


**'STATE OF COMPLIANCE WITH INTERNATIONAL AND REGIONAL LEGAL  
FRAMEWORKS FOR PROMOTION OF PEACE AND SECURITY OF WOMEN  
AND GIRLS: A CASE STUDY OF KENYA'**

**BY:**

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REQUIREMENTS FOR THE DEGREE OF MASTERS OF ARTS (MA) IN  
INTERNATIONAL CONFLICT MANAGEMENT (ICM).**

  
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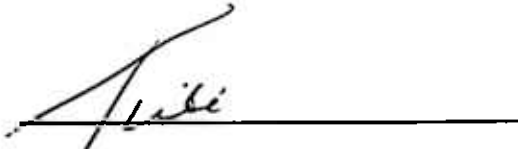
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## DECLARATION

I, **MUTINDI STEPHANIE MUNYAO**, hereby declare that this dissertation thesis is my original work. This work has never been submitted to any University, College or other institution of learning for any academic or other award. Other works cited or referred to are accordingly acknowledged.

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23<sup>rd</sup> Nov. 2015

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### Supervisor's Approval

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## **ABSTRACT**

**Women and girls suffer the greatest and disproportionately in conflict situations. While women and girls endure the same trauma as the rest of the population -- bombings, famines, epidemics, mass executions, torture, arbitrary imprisonment, forced migration, ethnic cleansing, threats and intimidation -- they are also targets of specific forms of violence and abuse, including sexual violence and exploitation. The United Nations has led the drive in protection women and girls by guaranteeing their peace and security, especially in time of conflict, by the promulgating the four major resolutions on women peace and security (resolution 1325, resolution 1880, resolution 1889, and resolution 1830). In addition, there exists a host of four international legal instruments, treaties, and declarations, including, but not limited to CEDAW (Convention on the elimination of all forms of discrimination against women and girls), Beijing Platform for Action, and the international bill of rights, to name but a few, all with provisions geared to protect the status of women in times of conflict. However, despite these resolutions and a number of policy and programmatic initiatives at the international, regional and national levels, the connection between international laws, national legislation and policy frameworks on the one hand and meaningful change in the lived realities of men and women affected by conflict on the other remains elusive. In Kenya, women and other vulnerable groups are still suffering from both sporadic, as well as systemic abuses which threaten their peace and security, as was evident in the times of the post-election violence in 2007, and as currently exists in various forms. The project sought to analyse the level of compliance of Kenya with the international legal framework on protection of women. The findings indicate that Kenya is a signatory to all the treaties and resolutions that promote women peace and security, but there are gaps in institutionalisation, and implementation of the same, due to mind set shifts, lack of education, legal illiteracy, and capacity constraints in resources. The project further finds that efforts to resolve these conflicts and address their root causes will not succeed unless we empower all those who have suffered from them. The project proposes and recommends the amendment of sections of Kenya's Sexual offences Act to provide for better protection of the women, while also calling for more political advocacy, awareness creation, broad interpretation of the constitutional provisions, as well as the need for collaborative networks to ensure complete promotion of women peace and security, and full implementation of the Kenya national Action Plan. The study further recommends that only if women play a full and equal part in peace making and peace building can we build the foundations for enduring peace, development, good governance, human rights and justice.**

## **DEDICATION**

**I dedicate this work to the women and girls who continue to suffer violence.**

## **ACKNOWLEDGEMENT**

**I thank God for merciful guidance through my studies.**

**I also wish to acknowledge the contribution of my supervisor Professor Maria Nzomo, whose input and admirable dedication contributed immensely to the completion of this project.**

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## **LIST OF ABBREVIATIONS**

<b>AG</b>	<b>Attorney General</b>
<b>AU</b>	<b>African Union</b>
<b>ACHPR</b>	<b>African Charter on Human and Peoples' Rights</b>
<b>ACHPR</b>	<b>African Commission on Human and Peoples' Rights</b>
<b>CBOs</b>	<b>Community Based Organisations</b>
<b>CEDAW</b>	<b>Convention on the Elimination of All Forms of Discrimination against Women</b>
<b>CSOs</b>	<b>Civil Society Organizations</b>
<b>EIA</b>	<b>Environmental Impact Assessment</b>
<b>EITI</b>	<b>Extractive Industries Transparency Initiative</b>
<b>HC</b>	<b>High Court</b>
<b>IFC</b>	<b>International Finance Corporation</b>
<b>ICC</b>	<b>International Court of Justice</b>
<b>ILC</b>	<b>International Law Commission</b>
<b>ICTY</b>	<b>International Criminal Tribunal for the former Yugoslavia</b>
<b>IHL</b>	<b>International Humanitarian Law</b>
<b>NGOs</b>	<b>Non-Governmental Organizations</b>
<b>RTOP</b>	<b>Responsibility to Protect</b>
<b>UK</b>	<b>United Kingdom</b>
<b>UNGA</b>	<b>United Nations General Assembly</b>
<b>USA</b>	<b>United States of America</b>
<b>TRC</b>	<b>Truth and Reconciliation Commission</b>

## INTRODUCTION

“kimiyo mon, timiyo ji duto.”

— *Luo Proverb. (Trans. When you give a woman, you give to the whole community.)*<sup>1</sup>

### 1.1 Introduction

Women bear the major burden of conflict.<sup>2</sup> The United Nations, as a union of world governments, has proposed and passed several resolutions to promote the advancement of women’s status in society, guided by the rallying call, ‘As Women Thrive, So Will We All’.<sup>3</sup> Both the United Nations and regional continental bodies have promulgated a raft of treaties, declarations and resolutions to protect and promote the peace and security of women during conflict periods. One of such leading documents is the United Nations Security Council Resolution 1325 (UNSCR 1325) was adopted unanimously on 31 October 2000, after recalling resolutions 1261 (1999), 1265 (1999), 1296 (2000), and 1314 (2000). The resolution acknowledges the disproportionate and unique impact of armed conflict on women and girls.<sup>4</sup> It calls for the adoption of a gender perspective to consider the special needs of women and girls during conflict, repatriation and resettlement, rehabilitation, reintegration and post-conflict reconstruction.<sup>5</sup>

The research focuses on the state of national compliance with international and regional policy frameworks for promoting gender based peace and security. The researcher hypothesizes that the extent to which a state complies is also the extent to which peace and security of women and girls is achieved promoted and attained. Promotion of women’s role in peace and security is a key factor to reducing the imperfect, disproportionate effects of conflict on women and girls.<sup>6</sup> Such programs need to be entrenched in the culture of the state, and the institutional, legal and policy frameworks of government bureaucracies so as to lead to

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<sup>1</sup>See Ojijo. *The Luo Nation: Origins, History and Culture of the Luo People of Kenya*. Kampala, Uganda. 2012.

<sup>2</sup> United Nations Research Institute for Social Development. 2010. *Combating Poverty and Inequality: Structural Change, Social Policy and Politics*. Geneva: UNRISD “Gender Inequalities at Home and in the Market.” Chapter 4, pp. 5–33

<sup>3</sup>See *High-Level Meeting Adopts Political Declaration Pledging Government Action* available at <http://www.un.org/press/en/2015/wom2021.doc.htm> accessed on July 7, 2015

<sup>4</sup> Chowdhury, Anwarul (31 October 2010). "A.K. Chowdhury: Women Are Essential for Sustainable Peace". *Universal Peace Federation*. Retrieved 17 December 2014.

<sup>5</sup> Shepherd, Laura J. (2008). *Gender, Violence & Security*. London, UK: Zed Books Ltd. pp. 88–89. ISBN 978 1 84277 927 9.

<sup>6</sup> Puechguirbal, Nadine. "Peacekeeping, Peace building and Post-conflict Reconstruction". In *Gender Matters in Global Politics*, edited by Katharine Sarikakis and Leslie Regan Shade, 161-175. London and New York: Routledge, 2010.

sustainable capacitation of the women by creating a culture of continuous equity, equality and egalitarianism<sup>7</sup>. It is the role of the bureaucracy, or governments, to organize human activity.<sup>8</sup>

The purpose of this project is to analyse the extent to which the Kenyan government, under the new constitution, has put in place legal and institutional frameworks to empower women. In seeking to fulfil this objective, the research project will endeavor to establish whether Kenya's institutional frameworks are in line with the international and regional guidelines on protection and promotion of security and peace of women during time of conflict.

## **1.2 Background**

The protection, promotion and empowerment of women has its roots in various levels of global governance, from the United Nations, through continental unions, to local/municipal government's constitutions and statutes, policies and institutional platforms.

The world and Africa in particular have encountered so many conflicts most of which have led to the loss of life and destruction of properties and separation of families. Civil strife within the continent has led to more loss of life than the world wars combined.

Around the world, women, men, boys and girls suffer multiple forms of vulnerability and violence that affect their security, development and well-being every day, particularly in situations of armed conflict. Over the last few years, an increasing number of policies and programmes have been formulated to acknowledge and address these realities. In spite of this increased attention, gender considerations continue to be marginalized during conflict and post conflict situations. In particular, women are still largely excluded from conflict resolution and peace building efforts; impunity still surrounds gender-based violence; children are still recruited by fighting forces; and civilians continue to be targeted, becoming victims of political violence.

Building on a variety of existing international legal and political commitments, the United Nations Security Council took decisive action in 2000 by adopting the first resolution to specifically address women and peace and security issues. United Nations Security Council resolution 1325 on women and peace and security (resolution 1325) obliges all UN Member States to promote the participation of women at all levels in peace processes and in the

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<sup>7</sup>See Stewart, Aileen Mitchell. *Empowering People* (Institute of Management). Pitman. London: Financial Times Management, 1994.

<sup>8</sup> Weber, Max. *The Theory of Social and Economic Organization*. Translated by A.M. Henderson and Talcott Parsons. London: Collier Macmillan Publishers, 1947.

prevention of conflict; to protect women from gender-based violence; and to take their specific needs into account as ex-combatants or refugees.

In 2008, the Security Council further emphasized the need for prosecution of gender-based crimes through the adoption of resolution 1820 on sexual violence in conflict (resolution 1820). On 29 September 2009, the Security Council adopted resolution 1888, which mandates peacekeeping missions to protect women and children from rampant sexual violence during armed conflict, and requests the UN Secretary-General to appoint a special representative to coordinate a range of mechanisms to fight against these crimes.

Resolution 1889, which was adopted on 5 October 2009, reinforces the provisions of resolution 1325 and calls on the Secretary-General to develop a set of global indicators within six months to track implementation of resolution 1325.<sup>9</sup>

Despite these resolutions and a number of policy and programmatic initiatives at the international, regional and national levels, the connection between international laws, national legislation and policy frameworks on the one hand and meaningful change in the lived realities of men and women affected by conflict on the other remains elusive.

Women and children are the victims of sexual and gender based violence during conflict as rape is often used as a weapon of war. Rebel groups, national armies target women and girls as a part of a wider war/ conflict strategy to inflict pain on their rivals. This has been observed in most countries plagued by violent conflicts. When a woman is faced with conflict various aspects of her life are affected such as: her health and that of her family; the livelihoods and economic participation that eventually leads to poverty, hunger and hunger related loss of lives; family disintegration; single parent and child headed households.

Different NGOs in Kenya call attention to economic vulnerability and empowerment aspects in relation to implementation of Resolution 1325. Empowerment, especially economic empowerment, is often mentioned as a crucial area for and by the women in conflict countries for improving their status and enabling participation, yet, relatively little is being done.

