Kenya 2014, 13–16).

## **CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS**

This research project spoke to 63 women affected by violence, from four distinct regions of Kenya: Nairobi, Kisumu, Bungoma, and those displaced from Tana Delta. By both presenting Kenyan women's views and experiences regarding women's justice needs, and highlighting such catastrophic consequences of violence as HIV, homelessness and social exclusion, a key message arose that *gender-sensitive justice, to be effective, must be holistic rather than atomistic*. Justice must take account of the complex social, economic, cultural, and political context through which women are exposed to an intersecting web of harms; it needs to incorporate legal, psychological, economic, and politico-cultural remedies. Together, these will better enable women to live fulfilled, dignified lives, free from violence and with opportunities to nourish future generations. Accordingly, the following recommendations are proposed.

### **5.1 Recommendations**

#### **To the Government of Kenya:**

- The women of Kenya need the government to recognise the prevalence and seriousness of violence against women, committed both during times of emergency, and on a day-to-day basis. Reducing the unacceptably high levels of violence against

women in Kenya will require committed and sustained leadership from the top down, aimed at changing social and institutional attitudes which undervalue women's rights to safety and integrity, and which perpetuate a culture of impunity.

- To this end, the Government of Kenya should immediately task and fund an existing body, to create and maintain a national database on violence against women, with a view to establishing a comprehensive picture of the typologies of violence (their prevalence and incidence) and criminal investigations, prosecutions, and convictions, as an essential step in seriously targeting violence through policy and law. Data should be systematically and regularly collected and be made publicly accessible.
- While the Government of Kenya needs to urgently address the security and cost barriers to women accessing healthcare following violence, it additionally needs to lead a long-term public awareness campaign to change popular attitudes which blame women for being raped, and which condone men's right to beat their wives. Public attitudes to violence against women are both enabling of such violence, and continue to impair women's ability to access necessary services for their recovery.
- Women affected by violence need far greater access to high quality psychosocial support to aid their recovery, and facilitate their full participation in social, civic, and economic life. The Government of Kenya is urged to expand access to psychosocial services, particularly in regional Kenya.
- The Government of Kenya is urged to act on commitments made regarding reparations and compensation as a matter of urgency, and to consider the effects of evidentiary burdens on women (notably displaced women, widows, and survivors of sexual violence).
- The Government of Kenya is further urged to extend reparations beyond monetary compensation, to include law, policy, and service provision aimed at addressing the structural and systemic barriers to justice that women face.
- The Government of Kenya is urged to sincerely address issues of corruption and failure in the discharge public duties by officials of the state, including police, judiciary, and public servants. To this end, rigorous mechanisms for monitoring and evaluating police and judicial performance are called for, as is a commitment to ongoing rigorous and gender sensitive training of police and judicial actors. The implementation of gender-balanced representation and staff recruitment practices should also be effected throughout the justice sector.
- The Government of Kenya is urged to implement judicial strategies that recognise the especial needs of survivors of sexual violence, and accord them the support and protection needed throughout their interaction with the justice system (including implementation of mechanisms to expedite cases).

#### **To the international community:**

- Governments of donor nations and international organisations should maintain pressure on the Government of Kenya to address the status of women and the violence directed against them, in a systemic holistic and long-term manner. In particular, the international community has a key role to play in insisting that the Government of Kenya prosecute perpetrators of violence against women, and sanction state agents who fail to properly discharge their duty of care regarding women's safety.
- Governments of donor countries and international organisations have a key role to play in maintaining pressure on the Government of Kenya to enact the recommendations of the Truth, Justice and Reconciliation Commission, and to ensure

that recommendations are enacted equitably, transparently, and with regard to their impacts on women.

- Members of the international community should provide assistance and encouragement to the Government of Kenya to eradicate corruption in key justice processes, notably (but not exclusively) the police service.
- International organisations should strive for increased inter-agency and inter-sectoral co-operation in promoting women's rights, and delivering women-centred programs.

**For service delivery and programming:**

- Women need high quality and accessible psychosocial services. Such services need to incorporate both psychological counselling and more acute specialist post-traumatic care. In particular, women urgently need assistance recovering from the psychosocial effects of sexual assault.
- Education is crucial for individuals' life chances and for the well-being of society as a whole. Women impacted by violence, and their children, are disadvantaged in accessing education, and are at high risk of becoming ever-more entrenched in poverty and vulnerability to violence. Women and children should be given genuinely free access to education at all levels. Programmes specifically targeting the children of displaced, widowed, or sexually assaulted women are needed to ensure their equal and uninterrupted access to education.
- Programmes aimed at women's political empowerment, targeting both skills-development among women and structures which currently exclude or marginalise women, will assist women to build a local, regional, and national political voice – a necessary step for the long term equality aspirations of Kenyan women. Such programmes need to ensure participation across class, social status, regional, and ethnic boundaries, to include those women who are most marginalised (whether through poverty, health status, displacement, marital status, or ethnicity).
- Development of programmes that genuinely afford women a voice, and recognise their agency.