For a long time, Kenya has been argued to be one of the most progressive countries when dealing with gender equality this is evidenced by the existence of the Constitution that was passed in 2010 and the various gender responsive laws that exist e.g. Prohibition against

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<sup>9</sup> S/RES/1888.

female genital mutilation Act, the sexual offences act, Children's Act and the recently passed Protection against domestic violence act.

Indeed, Kenya was previously referred to as the haven of peace by many until the post-election violence of 2007/2008. This is however not to state that the country had not experienced any conflict before then, the country had experienced low intensity civil strife that could be termed as tribal clashes, that were costly in terms of human lives and property. However the magnitude of violence that was encountered during 2007/2008 bypassed any conflict previously experienced in Kenya. It is safe to argue that during any conflict the most affected are women and children and they are argued to bear the brunt of conflict and post conflict societies.

The 2007/8 post-election violence (PEV) experiences in Kenya renewed interest in the adoption and implementation of Security Council resolutions 1325 and 1820. Before the 2007/8 post-election violence the process of adoption was slow. In June 2009, the process of developing the Kenya National Action Plan (KNAP) started under the leadership of the National Gender and Equality Commission under an inclusive and participatory process between the government and civil society.

The Kenya National Action Plan (KNAP) is premised on four pillars: prevention, protection, participation, relief and recovery. The KNAP is unique compared to other NAPs because it is premised on a human security framework in an attempt to address the root causes of the economic and social-political issues around peace and security facing Kenyan women. Additionally, the proposed KNAP promises to deepen understanding of the multiple roles and concerns that women have in peace processes while mainstreaming them by creating accountability from different actors responsible for its implementation through resource allocation and policy development. This project reviews the position on the implementation of United Nations Security Council Resolution 1325. It reviews previous and current experiences of others in implementing Resolution 1325. The review is on selected reporting by UN agencies, bilateral donors and NGOs indicates that the emphasis in UNSC Resolution 1325 implementation has been mainly on participation of women, and on protection of women and girls in conflict and humanitarian crisis (experiences of Finland and other donors).

### **1.3 Statement of the Problem**

Despite the numerous legal institutional and policy frameworks to promote women and girls rights in Kenya, gender based violence and other forms of gender based insecurities still persist. Various scholars and researchers including Cockburn<sup>10</sup>, Tryggestad<sup>11</sup> and Dharmapuri<sup>12</sup> have documented the disproportionate and unique impact of armed conflict on women and girls. Kenya has experienced various conflicts, with irreversible disproportionate effects on women and girls. Kenyan women remain largely excluded from peace and security processes despite their efforts in preserving social order and educating for peace at the grassroots; lobbying and advocacy for the equitable distribution of resources at the national level and despite international policies which explicitly call for women's involvement in decision making at national and international levels. This marginalization hinders efforts to build sustainable peace and stable communities in Kenya. Moreover, when women are excluded, the differential impact of the decisions on men and women is not fully understood, women's rights are not overtly addressed while their recommendations are excluded from final agreements. Conflicts within pastoral communities, conflicts between pastoral and agricultural communities, conflicts linked to the presence of refugees and ethnic clashes, and the increasing terrorist attacks. This study presents an in-depth call from a gender perspective to establish the progress that Kenya has made in relation to peace of its citizens with specific emphasis on women, in order to establish whether the country is in compliance with the various international, regional treaties on peace and security. There is also need for adoption of a gender perspective to consider the special needs of women and girls during conflict, repatriation and resettlement, rehabilitation, reintegration and post-conflict reconstruction.<sup>13</sup>

Apart from there lacking any lucid and clear status or empirical data on the implementation of various international and regional conventions, there is also the challenge of ascertaining if women are more represented, participate more in peace and security matters.

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<sup>10</sup> Cockburn, Cynthia (2011). "Snagged On The Contradiction: NATO, UNSC Resolution 1325, and Feminist Responses" (PDF). Retrieved 17 December 2014.

<sup>11</sup> Tryggestad, Torunn L. (1 October 2009). "Trick or treat? The UN and implementation of security Council resolution 1325 on women, peace, and security". *Global Governance (Lynne Rienner Publishers)* 15 (4): 539–557. Retrieved 23 August 2014.

<sup>12</sup> Dharmapuri, Sahana (2012). "Implementing UN Security Council Resolution 1325: Putting the Responsibility to Protect into Practice" (PDF). *Global Responsibility to Protect*. doi:10.1163/187598412X639728. Retrieved 17 December 2014.

<sup>13</sup> Chowdhury, Anwarul. "A.K. Chowdhury: Women Are Essential for Sustainable Peace". (Universal Peace Federation, 31 October 2010). Retrieved 17 December 2014.

## **1.4 Purpose of the Project**

The main objective of this project is to analyse the extent to which the international and regional treaties and declarations promoting and protecting women and girls in times of conflict have been implemented in Kenya.

The specific objectives of the research project will be:

1. To analyse the content of international and regional frameworks in promoting gender based peace and security globally;
2. To analyse the current status, challenges and opportunities in implementation of international and regional frameworks for promotion of peace and security of women and girls in Kenya;
3. To determine the extent to which the lack of implementation of the legal and policy framework has contributed to discrimination, marginalisation of women and derogation of peace and security of women.

## **1.5 Research Questions and Research Hypothesis**

### **1.5.1 Research Questions**

1.5.1.1 What is the content of international and regional frameworks in promoting gender based peace and security globally?

1.5.1.2 What is the current status, challenges and opportunities in implementation of international and regional frameworks for promotion of peace and security of women and girls in Kenya?

1.5.1.3 What is the extent to which the lack of implementation of the legal and policy framework has contributed to discrimination and marginalisation of women in the security sector but also in other arenas?

### **1.5.2 Research Hypothesis**

1.5.2.1 The content of international and regional frameworks promotes gender based peace and security globally.

1.5.2.2 Kenya has not fully complied with international and regional frameworks for promoting gender based peace and security.

**1.5.2.3 The lack of implementation of the international legal and policy framework has contributed to discrimination and marginalisation of women in the security sector in Kenya.**

## **1.6 Significance of the Project**

The relevance of international and regional treaties in promoting deterrence, as well as compliance with international and universal customs and practices to promote women interests, cannot be gainsaid. However, the practicality of fulfilment of this objective, given the environment of wars, conflicts, and related ills, is in murky waters of question. Whereas the importance of international treaties is not doubted, the extent of compliance by Kenya has not been studied.

The project is critical because the Kenya, like any other third world countries, is now facing integrity and legitimacy questions, especially with reference to the protection of women rights especially in the current economic booms. There is need to analyse the effectiveness of UN treaties, with special reference to UN Resolution 1325, to realise better lives for women.

The project will also seek to establish how women are affected from the special interest groups i.e. women with disability, youthful women and elderly women, and how they relate with their insecurities. The project will give us an opportunity to encounter and engage with women's voices and interests in terms of the security arena.

The research project will serve as a lucrative platform to demonstrate how women engage with peace and security either as perpetrators, change agents and victims of the conflict. In terms of the 3 P's in UNSCR 1325, namely Participation, Protection and Prevention, the focus of international cooperation has been mostly on participation: participation of women in national level political and electoral processes. Participation of women is also the basis of a gender sensitive agenda in a post-conflict society. In the Kenyan context women's participation in this sphere has been buttressed by the realisation of the two thirds gender principle, the Supreme Court ruling upheld that this principle should be progressively realised by August 2015. The project will seek to ascertain whether this principle has enhanced the notion of positive peace in Kenya.

The research project will seek to evaluate the progress that the country has made with regard to peace building and the promotion of gender equality, the project will also assess the effect of gender equality on peace building initiatives in particular whether advancing the gender agenda will significantly propagate for peace in Kenya.



The project is envisaged to contribute to the understanding of the role of women in peace building as change agents, perpetrators and victims. The research project will inform as to whether women are actively involved in the peace building process.

The research project is envisioned to inform Kenya's legislation and National Action plan to comply with the various regional and international legislation.

The research project examines sexual and gender based violence in Kenya, and seeks to ascertain whether Kenya has indeed made progress in the protection of women and girls in post conflict Kenya. The research project will examine the prosecution of these cases, whether they are handled with the sensitivity that they require and in a timely manner.

Further, this project relates this project to the larger, ongoing analysis in the literature about the role of UN treaties on gender empowerment.

Finally, the results of this project provides useful research information and resource to students, academicians, policy makers and other stakeholders who wish to understand in depth the area of project. Consequently, it offers a basis for further criticisms and development of the knowledge on the need for expetive theory, and practice, in the area of project.

## **1.7 Review of Literature**

### **1.7.1 Role of Government Bureaucracy in Women Empowerment Programs**

The German sociologist Max Weber argued that bureaucracy constitutes the most efficient and rational way in which one can organize human activity, and that systematic processes and organized hierarchies were necessary to maintain order, maximize efficiency and eliminate favoritism.<sup>14</sup>

Oloo, Adams opines that increasing support to women's political participation and participation in peace building at local levels<sup>15</sup> is key to building their political and policy making power to cumulatively cultivate a culture of protection of women and advancement of women's interests.

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<sup>14</sup> Weber, Max. *The Theory of Social and Economic Organization*. Translated by A.M. Henderson and Talcott Parsons. London: Collier Macmillan Publishers, 1947.

<sup>15</sup> Oloo, Adams, 'The Contemporary Opposition in Kenya: Between Internal Traits and State Manipulation' in Murunga Godwin, Nasong'o Wanjala eds., *Kenya: The Struggle for Democracy* (Dakar:CODESRIA,) (2007), pp.90-129.

In the book *Empowerment Takes More Than a Minute*, the authors illustrate three keys that organizations can use to open the knowledge, experience, and motivation power that people already have.<sup>16</sup>

According to Alston, government should focus on gender equality and women's empowerment not only as human rights, but also because they are a pathway to achieving the Millennium Development Goals and sustainable development.<sup>17</sup>

According to author Stewart, in her book *Empowering People* she describes that in order to guarantee a successful work environment, managers need to exercise the "right kind of authority"<sup>18</sup>. To summarize, "empowerment is simply the effective use of a manager's authority", and subsequently, it is a productive way to maximize all-around work efficiency.

Barr argues that over the last few years, a fourth P – prosecution – is increasingly mentioned in the expert discussions related to Resolution 1325. This stems particularly from the heightened attention to sexual and gender-based violence in Resolutions 1820, 1888, and 1889, and to the call to end impunity in this regard<sup>19</sup>.

### **1.7.2 Women in Peace and Security**

Various scholars and researchers including Cockburn<sup>20</sup>, Tryggestad<sup>21</sup> and Dharmapuri<sup>22</sup> have documented the disproportionate and unique impact of armed conflict on women and girls.

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<sup>16</sup> *Empowerment Takes More Than a Minute* by Ken Blanchard, John P. Carlos, and Alan Randolph

<sup>17</sup> Alston, ed. by Philip. *The United Nations and human rights : a critical appraisal* (1. issued as pbk. ed.). Oxford: Clarendon Press. (1992)p. 474. ISBN 0-19-825450-4.

<sup>18</sup> Stewart, Aileen Mitchell. *Empowering People* (Institute of Management). Pitman. London: Financial Times Management, 1994. (p. 6)

<sup>19</sup> Barr, I., 3 Party Mobilization and Membership: Old and New Identities in Kenyan Politics' in Kanyinga Karuti, Okello Duncan, eds., *Tensions and Reversals in Democratic Transitions. The Kenyan 2007 General Election* (Nairobi: Society for International Development) (2009), pp.31-61.

<sup>20</sup> Cockburn, Cynthia. "Snagged On The Contradiction: NATO, UNSC Resolution 1325, and Feminist Responses" (PDF). (2011) Retrieved 17 December 2014.

<sup>21</sup> Tryggestad, Torunn L.. "Trick or treat? The UN and implementation of security Council resolution 1325 on women, peace, and security". *Global Governance* (Lynne Rienner Publishers) (2009) 15 (4): 539–557. Retrieved 23 August 2014.

<sup>22</sup> Dharmapuri, Sahana. "Implementing UN Security Council Resolution 1325: Putting the Responsibility to Protect into Practice" (PDF). *Global Responsibility to Protect*. (2012) doi:10.1163/187598412X639728. Retrieved 17 December 2014.

Chowdhury argues that there is need for adoption of a gender perspective to consider the special needs of women and girls during conflict, repatriation and resettlement, rehabilitation, reintegration and post-conflict reconstruction.<sup>23</sup>

According to the United Nations Population Fund (UNFPA)<sup>24</sup>, more than 50 countries are undertaking programmes related to Resolution 1325 even if all these countries do not have National Action Plans for implementation. Most of the interventions in developing countries are carried out by local NGOs and multilateral or bilateral donor agencies. There is little information on the role of the national, and particularly regional or local governments of developing countries in the implementation of Resolution 1325. This may reflect the fact that very few governmental programmes focus explicitly on Resolution 1325. Yet, activities related to gender and the security sector exist, even if they are not seen or reported as explicitly part of the Resolution 1325 framework. This may also reflect the severe lack of monitoring of activities, or lack of reporting, regarding implementation of other government policies.

The United Nations has special entities, institutions and programs that incorporate gender perspectives into their work programmes, support member states and civil society in the promotion of gender equality and empowerment of women, and facilitate the implementation of international instruments. Indeed, the UN has two specially founded bodies to advance the agenda of women. The UN Women: United Nations Entity for Gender Equality and the Empowerment of Women<sup>25</sup> was created accelerate progress in meeting the needs of women and girls worldwide. The second body, Inter-Agency Network on Women and Gender Equality (IANWGE)<sup>26</sup>, is a network of Gender Focal Points in United Nations offices, specialized agencies, funds and programmes. It meets annually and has a number of inter-sessional task forces on specific gender related topics. Both these are part of the UN reform agenda, bringing together resources and mandates for greater impact.

The attainment of peace needs to be a comprehensive process that promotes gender equality and the involvement of both men and women.

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<sup>23</sup> Chowdhury, Anwarul. "A.K. Chowdhury: Women Are Essential for Sustainable Peace". Universal Peace Federation. (2010) Retrieved 17 December 2014.

<sup>24</sup> UNFPA. Women's Participation in Peace Negotiations: Connections between Presence and Influence (New York: UNIFEM) (2010)

<sup>25</sup> Available at <http://www.unwomen.org/> accessed on September 7, 2015

<sup>26</sup> Available at [www.un.org](http://www.un.org) accessed on September 7, 2015

As a follow up to UNSCR 1325, the United Nations Security Council adopted four other resolutions, namely:

Resolution 1889, which calls for further strengthening of women's participation in peace processes and the development of indicators to measure progress on resolution 1325.

Resolution 1820, which explicitly links sexual violence as a tactic of war with women, peace and security issues and reinforces resolution 1325 and highlights that sexual violence in conflict constitutes a war crime and demands parties to armed conflict to immediately take appropriate measures to protect civilians from sexual violence, including training troops and enforcing disciplinary measures

Resolution 1888 is a follow up to resolution 1820 and mandates that peacekeeping missions to protect women and children from sexual violence during armed conflict and requests the secretary general to appoint a special representative on sexual violence during armed conflict.

Resolution 1960 was adopted to build on and deepen the women, peace and security agenda on sexual violence.

The focus on protection has often been small scale, taking place mainly through civil society actors. The least focus and very little practical work, have been undertaken on the prevention of conflicts, i.e. addressing the core problems and potential causes of conflict (for example, questions of land ownership and the situation of IDPs).

IGAD's early warning system, Conflict Early Warning and Early Response Mechanism (CEWARN), established in 2003, is designed to serve the region as a mechanism that systematically anticipates and responds to violent conflicts in a timely and effective manner. Since its establishment, the CEWARN has used its network of Field Monitors, Country Coordinators, National Research Institutes and Conflict Early Warning and Response Units (CEWERUs) at the national level, to monitor and report on pastoralist conflicts in two pilot areas: the Somali cluster (that incorporates parts of Kenya, Ethiopia and Somalia) and the Kamaroja cluster (that incorporates parts of Ethiopia, Kenya, Sudan and Uganda). IGAD assisted with ensuring that SCR 1325 (2000) was applied to the Somali Peace Process. Although progress was achieved in the peace process, it was not followed through by the Transitional Federal Government.

Oloo, Adams opines that increasing support to women's political participation and participation in peace building at local levels<sup>27</sup> is key to building their political and policy making power to cumulatively cultivate a culture of protection of women and advancement of women's interests.

In the international and national discussions related to Resolution 1325, women are still often perceived and presented as a homogenous group, although researchers have emphasized for decades that any analysis of the position of women or men has to take into account other hierarchical attributes such as class, race, ethnicity, and age. In discussions on how to promote women's political participation, little focus is on the differences among women (based on class, caste, ethnicity, etc.) and different restrictions on participation of women in different groups (or men, for that matter).

As regards protection of women and girls, there is heightened interest in the question of sexual and gender-based violence. This can generally be perceived as a very positive thing, since it is only ten years ago that there was almost total silence on these questions. Now, multiple projects and programmes exist throughout the world, both on developing referral systems for victims of sexual violence to provide diverse support to victims and, increasingly, to prevent sexual violence. Most focus is on sexual violence against women and girls, while the recognition of men and boys as victims of sexual violence has usually not led to concrete activities or project. Despite the increased support on protection of women and girls, projects tend to be scattered, small in budgets, short-term and often carried out by NGOs which mainly rely on donor funding, a factor that might hamper sustainability. In Sierra Leone, however, during and after the conflict violence against women and girls was identified as one of the biggest obstacles to peace by the Truth Justice and Reconciliation Commission. As a result, United Nations Development Program (UNDP) current Access to Justice Programme includes heavy emphasis on access to justice, especially for women in violence against women and girls cases.

The third P – prevention of conflicts – has received the least attention for implementation. Surprisingly little information exists on developing of early-warning mechanisms, or on gendered roles of women and men in the prevention of a potential conflict. Often, when international organizations and CSOs discuss prevention, they refer to prevention

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<sup>27</sup> Oloo, Adams, 'The Contemporary Opposition in Kenya: Between Internal Traits and State Manipulation' in Murunga Godwin, Nasong'o Wanjala eds., Kenya: The Struggle for Democracy (Dakar:CODESRIA) (2007), pp.90-129.

of sexual violence, rather than prevention of conflicts. Within the context of prevention, one of our interests here has been to understand how issues that cause and maintain conflicts (such as disputes over land-use, the existence of IDPs, environmental degradation as a cause of conflict, and so on) are being addressed by different actors. It appears that there is very little contextualized data available on gender in relation to environment and conflicts, natural resources, land-use, and/or IDPs. Yet, there is recognition that these are issues which, when unsolved, have major implications for future peace and security.

Barr argues that over the last few years, a fourth P – prosecution – is increasingly mentioned in the expert discussions related to Resolution 1325. This stems particularly from the heightened attention to sexual and gender-based violence in Resolutions 1820, 1888, and 1889, and to the call to end impunity in this regard<sup>28</sup>.

According to the United Nations Population Fund (UNFPA)<sup>29</sup>, more than 50 countries are undertaking programmes related to Resolution 1325 even if all these countries do not have National Action Plans for implementation. Most of the interventions in developing countries are carried out by local NGOs and multilateral or bilateral donor agencies. There is little information on the role of the national, and particularly regional or local governments of developing countries in the implementation of Resolution 1325. This may reflect the fact that very few governmental programmes focus explicitly on Resolution 1325. Yet, activities related to gender and the security sector exist, even if they are not seen or reported as explicitly part of the Resolution 1325 framework. This may also reflect the severe lack of monitoring of activities, or lack of reporting, regarding implementation of other government policies.

Local governments (national, regional, local) and sectoral ministries are easily bypassed in discussions of international organizations and NGOs on partnerships for the implementation of Resolution 1325. Their unintentional (or intentional) exclusion from the discussions, information sharing, activities, etc. on Resolution 1325 at different levels of governance, may undermine their efforts in health and security. Concentration on NGOs as the main partners by donors does not strengthen the governments' capacities and may weaken the national ownership of projects and programmes thus the potential for wider impact and sustainability of the activities. The UNIFEM project on governance and gender in East Africa,

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<sup>28</sup> Barr, I., '3 Party Mobilization and Membership: Old and New Identities in Kenyan Politics' in Kanyinga Karuti, Okello Duncan, eds., *Tensions and Reversals in Democratic Transitions. The Kenyan 2007 General Election* (Nairobi: Society for International Development) (2009), pp.31-61.

<sup>29</sup> UNFPA. *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UNIFEM) (2010)

whilst it includes many forward-looking and innovative elements, almost totally (and somewhat ironically) bypasses the need to strengthen governmental actors involved in these issues.

CSOs directly involved in the implementation of UNSCR 1325 are mostly women's NGOs. It should also be noted that, even if there is cooperation among women's NGOs, there is often not much cooperation between them and other NGOs such as women's economic cooperatives or labour movements, which would be crucial for long-term impact.

Beetham and Popovic<sup>30</sup> have written that many of these NGOs mainly work in the country capitals, and do not have a large constituency.

The long-term impact of the organizational interventions may be negated because of fragmented interventions and unsecured funding, despite their often significant contributions to direct or indirect implementation of Resolution 1325. In general, the overall stagnant nature of civil society in post-conflict contexts, which can be partly attributed to under-funding, fragmentation, or lack of trust or cooperation, may pose challenges for the work of CSOs, and for working with them. More cooperation is needed between women's NGOs and other civil society organizations, for example, youth and student organizations, labour movements, etc. The support of donors, particularly the UN, to governments is also not necessarily sufficient.

The unanimous adoption of SCR 1325 in October 2000 set the international framework for women's engagement in peace and security. Previously, women's peace and security concerns had not been adequately addressed within the UN bureaucracy and when they did they were ad hoc and without any policy direction. SCR 1325 called for implementation of women's participation in three areas: in leadership positions in peacekeeping and peacemaking; increased resources for women and girls to protect themselves against gender-based violence during and after the conflict and increased efforts to support women's role in conflict prevention, especially through local women's initiatives.

After the adoption of the resolution in 2000, there was a concerted increase in efforts particularly by the United Nations to mainstream the SCR 1325 within its bureaucracy and within the UN. However, as several case studies demonstrate these efforts at the United

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<sup>30</sup> Beetham and Popovic. *Horizontal Inequalities in Kenya in Conflict, Security and Development Journal* (2010) Vol .10 Number I march 2010.

Nations' level rarely translated to actual change in the implementation of women, peace and security concerns at the local level due to a number of challenges in implementation.

One challenge that impeded effective implementation of SCR 1325 was the lack of an effective accountability mechanism at the international and national level. This challenge was overcome at policy level by the adoption of Security Council Resolutions 1820(2008), 1888(2009) and 1889 (2009) which attempted to ensure greater accountability mechanisms for sexual violence related crimes and ensuring increased women's participation.

SCR 1820 specifically focused on increasing accountability for sexual violence related crimes building upon the more general SCR 1325. This resolution calls on governments and the International Criminal Court to prosecute perpetrators of violence who use rape as a weapon of war among other recommendations. SCR 1888 and 1889 expanded SCR 1820 and SCR 1325 respectively. SCR 1888 tasked the UN Secretary General to appoint experts to monitor and advise the Secretary General in situations of conflict related sexual violence.

SCR 1889 reaffirmed SCR 1325 calling on member states and the Secretary General to develop a strategy and concrete indicators to increase participation of women through training and appointment of women to UN offices. This resolution also called for a reporting mechanism in which the Secretary General must submit a report on progress made within 6 months.

Barnes, et al. have reported in their project that assessing SCR 1325 show that UNSCR has most often been lost in translation<sup>31</sup>. Indeed, they argue that despite these tools to increase the momentum for accountability from the United Nations and individual states for the women, peace and security resolutions, and progress has been slow. Consequently, SCR 1325 seems to be lost in translation 10 years later after it was adopted.

Shaw<sup>32</sup> states that although SCR 1325 is a visionary resolution developed through a consultative process with activists, progress on adoption and implementation in individual states remains ad hoc and slow. These commentators have expressed concern over the resolution's victim like soft language which may further lead to systemic discrimination of women. In his criticism, he observed that UNSCR 1325 was feminized by the drafters making

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<sup>31</sup> Barnes, et al. *Multi-Party Politics in Kenya: the Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (Oxford: James Currey,) (2010)p. 584.

<sup>32</sup> Shaw, K.. *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UNIFEM) (2010)



it soft law as opposed to hard law that would need robust implementation from the UN Charter's Chapter 8, hence the current challenges of implementation.

On the other hand, Swaine<sup>33</sup> has argued that minimum efforts have been made in operationalizing SCR 1325 unlike other SCR resolutions such as 1372 on counter –terrorism which has attracted greater resources and political will in implementation.

Susan Willet<sup>34</sup> cautions against the continued essentialist notions of women despite the decade long campaigns for greater appreciation of gender as a political tool. She observes that due to lack of mainstreaming, SCR 1325 has further secluded women because its implementation has mainly been tokenistic within the dominant epistemology of hegemonic masculinities, militarism and war<sup>35</sup>. Hence many peacekeeping operations consider 1325 as important only in protecting victim 'women' as opposed to challenging the power relations further perpetuating the 'protector men and protected women binary'.

This essentialist notion is further perpetuated in peace building programmes which should appreciate the gendered differences between women, men, boys and girls. Unfortunately, peace building has been considered a gender neutral concept and practice which is not the case in reality as observed by Willet<sup>36</sup>.

Willet opines that this notion further maintains gender inequality as activities such as Disarmament, Demobilization and Reintegration (DDR), Security Sector Reform (SSR) and public sector governance reforms mainly benefit men due to the patriarchal and masculinist notions of peace building<sup>37</sup>.

Actions Plans were developed by activists and feminists as a way of gaining traction on SCR 1325 which was and still continues to be under-resourced, slow and ad hoc<sup>38</sup>. They are important in advancing the implementation of women, peace and security concerns because they provide a practical tool through which civil society can hold the state to account on SCR

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<sup>33</sup> Swaine Aisling, , 'Assessing the Potential of National Actions Plans to Advance the Implementation of United Nations Security Council Resolution 1325 in the Yearbook of International Humanitarian Law (2009) Vol. 12, pp.403-433

<sup>34</sup> Susan, W.. UNSCR 1325 in Liberia, Dilemmas and Challenges in Barnes et al. eds. in UNSCR 1325 Translating Policy into Practice (London: Routledge, 2010)

<sup>35</sup> Ibid

<sup>36</sup> Willet, N. Interviews with women survivors of the 2007/2008 post-election violence in Uasin Gichu County held in September 2013. (2010)

<sup>37</sup> Ibid

<sup>38</sup> Swaine Aisling, , 'Assessing the Potential of National Actions Plans to Advance the Implementation of United Nations Security Council Resolution 1325 in the Yearbook of International Humanitarian Law (2009) Vol. 12, pp.403-433

resolutions. They also provide a comprehensive approach to implementation while raising awareness and enhancing ownership among the implementers<sup>39</sup>.

In many countries not experiencing open conflict, SCR 1325 is not widely used. This is true of countries that contribute troops to peacekeeping missions such as Kenya. In Kenya where progressive gender mainstreaming policies and initiatives exist, the focus on women's peace and security is predominantly domestic addressing issues like domestic violence. More attention is given to ensuring the implementation of CEDAW.

Kenya experienced post-election violence in 2008. Kofi Annan was invited to lead the mediation process. His intervention created some recommendations, including what has come to be known as Agenda Four, a set of actions and reforms that the government was required to undertake in a process geared toward creating mechanisms of accountability, democracy and rule of law in Kenya.

Research has shown that peace processes with increased women's involvement are more sustainable. On March 22nd - 23rd 2010, 35 Kenyan civil society and political women met to reflect on lessons learnt on women's participation during the Kofi Annan led mediation process of February 2008. This was a research project investigating women's participation in the Kenyan Mediation Process. The round table and research concluded that there is need for increased training on United Nations Security Council (UNSCR) 1325 for Kenyan women to ensure they understand issues relating to peace, security and conflict as they impact women.

### **1.7.3 Gap in Literature**

From the above literature review, there is a wide gap on the status of Kenya's implementation of resolution 1325. Further, there is a need to analyse the comparative global implementation of Resolution 1325, and other specific treaties that advance the gender agenda. Finally, there is a gap on the study of the implementation of the resolution, and how county governments in Kenya can promote the same.

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<sup>39</sup> Ibid

## **1.8 Theoretical Framework**

The project involves the analysis of the doctrines of equality and equity as espoused by International human rights system and theorists, and their relationship to protection of women and girl child in conflict situations. In so doing the project delves into the theory of justice systems, as propounded by scholars like Hume, which seeks to marry the fairness of actions and institutions, and the relevance of social institutions.

The research project also argues that the security agenda should also include hunger, disease, threats to people's empowerment, and natural disasters, for example, because these may be of more consequence to individuals than armed conflicts. This concept is relevant to Kenya as the conflicts experienced in the country are usually interrelated with the non-conventional effects of conflicts. The research project emphasize on discourses on women's roles in conflict, post-conflict and reconciliation situations.

Further, the project also seeks to expose the practice of basis of UN Resolutions, treaties and other declarations on the rights of women, and postulate as to the reasons for the slow progress in improvement of women's interests.

In essence, the project contrasts and compare the two antagonist theories of equality, as against equity, as well as positive discrimination, in the protection and advancement of the interests of women.

Further, it interrogates the theory of conflicts, existence of conflicts, causes, and cures, both at inter, and intra-state levels.

In addition, the project looks at the post-modern Marxist conflict theories of economic classes, as well as the modern social conflict theories of Mills, on the power elites, and its cogs in the wheels of justice to perpetuate sustainable international peace and conflict resolution.

Finally, the project considers a possible framework for the broader interpretation of the Resolution 1325, to realise not only universal jurisdiction, but also universal acceptance.

## **1.9 The Research Methodology**

### **1.9.1 Data Type, Sources and Analysis**

The research utilizes both secondary and primary data obtained through desktop research. Other than Journals, the analysis also utilized magazines with articles from legal scholars, practicing Advocates and news project articles featuring newsworthy content recorded on the subject as they unfold.

The data was analysed through a comparative study of the research materials so as to seek to answer the research questions and ultimately, the research objective; and thematic analysis based on the research questions.

The research project endeavours to undertake structured interviews with the relevant government officials, donor institutions and civil society organisations.

### **1.9.2 Scope and Limitations of the Project**

This proposed area of study is precise and definite, and the research project hence was limited to the scope of various international and regional instruments dealing with protection and promotion of women and girls in conflict. The project also considered the challenges or limitation faced by the United Nations Security resolution 1325 in order to achieve its objectives.

## **1.10 Chapter Breakdown**

The research project is undertaken in four chapters. Each chapter aimed at answering one or more of the research questions.

Chapter one serves as the introduction, and provides the general background and framework for the research project. Chapter two is an analysis of the content of international and regional frameworks in promoting gender based peace and security. Chapter three is an analysis of the guidelines in international and regional documents protecting and promoting women peace and security in times of conflict, and a study of the various structures, legal, policy, and institutional, put in place by the Kenyan government, to negate the disproportionate effects of conflict on women and the girl child. The chapter particularly focuses on the special role the new constitution can play to ensure deeper protection of women and girls in conflict. Chapter four is the summary of findings, conclusion and recommendations of the research project.

## **CHAPTER TWO: THE CONTENT OF INTERNATIONAL AND REGIONAL FRAMEWORKS IN PROMOTING GENDER BASED PEACE AND SECURITY GLOBALLY**

### **2.1 Chapter Summary**

Chapter two is an analysis of the content of international and regional frameworks in promoting gender based peace and security. The chapter provides an overview of the application of these complementary strands of international law. It also considers procedural innovations that address the particular needs of women and girl victims of international crimes in armed conflict. Avenues for compensation for war-related injuries, which is of particular relevance for women and girls as they seek to reconstruct their lives, are also described.

### **2.2 Introduction**

International law provides a framework of protection for individuals affected by armed conflict. International humanitarian law, the body of law which comes into operation at the outbreak of international or non-international armed conflict, regulates the conduct of hostilities and protects those who are not taking part in hostilities or are no longer doing so. It is the area of law that is of primary relevance to the protection of women and girls during armed conflict. International human rights law is also applicable in times of armed conflict, and is of particular importance in the context of internal armed conflict, where international humanitarian law may not apply. International criminal law has also come to assume increasing significance in relation to crimes against women and girls during armed conflict, in particular crimes of sexual violence. The protections offered by the provisions of international refugee law are also of relevance to women and girls prior to, during and in the aftermath, of armed conflict.

As stated previously on this page, international and national security are inherently linked. U.S. Secretary of State Hillary Rodham Clinton has been prominent in highlighting the importance of women in national and thus international security. In what has been referred to as "the Hillary Doctrine", she highlights the adversarial relationship between extremism and women's liberation in making the point that with women's freedom comes the liberation of whole societies.<sup>40</sup> As states like Egypt and Pakistan grant more rights to women, further liberation and stability within such countries will inevitably ensue, fostering greater security

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<sup>40</sup>Tzemach Lemmon, Gayle. "The Hillary Doctrine: Women's Rights are a National Security Issue". The Atlantic. Retrieved November 17, 2013.

throughout the international realm.<sup>41</sup> Along the same lines, Secretary of State John Kerry stated that "no country can get ahead if it leaves half of its people behind. This is why gender equality is critical to our shared goals of prosperity, stability, and peace, and why investing in women and girls worldwide is critical to advancing international peace and security."<sup>42</sup> Elevating women to equal standing internationally will help achieve greater peace and security. This can be seen in both developmental and economic factors, as just two examples among many. Built into American foreign policy is the idea that empowering women leads to greater international development due to their increased ability to maintain "the well-being of their families and communities, drive social progress, and stabilize societies."<sup>43</sup> Female empowerment through economic investment, such as supporting their participation in the workforce, allows women to sustain their families and contribute to overall economic growth in their communities.<sup>44</sup> Such principles must be propagated nationally and globally in order to increase the agency of women to achieve the necessary gender equality for international security.

There is much consideration within feminist international relations (IR) surrounding the importance of female presence to international security. The inclusion of women in discussions surrounding international cooperation increases the likelihood of new questions being asked that may not be given consideration in an otherwise masculine-dominated environment. As a renowned theorist within Feminist IR, J. Ann Tickner points out questions that women would likely be more inclined to ask in regards to war and peace. For example, why men have been the predominant actors in combat, how gender hierarchies contribute to the legitimization of war, and the consequences of associating women with peace.<sup>45</sup> In general, the main issue of concern to feminists within IR is why in political, social, and economic realms, femininity remains inferior to masculinity, as they see the effects of this transcendental hierarchy both nationally and internationally.<sup>46</sup> Such considerations contribute significant perspective to the role that women play in maintaining peaceful conditions of international security.

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<sup>41</sup>Kolodziej, E. (2005). *Security and International Relations*. Cambridge, Cambridge University Press, p.11.

<sup>42</sup>Elman, C. (2008). *Realism. Security Studies: and Introduction*. P. D. William. New York, Routledge.

<sup>43</sup>Arcudi, G. (2004). "Forces de police et forces armées, sécurité et défense: où sont les frontières?", *Cahier du GIPRI* (2): 17–64.

<sup>44</sup>Tzemach Lemmon, Gayle. "Why Should U.S. Foreign Policy Include a Focus on Women in International Development". Council on Foreign Relations. Retrieved November 15, 2013.

<sup>45</sup>Tickner 2006, pg. 23

<sup>46</sup>Owen, T. (2004), "Challenges and opportunities for defining and measuring human security", *Human Rights, Human Security and Disarmament, Disarmament Forum*. 3, 15–24

Despite acknowledgment of the importance of recognizing women's role in maintaining international security by Clinton, Kerry, and conceivably many others, the fact remains that women are disproportionately present as victims, rather than actors or leaders. This can be derived by looking at information and statistics presented in Joni Seager's book *The Penguin Atlas of Women in the World*. For example, in combat zones, women face heightened risks of sexual assault, and their familial responsibilities are complicated by reduced access to necessary resources.<sup>47</sup> In terms of governmental presence, (to support their role as leaders), women have not yet achieved equal representation in any state, and very few countries have legislative bodies that are more than 25% female.<sup>48</sup> While prominent female politicians are becoming more frequent, "women leaders around the world like those who become presidents or prime ministers or foreign ministers or heads of corporations cannot be seen as tokens that give everyone else in society the change to say we've taken care of our women".<sup>49</sup> This statement by Clinton reiterates the necessity to confront such on-going challenges to female participation, making such issues pertinent to international security.

War crimes disproportionately affect women and girls at an alarming rate. Indeed, women and girls often makeup the majority of victims of such violence and bear the brunt of the economic and social consequences of atrocities. Discrimination against women and girls, as well as the violation of their human rights, signals a gradual break down of good governance and the rule of law, with the United Nations (UN) Secretary General (UNSG) explicitly stating that such discrimination can be a source of risk. Such violations are also indicators for atrocity crimes,<sup>50</sup> and can themselves amount to genocide, war crimes, crimes against humanity or ethnic cleansing. Additionally, women and girls can themselves be the perpetrators of atrocity crimes, either directly or indirectly.

Such action may be voluntary or result from abduction or enforcement. However, women are not just victims or perpetrators of atrocities. They also have a critical role to play in the implementation of all aspects of the responsibility to protect (RtoP) and an inherent right to participate in the norm's advancement. Women activists, rights organizations, and policy makers serve as key stakeholders in building state resilience to atrocities.

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<sup>47</sup>Joni, Seager (2009). *The Penguin Atlas of Women in the World*. New York: Penguin Books.pg. 100

<sup>48</sup>Wolfers, A. (1952). "'National Security' as an Ambiguous Symbol." *Political Science Quarterly* 67(4): 481–502.

<sup>49</sup>Tzemach Lemmon, Gayle. "The Hillary Doctrine: Women's Rights are a National Security Issue". *The Atlantic*. Retrieved November 17, 2013.

<sup>50</sup>UN Framework of Analysis for Atrocity Crimes. <http://www.un.org/en/preventgenocide/adviser/>

United Nations Security Council (UNSC) Resolution 1325 (2000) marked the first time the Council recognized the disproportionate impact of conflict on women and girls as well as the underrepresentation of women within conflict prevention and response, peacekeeping, and peace building. RtoP has developed alongside the efforts undertaken to advance the Women, Peace and Security (WPS) agenda. Despite such parallel developments, the clear manner in which atrocity crimes affect women and girls, and the need to ensure full and equal participation of women in operationalizing RtoP, there has been limited attention and effort dedicated to integrating a gender lens into the norm's advancement, nor for consideration of RtoP within the development of WPS. Such issues need to be addressed as WPS and RtoP are mutually reinforcing; through implementing actions to uphold women's rights and participation in the area of atrocities prevention and response, actors at all levels contribute to the overarching goals of both agendas.

Protecting women's human rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peace building, peace-making, and reconstruction processes are important provisions of various international conventions and human rights law, as discussed below.

### **2.3 International Humanitarian Law and Human Rights Law**

International humanitarian law consists of both conventional and customary rules, the principal conventional instruments of relevance to the protection of victims of armed conflict being the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, which deal with international armed conflicts and non-international armed conflicts respectively.<sup>51</sup> International humanitarian law is binding on both States and organized groups. Many of the rules provided by these treaties form part of customary international law, and are thus binding on all States.

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<sup>51</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (75 UNTS 31) [hereafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (75 UNTS 85) [hereafter Second Geneva Convention]; Geneva Convention relative to the Protection of Prisoners of War of 12 August 1949 (75 UNTS 135) [hereafter Third Geneva Convention]; Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (75 UNTS 287) [hereafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted in 1977 (Protocol I), (1977) (1125 UNTS 3) [hereafter Protocol I] and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted in 1977 (Protocol II), (1977) (1125 UNTS 609) [hereafter Protocol II].



The protections and guarantees laid down by the Geneva Conventions and their Additional Protocols are granted to all without discrimination. Accordingly, women combatants and civilians enjoy the protection of the general rules of international humanitarian law on a basis of equality with men.

Some of the provisions of international humanitarian law are of particular importance to women, including those relating to the maintenance and restoration of family ties (Geneva IV, Article 26; Protocol I, Article 32). The Conventions and their Additional Protocols also include special provisions that offer additional protection to women. These require women to be treated with all consideration due to their sex (Geneva I, Article 12; Geneva II, Article 12; Geneva III, Article 14, Protocol I, Article 76), and seek to reduce their vulnerability to sexual violence, or provide protections for pregnant women and mothers of young children. There are no special provisions in relation to women in the rules determining the legitimate conduct of hostilities.

The conventional rules proscribe any attacks on the “honour” of civilian women, with Article 27 of the Fourth Geneva Convention providing that such women are to be “especially protected ... in particular against rape, enforced prostitution or any form of indecent assault”. Article 27 does not protect women from the activities of the State of which they are a national, but Protocol I extends protection to all who are in the territory of a party to a conflict. Article 75.2 of that Protocol prohibits, in relation to both women and men “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”, whether committed by military or civilian personnel. Article 76 of the Protocol applies specifically to women, and provides that women “shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other forms of indecent assault”. Female prisoners-of-war, internees and detainees are to be treated with all the regard due to their sex, and are to be provided with female supervision and accommodation and sanitary conveniences separate <sup>52</sup>from those provided to men). Punishments in excess of those applicable to male prisoners-of-war may not be imposed on women prisoners (Geneva III, Article 88).

Additional protection is provided to pregnant women and mothers of young children (Geneva IV, Articles 18, 20 and 21). They are accorded special treatment in relation to medical care (Geneva IV, Articles 50 and 91; Protocol I, Article 70); food (Geneva IV, Articles 23, 50

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<sup>52</sup> Geneva III, Articles 13; 25; 29; 85; 97; and 108; see also Protocol I, 75.6; Protocol 5 (2)

and 89; Protocol I, Article 70); physical safety (Geneva IV, Articles 14, 17, 18, 20 and 21); release, repatriation and accommodation in neutral countries ((Geneva IV, Article 132; Protocol I, Article 76) and criminal sanctions (Protocol I, Article 76 (3); Protocol II, Article 6(4)). Further, during times of occupation, any existing preferential rights of pregnant women and mothers of young children are to be respected (Geneva IV, Article 50).

Girls benefit from the protection of the general provision of international humanitarian law applicable to all victims of armed conflict, as well as the special protections available to women, and indirectly from the additional provisions protecting pregnant women and mothers of young children. Girls also fall under the protection of the special provisions of international humanitarian law dealing with the protection of children. For example, Protocol I Additional to the Geneva Conventions provides that all children shall be the object of special respect and are to be protected against sexual assault.

The protection afforded by international humanitarian law is applicable in situations amounting to an “armed conflict”. In general terms, an armed conflict exists when there is a resort to the use of force between two or more States, or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State. The determination of whether a violent confrontation within a State goes beyond the realms of domestic criminal law and can be categorized as armed conflict to which international humanitarian law applies can be difficult, especially when the State concerned indicates that it has the situation under control.

The legal consequences of characterizing a conflict as solely internal are significant, as Protocol II, which applies to internal conflicts provides fewer protections than the Geneva Conventions provide to those affected by interstate armed conflict. Moreover, those protections do not apply in “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (Article 1, paragraph 2).

Basic protections are also provided to civilians affected by non-international armed conflict through Article 3, common to the four Geneva Conventions of 1949. That Article prohibits violence to life and person, in particular murder of all kinds, mutilation, torture, cruel treatment and the taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment and the passing of sentences and the carrying out of executions without previous judgement carried out by a regularly constituted court, affording judicial guarantees. In addition, where war crimes are concerned, although there have been important

recent developments in this area as discussed in part B of this chapter, the Geneva Conventions create criminal liability only for those violations committed in international armed conflict. Women, Peace and Security 36 125. Most conflicts which occur in the world today are non-international in nature. Although some reach the threshold of violence and organization required for the application of Protocol II, common Article 3 is perhaps the area of international humanitarian law most applicable to contemporary conflict.

International humanitarian law generally ceases to apply on the general close of military operations or on the final repatriation of protected persons<sup>53</sup>. In the case of an occupied territory, the Fourth Convention generally ceases to apply one year after the general close of military operations, but an occupying power which exercises effective control over a territory, continues to be bound by a significant part of the Convention for the duration of that occupation. A significant part of the conventional rules of international humanitarian law relating to conflict and occupation apply to “protected persons” only, that is, to persons who find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.<sup>54</sup>

The Fourth Geneva Convention, which deals with the protection of the civilian population, provides protection for the whole of the population of the countries in conflict.<sup>55</sup>

The protection provided by international humanitarian law to women and girls in times of armed conflict are complemented by those provided by international human rights law, with the Preamble to Protocol II to the Geneva Conventions recalling that international instruments relating to human rights offer a basic protection to the person. Human rights norms are particularly significant in the context of non-international armed conflicts where the protection provided by conventional international humanitarian law is more limited. Human rights obligations relating to the rights to life, to freedom from torture and other inhuman or degrading treatment, and to freedom from slavery provide legal protection against the majority of the worst abuses suffered by women and girls during armed conflicts. The International Covenant on Civil and Political Rights defines these rights as non-derogable, including in times of public emergency that threatens the life of a nation. International human rights law is fully applicable

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<sup>53</sup> Art. 5 First and Third Geneva Conventions, Art. 6 Fourth Geneva Convention and Art. 3 Protocol I.

<sup>54</sup> Art. 4 Fourth Geneva Convention.

<sup>55</sup> See Pt. II Fourth Geneva Convention and see Arts. 68-71 Protocol I (dealing with relief in favour of the civilian population as defined in Art. 50).

in the pre-conflict and post-conflict stages, where international humanitarian law does not apply.

The legal protection available under international human rights law, including those provided by the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment and the Convention on the Rights of the Child, apply to women and girls on the basis of non-discrimination.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women is the most comprehensive treaty on women's human rights, imposing legally binding obligations on States parties to end discrimination against women in the enjoyment of the full range of civil, political, economic, social and cultural rights. This Convention also expressly addresses issues, such as traffic in, and the exploitation of prostitution of women, which may occur in times of conflict or its aftermath. An Optional Protocol to the Convention, which entered into force in December 2000, enables individuals and groups of individuals who have fulfilled certain admissibility criteria, including exhausting domestic remedies, to submit petitions on violations of the rights in the Convention to the Committee on the Elimination of Discrimination against Women, the monitoring body established by the Convention. The Protocol also enables the Committee to initiate inquiries into situations of grave or systematic violations of the Convention in those States which have accepted this procedure.

Girls benefit from the specific protections for children set out in the almost universally accepted 1989 Convention on the Rights of the Child which are to be respected and ensured by States parties without discrimination of any kind, including on the basis of sex. By virtue of Article 38 of this Convention, States parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child, and to take all feasible measures to ensure protection and care of children who are affected by armed conflict. Further protections are provided by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which provides detailed requirements for criminalization of these activities, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which seeks to limit the use of children in armed conflict, including

through raising the minimum age of recruitment to 18 years. Both these treaties were adopted in 2000, and entered into force on 18 January and 12 February 2002, respectively.

A number of abuses associated with armed conflict or its aftermath, such as trafficking in women and girls, which have emerged as a particular concern in these contexts, are specifically addressed by international law. The first consolidated instrument on trafficking, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted by the General Assembly in 1950. Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, Peace and Security 38 Women, and Articles 34 and 35 of the Convention on the Rights of the Child are also directed at the elimination of this abuse, while the International Labour Organization's 1999 Convention 182 on the Worst Forms of Child Labour requires each State party to take immediate and effective measures to prohibit and eliminate the worst forms of child labour, which include slavery, or practices similar to slavery, such as the sale and traffic king in children.

In 2000, the General Assembly adopted the United Nations Convention against Transnational Organized Crime, and its supplementary Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air. The Convention provides, among other things, for cooperation in investigation, mutual legal assistance, extradition where trafficking is concerned, while the Trafficking Protocol provides the first international definition of trafficking, and requires States parties to criminalize such activity and makes provision for assistance to and protection of victims of trafficking, and elaborates preventive measures and preserves existing rights, obligations and responsibilities with respect to refugees.

Responses by United Nations system organizations to address trafficking have included principles developed by OHCHR to ensure the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions, 5 which require the human rights of trafficked persons to be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. The principles indicate that States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons. They also make clear that anti-trafficking measures should not adversely affect the human

rights and dignity of persons, in particular the rights of those who have been trafficked, of migrants, internally displaced persons, refugees and asylum-seekers.

#### **2.4 Redress for Women and Girls for Conflict-Related Abuses**

At the international level, the main avenues of redress for women and girls who have experienced conflict-related abuses are through claims of war crimes, crimes against humanity and genocide. In some situations, such women and girls may also be able to claim financial compensation for their war-related injuries. Legal developments during the last decade have focused on individual responsibility for abuses committed during armed conflict, with the Statutes of the two ad hoc Tribunals created by the Security Council to address crimes committed in the former Yugoslavia and Rwanda providing redress for victims through the international criminal law process. The Statute of the Special Court for Sierra Leone provides similar relief. The Rome Statute of the ICC, which recognizes that Court's competence with regard to war crimes committed in both international and non-international armed conflict provides world-wide jurisdiction to try individuals charged with the most serious crimes. Other extra-legal mechanisms have also been introduced to provide alternative, and in some cases, complementary avenues for redress. These include truth and reconciliation processes designed to address the violations of international humanitarian law and human rights law, which are intended to supplement traditional judicial proceedings. It is through these developments that the international community has sought to address the culture of impunity for violations in armed conflict, including gender-based violence, such as rape, enforced prostitution, and trafficking in armed conflict, with such violence being included within definitions of war crimes, crimes against humanity, and forming components of the crime of genocide, as well as torture or other cruel, inhuman and degrading treatment, and enslavement. Their goals are not only to deal with past atrocities, but also to form part of peace and reconciliation which is fundamental to nation-building or rebuilding.

##### **2.4.1 War Crimes**

Those who commit war crimes incur individual criminal responsibility for their actions. The four Geneva Conventions of 1949 codify war crimes in provisions which identify "grave breaches", with each of the Conventions containing its own list of grave breaches, which are expanded by Additional Protocol I. Under the Conventions and the Protocols, States are obliged to look for those who commit grave breaches and prosecute them, or hand them over to a State

willing to do so. States also undertake to enact the necessary legislation to provide effective penal sanctions for those who commit or order grave breaches.

Many of the abuses women and girls experience during armed conflict, such as wilful killing, torture or inhuman treatment, are classified as grave breaches of the Geneva Conventions and Additional Protocol I, but gender specific abuses, such as sexual violence, are not expressly classified as grave breaches. Article 2 of the Statute of the International Criminal Tribunal to Women, Peace and Security 40 address crimes committed in the former Yugoslavia (ICTY) States that Tribunal jurisdiction with respect to grave breaches of the four 1949 Geneva Conventions and Protocol I, including torture and inhuman treatment and wilfully causing great suffering or serious injury to body and health. Article 3 of the Statute also criminalizes violations of the laws and customs of war.

As a result of gender-sensitive prosecutorial policies, sexual violence has been charged under the Statute of the ICTY as a grave breach of the Fourth Geneva Convention relative to the Protection of Persons in Time of War in several cases. For example, in its 1998 Celebici decision, the Trial Chamber of the ICTY<sup>56</sup> considered whether rape constituted torture within the definition of a grave breach for the purposes of Article 2 of the Statute. In concluding that rape at the instigation of a public official or with such an official's acquiescence in situations of armed conflict was torture within the Statute, the Trial Chamber emphasized that gender discrimination was a prohibited purpose for the offence of torture.<sup>57</sup> Other decisions of the ICTY have also determined that rape constitutes torture within Articles 2 and 3 of its Statute.<sup>58</sup>

Similar decisions have been reached by the ICTR,<sup>59</sup> as well as the Inter-American Court on Human Rights and the European Court of Human Rights.<sup>60</sup> In addition, the ICTY has

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<sup>56</sup> Prosecutor v Delalic and Others, Case No. IT-96-21, Judgement (16 November 1998) [hereafter Celebici Judgement].

<sup>57</sup> Ibid. at paras. 941 and 963.

<sup>58</sup> Prosecutor v Furundzija, Case No IT-95-17/1, Judgement (10 December 1998) [hereafter Furundzija Judgement]; Prosecutor v Nikolic, First Amended Indictment, Case No IT-94-2 [hereafter Nikolic Amended indictment]; Prosecutor v Jankovic and Others, Case No IT-96-23, Judgement (22 February 2001) (on appeal) [hereafter Foca Judgement]; Prosecutor v Kvočka and Others, Case No IT-98-30/1, Judgement (2 November 2001) (on appeal) [hereafter Omarska, Keraterm Camps and Trnopolje Judgement].

<sup>59</sup> Prosecutor v Akayesu, Case No. ICTR-96-4, Judgement (2 September 1998) [hereafter Akayesu Judgement] at paras. 598 and 687. See also Prosecutor v Nyiramasuhuko and Another, Indictment, Case No ICTR-97-21 [hereafter Nyiramasuhuko Indictment], (charging sexual violence (rape and forced nudity) as a violation of common Art. 3 by way of torture).

<sup>60</sup> Fernando and Raquel Mejia v Peru, Annual report of the Inter-American Commission on Human Rights, Report No 5/96, Case No. 10.970, 1 March 1996; Case of Aydin v. Turkey (57/1996/676/866), European Court of Human Rights.

determined sexual violence consisting of outrages on personal dignity, including rape, to constitute a violation of the laws and customs of war.<sup>61</sup>

Article 8 of the Rome Statute of the ICC defines war crimes as grave breaches of the 1949 Geneva Conventions. It also defines “[o]ther serious violations of the laws and customs applicable in international armed conflict...” as war crimes. Included within this list of crimes are gender specific offences, namely: “rape, sexual slavery, enforced prostitution, forced pregnancy,<sup>62</sup> ... enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”. The crime of “committing outrages upon personal dignity, in particular humiliating and degrading treatment” is also included as a war crime.

Traditionally, war crimes were considered to arise from breaches of the law committed during international armed conflict only. Article 3 common to the 1949 Geneva Conventions, relating to non-international armed conflicts, is not included in the grave breach provisions of the Conventions, while Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts contains no provisions on grave breaches. However, recent State practice has established that certain breaches of the laws regulating non-international armed conflicts constitute war crimes, and they therefore attract individual criminal responsibility.

Article 4 of the Statute of the ICTR criminalizes “serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”, including “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”. The ICTR has concluded that sexual violence constitutes a violation of the laws and customs of war<sup>63</sup> and has articulated the elements required to establish the crimes of “humiliating and degrading treatment”, “rape”, and “indecent assault”.<sup>64</sup> Notably, in the absence of a commonly accepted definition of rape in international law, in its judgement in *Akayesu* in 1998, the ICTY defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances that are coercive”. It has also described sexual violence, which includes rape, “as any act of a sexual nature that is committed on a person under circumstances that are coercive” and continued that “sexual violence is not limited to physical invasion of a human body and may include acts that do not involve penetration or

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<sup>61</sup> Prosecutor v Furundzija, Case No. IT-95-17/1, Decision of the Trial Chamber on the Preliminary Motion of the Defence, 29 May 1998

<sup>62</sup> Art. 7(f) Statute of ICC.

<sup>63</sup> *Akayesu* Judgement

<sup>64</sup> Prosecutor v Mesuma, Case No. ICTR-96-13-1 Judgement (27 January 2000) [hereafter *Mesuma* Judgement].



physical contact”.<sup>65</sup>In Akayesu itself, where evidence existed that girls were forced to perform gymnastics naked for the entertainment of soldiers, the Trial Chamber cited forced nudity as falling within the definition of sexual violence.

In the case of a non-international armed conflict the Rome Statute defines “war crimes” to include serious violations of Article 3 common to the Geneva Conventions. These include, “committing outrages upon personal dignity, including humiliating and degrading treatment”.<sup>66</sup> In non-intentional armed conflicts “that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”, the following acts are within the jurisdiction of the ICC: “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions”.<sup>67</sup>

Article 3 of the Statute of the Special Court for Sierra Leone establishes jurisdiction over serious violations of Article 3 common to the Geneva Conventions. These are defined to and include “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”. The Statute also empowers the Court to prosecute those who have committed certain crimes under Sierra Leonean law, which include offences relating to the abuse of girls.<sup>68</sup>

#### **2.4.2 Crimes against Humanity**

Like war crimes, crimes against humanity are also subject to universal jurisdiction and may therefore be tried by any State. Although long part of international customary law, Article 6 (c) of the Charter of the International Military Tribunal (Nuremberg Tribunal) provided the first definition of crimes against humanity in positive international law. Several indictments of the International Military Tribunal for the Far East included charges of sexual violence as crimes against humanity, but the Nuremberg Charter did not include gender based crimes. The Statute of the ICTY includes gender-based and sexual violence expressly in its definition of crimes against humanity, with Article 5 of the Statute of the ICTY conferring power on the Prosecutor to prosecute persons responsible for, inter alia, rape “when committed in armed

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<sup>65</sup> Akayesu Judgement, para 688.

<sup>66</sup> Art. 8(2)(c)(ii) Statute of the ICC.

<sup>67</sup> Art. 8(2)(e) and (f) Statute of the ICC.

<sup>68</sup> Art. 5(a)(i)(ii) & (iii) Statute of the Special Court for Sierra Leone.

conflict, whether international or internal in character, and directed against any civilian population”.

Article 3 of the Statute of the ICTR, which deals with crimes against humanity, also expressly includes rape.

The Prosecutor has issued indictments in relation to both conflicts charging rape as a crime against humanity<sup>69</sup> and the Tribunals have found individuals guilty of crimes against humanity for, inter alia, rape.<sup>70</sup> Acts of sexual violence other than rape have also been charged as crimes against humanity, being categorized as inhumane acts, before both the ICTY and the ICTR.<sup>71</sup> The classification of “serious sexual assault” as a crime against humanity via the categorization of inhumane acts has also been confirmed by the ICTY. Similarly “enslavement”, another of the acts defined as a crime against humanity, has also been interpreted to reflect the perspective of women. The Trial Chamber of the ICTY in its Foca decision convicted defendants who had held women captive for sex and domestic service of crimes against humanity by way of sexual enslavement, thereby indicating that existing crimes are, increasingly, being interpreted to reflect the perspective of women.

The Statutes of both Tribunals and the Rome Statute provide that torture may constitute a crime against humanity if it is directed against any civilian population.<sup>72</sup> The Prosecutor has issued indictments against defendants before the ICTY for crimes against humanity on the basis of sexual violence as torture<sup>73</sup> and has successfully prosecuted sexual violence on political, racial and/or religious grounds as persecution constituting a crime against humanity.<sup>74</sup> The Rome Statute extends the range of gender-related crimes within the definition of crimes against humanity to include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”, provided these crimes are “committed as part of a widespread or systematic attack directed against any civilian

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<sup>69</sup> Prosecutor v Meakic and Others, Indictment as Amended 2 June 1998, Case No. IT-95-4, [hereafter Omarska Camp Indictment]; Nikolic Amended indictment. In the context of the ICTR see, for example, Prosecutor v Akayesu, Indictment as amended 17 June 1997, Case No ICTR-96-4-1 [hereafter Akayesu Indictment]; Prosecutor v Nyiramasuhuko and Another, Indictment, Case No. ICTR-97- 21 [hereafter Nyiramasuhuko Indictment]; Prosecutor v Mesuma, Indictment, Case No. ICTR-96-12 [hereafter Mesuma Indictment]

<sup>70</sup> Foca Judgement and Akayesu Judgement. See also Mesuma Judgement

<sup>71</sup> Furundzija Judgement at para. 175.

<sup>72</sup> Art. 5 (f) Statute of ICTY, Art. 3 (f) Statute of ICTR, and Art. 7 (f) of the Statute of ICC.

<sup>73</sup> Nikolic Amended Indictment.

<sup>74</sup> Prosecutor v Karadzic and Another, Indictment, Case No IT-95-5; Foca Judgement; Prosecutor v Talic, Indictment, Case No. IT-99-36; Prosecutor v Brdjanin and Another, Indictment as amended 20 December 1999, Case No. IT-99-36 and Prosecutor v Tadic, Case No. IT-94-1-T Judgement (7 May 1997) (the defendant was found guilty of crimes against humanity by way of persecution, based on, inter alia , rapes and other forms of sexual violence).

population, with knowledge of the attack”.<sup>75</sup> The Rome Statute further provides that the term “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children, thereby taking into account particular experiences of women. Accordingly, trafficking in women and children committed as part of a widespread or systematic attack directed against any civilian population meets the definition of a crime against humanity.<sup>76</sup> The Rome Statute also includes gender as one of the impermissible discriminatory grounds in the definition of the crime of persecution.<sup>77</sup>

The Statute for the Special Court for Sierra Leone is similar to that of the Rome Statute and includes within its definition of crimes against humanity in Article 2 “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence”.

### **2.4.3 Genocide**

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide, a term used in indictments of major war criminals at Nuremberg, as a specific example of the broader category of crimes against humanity. Genocide requires a physical act, such as killing, causing serious bodily or mental harm, deliberately inflicting conditions, calculated to bring about physical destruction, imposing measures intended to prevent births and forcibly transferring children. It is distinguished from other crimes against humanity, however, because a specific mental element is required: a specific intent to destroy a “national, ethnical, racial or religious group” in whole or in part. Although referring to the imposition of measures intended to prevent births within the group in Article II (d), the distinctive ways in which women and girls experience genocide are not expressly reflected in the Genocide Convention.

Both the Statutes of the ICTY and the ICTR include genocide within the jurisdiction of the Tribunals.<sup>78</sup> In its Akayesu decision, the Trial Chamber of the ICTR found the defendant guilty of genocide in that he abetted the infliction of serious bodily and mental harm on members of the Tutsi group, through “acts of sexual violence, mutilations and rape”, with the

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<sup>75</sup> Art. 7(1)(g) Statute of the ICC

<sup>76</sup> Art. 7 para. 2(c) Statute of the ICC for the definition of “[e]nslavement”.

<sup>77</sup> Art. 7 para. (3), for the purposes of the Statute,

<sup>78</sup> Art. 4 Statute of the ICTY and Art. 2 Statute of the ICTR.

necessary intent to destroy the group in whole or in part.<sup>79</sup> The classification of sexual violence as genocide has been subsequently confirmed by the ICTR.

It is to be noted that the definition of genocide in the Genocide Convention requires attacks on a “national, ethnical, racial or religious” group, and does not expressly cover the targeting of women solely on the basis of their sex. When women are specifically targeted, it is usually because they are within one of the specified groups and they are covered as constituting “part” of a group, within the meaning of Article II of the Genocide Convention. However, in cases where women are targeted for destruction solely on the basis of their sex, judgements of the ICTR provide support for the proposition that a flexible interpretation of genocide should be adopted.<sup>80</sup> For example, in the Akayesu decision, the Trial Chamber noted that the drafters of the Genocide Convention intended to include only “‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups”.

In considering whether additional groups meeting this criterion might also be covered, the Chamber stated that “the intention of ... the Genocide Convention, ... was patently to ensure the protection of any stable and permanent group”,<sup>81</sup> thereby providing support for the proposition that targeting women, exclusively on the basis of their sex, may fall within the existing definition of genocide.

Article 6 of the Rome Statute includes the crime of genocide within the jurisdiction of the Court, but does not make any specific reference to rape or sexual violence, adopting verbatim the definition of the crime contained in the Genocide Convention. However, the work of the Preparatory Commission of the ICC specifically acknowledges that, in certain circumstances, sexual violence may fall within the definition of genocide, thereby confirming the approach of the ICTR in such cases as Akayesu.

Rules and procedures for prosecuting international crimes committed during armed conflict 150. In addition to explicitly recognizing gender-based crimes, the constituent documents of the ICTY, the ICTR, the ICC and the Special Court for Sierra Leone include provisions to ensure the delivery of gender-sensitive justice. For example, the Statutes of both

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<sup>79</sup> Akayesu Judgement at paras. 706-707.

<sup>80</sup> Musema Judgement para. 163.

<sup>81</sup> Akayesu Judgement, para. 516

the ICTY and the ICTR provide for measures to protect the victim's identity<sup>39</sup> and the Rules of Procedure and Evidence of both Tribunals contain specific rules relating to evidentiary matters in cases of sexual assault.

A Victims and Witnesses Unit is also a feature of the Registry of both Tribunals. The aim of the Unit is to "recommend protective measures for victims and witnesses", and to "provide counselling and support for them, in particular in cases of rape and sexual assault".

There is no requirement in the Statute of either Tribunal for gender balance in the composition of the Tribunals themselves, in the staff of the Registry or in the Office of the Prosecutor. The only exception is in the context of the Victims and Witnesses Unit of the Registry, where consideration must be given "to the employment of qualified women".

The Rome Statute requires that in its "application and interpretation of law", the International Criminal Court "must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds, such as [inter alia] gender, as defined in Article 7, paragraph 3 [of the Statute] ...".<sup>82</sup> Provisions also seek to ensure that the Court has a balanced sex composition and gender expertise in all three organs of the Court namely, the Office of the Prosecutor, the Registry and the members of the Court.<sup>83</sup> To provide protection for victims and witnesses, the Registrar is required to set up a Victims and Witnesses Unit.<sup>84</sup> Trials before the Court must be conducted with full respect for the rights of the accused, and with "due regard for the protection of victims and witnesses".<sup>85</sup> With that balance in mind, the Court is required to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", and must have regard to, among other things, gender considerations, and "the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children".<sup>86</sup> Victims and witnesses also have the right to participate in the process at the ICC,<sup>87</sup> a development intended to give victims a more empowered role in the process.

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<sup>82</sup> Art. 21(3) Statute of the ICC.

<sup>83</sup> Arts. 36(8)(a)(iii), 36(8)(b), 42(9) & 44(2), Statute of the ICC. Art. 15 of the Statute of the Special Court for Sierra Leone mandates the appointment of persons with gender expertise in the Office of the Prosecutor

<sup>84</sup> Art. 43 Statute of the ICC and see also Art. 16 Statute of the Special Court for Sierra Leone

<sup>85</sup> Art. 64(2) Statute of the ICC.

<sup>86</sup> Art. 68(1) Statute of the ICC.

<sup>87</sup> Art. 68(3) Statute of the ICC.

## **2.5 Reparations for Victims of Conflict**

There are several legal avenues for victims of armed conflict to pursue claims for compensation. First, compensation may be payable by a State that is in breach of its obligations under international law. It is a well-established principle of international law that a State must make reparation (which can include the payment of compensation) for its internationally wrongful acts. The United Nations Compensation Commission, specifically recognized and compensated gender-based harms, such as sexual violence to women and girl children, injury to pregnant women, as well as other harms experienced by women, (albeit not exclusively), such as health effects of conflicts and certain types of economic loss.<sup>88</sup>

Notably, the Commission acknowledged the difficulties associated with reporting sexual violence, particularly during times of armed conflict, and regarded all forms of sexual assault to be compensable, regardless of whether these acts were part of a widespread campaign of sexual violence.

Another possible source of compensation for victims of criminal acts during armed conflict are the perpetrators of the offence themselves. As the international community has assumed greater responsibility for prosecuting international crimes committed during armed conflict, this issue has received some attention. Neither the Statute of the ICTY nor of the ICTR expressly includes the power to order compensation as part of the penalties imposed on convicted persons, although both confer the power on the relevant Tribunal to order the return of property and proceeds acquired by criminal conduct.<sup>89</sup>

The Rome Statute includes a provision on reparation for victims, which can include restitution, compensation and rehabilitation which entitles the Court, either on request or its own motion to determine the scope and extent of any damage, loss and injury to, or in respect of victims. The provision does not explicitly refer to gender issues, although these might be taken into account by the Court when it establishes principles relating to reparations. Reparations can be ordered directly against a person convicted by the Court, and in appropriate circumstances, may be paid through the Trust Fund established for the benefit of victims of crimes within the jurisdiction of the Court, and their families.

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<sup>88</sup> Report and recommendations made by the Panel of Commissioners concerning individual claims for serious personal injury or death (Category "B" claims) (S/AC.26/1994/1)

<sup>89</sup> Art. 24(3) Statute of the ICTY and Art. 23(3) Statute of the ICTR

## **2.6 Protecting Refugee and Internally Displaced Women and Girls**

International legal protection for refugees, IDPs and returnees, is provided by international human rights law, humanitarian law, and, increasingly, criminal law. Provisions within refugee law further strengthen the international legal regime protecting women and girls during times of armed conflict which are of particular significance in the aftermath of conflict. Policy directives and guidelines on the protection of refugee women, children and reproductive health, and against sexual violence, predominantly formulated by UNHCR over the past 15 years have led to the de facto expansion of protection for women and girls in this context.<sup>90</sup>

Under international law, the fundamental rights of refugees, returnees and internally displaced persons are essentially the same. Moreover, everyone within the territory or under the jurisdiction of a State has a right to the protection of, and is subject to, the laws of that country, regardless of migratory status, or sex.<sup>91</sup>

Under the 1951 United Nations Convention relating to the Status of Refugees, those who meet the definition of a refugee in Article 1 (2) of that Convention, have access to a wide array of rights and protections, including legal aid and material protection, as well as the right not to be returned to the place where they face persecution. Successive conclusions of UNHCR's Executive Committee have emphasized the importance of gender-sensitive interpretation of the Convention definition,<sup>92</sup> and women and girls have been classified as refugees on the basis of gender-based persecution, including through sexual violence, and because they are at risk of severe discrimination as a result of transgressing social mores.

Persons who are internally displaced fall outside the framework of the Refugee Convention, but are protected by the international human rights framework, and, in many cases, international humanitarian law. While there is no international organization with the global mandate to protect or assist internally displaced people, a number of steps have been taken to address their needs. ICRC provides protection to civilians, including IDPs, in the context of armed conflict. Although UNHCR's governing Statute makes no reference to internally displaced persons, UNHCR increasingly provides assistance and protection to internally displaced persons on the basis of General Assembly resolutions and Article 9 of its Statute when called upon to do so by the United Nations General Assembly, Security Council or

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<sup>90</sup> UNHCR policy on refugee women" (1990),

<sup>91</sup> (General comment No. 15 (1986),

<sup>92</sup> UNHCR, General conclusion on international protection, No. 79 (XLVII), 1996, para. o; UNHCR, Executive Committee conclusion No 39 (XXXVI) 1985, para. k .

**Secretary-General. Nonetheless, the absence of internally displaced persons from its mandate prevents UNHCR from taking the initiative and planning long-term for the protection that this group of forced migrants requires.**

**The 1998 Guiding Principles on Internal Displacement, which are not legally binding, consist of 30 principles to provide protection and assistance throughout displacement and against arbitrary future displacement, and establish guidelines for safe return, resettlement and reintegration. These principles, which are based on the binding rules for the protection of IDPs found in international humanitarian law and human rights, seek to provide guidance to United Nations and international and national actors in working with internally displaced persons. They pay particular attention to the rights and needs of children, including prohibitions on the sale of children into marriage, sexual exploitation, forced labour and recruitment or use of children during hostilities. The principles also stress equal educational opportunities for girls.**



## **CHAPTER THREE: THE CURRENT STATUS IN IMPLEMENTATION OF INTERNATIONAL AND REGIONAL FRAMEWORKS FOR PROMOTION OF PEACE AND SECURITY OF WOMEN AND GIRLS IN KENYA**

### **3.1 Chapter Summary**

An analysis of the guidelines in international and regional documents protecting and promoting women peace and security in times of conflict, and a study of the various structures, legal, policy, and institutional, put in place by the Kenyan government, to negate the disproportionate effects of conflict on women and the girl child. The research project particularly focuses on the special role the new constitution can play to ensure deeper protection of women and girls in conflict.

### **3.2 Introduction**

#### **3.2.1 Status of Women Peace and Security in Kenya**

Violence against women is perhaps the most widespread and socially tolerated of human rights violations, cutting across borders, race, class, ethnicity and religion. Sexual and gender-based violence (violence against women and girls)<sup>93</sup> is a particularly disturbing phenomenon which exists in all regions of the world. Kenya is not an exception to this form of brutality which negatively affects women and girls in particular. The term refers to any harmful act that is perpetrated against one person's will and that is based on socially ascribed (gender) differences between males and females.<sup>94</sup> It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, whether occurring in public or in private life.<sup>95</sup> In 1993, the UN Declaration on the Elimination of Violence against Women offered the first official definition of gender-based violence:<sup>96</sup>

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<sup>93</sup> Although the terms gender-based violence (GBV) and sexual and gender-based violence (SGBV) are often used interchangeably, UNHCR consciously uses the latter to emphasise the urgency of protection interventions that address the criminal character and disruptive consequences of sexual violence for victims/survivors and their families.

<sup>94</sup> 'Prevention of and Response to Gender Based Violence' available [https://www.nrc.no/arch/\\_img/9293565.pdf](https://www.nrc.no/arch/_img/9293565.pdf) accessed 28 March 2014.

<sup>95</sup> Inter-Agency Standing Committee *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings* (2005) <http://www.unhcr.org/refworld/docid/439474c74.html> accessed 14 February, 2014. This definition is also based on the UN Declaration on the Elimination of Violence against Women (1993).

<sup>96</sup> See Article 1 of DEVAW. Article 2 of the Declaration states that the definition should encompass, but not be limited to, acts of physical, sexual, and psychological violence in the family, community, or perpetrated or condoned by the State, wherever it occurs. These acts include: spousal battery; sexual abuse, including of female children; dowry-related violence; rape, including marital rape; female genital mutilation/cutting and other traditional practices harmful to women; non-spousal violence; sexual violence related to exploitation; sexual harassment and intimidation at work, in school and elsewhere; trafficking in women; and forced prostitution.

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life.

Violence against women and girls entails widespread human rights violations, and is often linked to unequal gender relations within communities and abuses of power.<sup>97</sup> According to Jewkes, violence against women is rooted in gender inequality.<sup>98</sup> He argues that violence against women involves men and women where 'the female is usually the victim and which arises from the unequal power relationships between men and women.'<sup>99</sup> It can take the form of sexual violence or persecution by the authorities, or can be the result of discrimination embedded in legislation or prevailing societal norms and practices. It can be both a cause of forced displacement and an intolerable part of the displacement experience.

Violence against women and girls in Kenya, as elsewhere in the world, is a complex issue that has as its root the structural inequalities between men and women that result in the persistence of power differentials between the sexes. Women's subordinate status to men in many societies, coupled with a general acceptance of interpersonal violence as a means of resolving conflict, renders women disproportionately vulnerable to violence from all levels of society: individual men, within the family and community, and by the state. In blaming men's violence for the impoverishment of the women, Cornwall Andrea states:

Men's violence is a key determinant of the inequities and the inequalities of gender relations that both disempower and impoverish women. Violence is a fundamental dimension of human poverty. Yet, men's natural aggression' is often invoked as a defining characteristic of an essential gender difference and as an explanation for gendered hierarchical arrangements in the political and economic contexts of richer and poorer countries alike.<sup>100</sup>

The impact of violence against women and girls is devastating. The individual women who are victims of such violence often experience life-long emotional distress, mental health

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<sup>97</sup> See *Beijing Declaration and Platform for Action*, 15 September 1995, Paragraphs 113 & 114.

<sup>98</sup> R. Jewkes *Intimate Partner Violence: Causes and Prevention*, (2002) 359, available at <http://www.thelancet.com/journals/lancet/article/PIIS0140673602083575/abstract.htm>, accessed on 19 February 2014.

<sup>99</sup> Jewkes (n 6 above) 361.

<sup>100</sup> A Cornwall, 'Men, Masculinity and Gender in Development' (2001) 5 2 *Gender and Development* 12.

problems and poor reproductive health, as well as being at higher risk of acquiring HIV and intensive long-term users of health services. In addition, the cost to women, their children, families and communities is a significant obstacle to reducing poverty, achieving gender equality and ensuring a peaceful transition for post-conflict societies. This, in conjunction with the mental and physical health implications of gender-based violence, impacts on a state or region's ability to develop and construct a stable, productive society, or reconstruct a country in the wake of conflict.

Effective protection can be established only by preventing violence against women and girls, identifying risks and responding to survivors, using a coordinated, multi-sectoral approach. The present protection environment in Kenya is fraught with challenges and filled with opportunities, which should be carefully considered when devising responses. Whereas the Kenyan legal framework provides a mechanism for addressing violence against women and girls, the levels to which the frameworks respond to the plight of the survivors of violence against women and girls is debatable. The legal and policy framework mostly focuses on bringing of the accused person to 'justice' without a corresponding obligation of alleviating the conditions of the survivor of violence against women and girls. In fact, the survivor of violence against women and girls is more of an alien to the criminal justice system because the offence is perceived by the system to have been committed against the state, not against the survivor of the violence against women and girls as an individual.

The state in most cases perpetrates or tolerates violence against women either through action or non-action by prioritizing custom or tradition over the respect of fundamental freedoms and rights belonging to women. Kenya is especially guilty of having a system that is replete with cases of abuse of women's rights. However, the recent case of *C.K. (A Child) Through Ripples International As Her Guardian And Next Friend & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others*<sup>101</sup> where the High Court made a finding that the police's failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringed upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 was a step forward in the right direction. In addition, the court observed that by failing to enforce existing defilement laws the police contributed to development of a culture of tolerance for pervasive

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<sup>101</sup> [2013] eKLR.

sexual violence against girl children and impunity. This decision informs the crux of this article and is therefore the point of departure.

### **3.2.2 Forms and Prevalence of Gender-Based Violence in Kenya**

Peace and security of women are not subjects only related to wars and armed conflicts. Rather, violence against women and girls it is rampant even where legal systems and institutions are working. Communities uphold, practice and normalize various forms of abuse against women that include violence against women and girls, female genital mutilation, early or forced marriage as well as virginity testing. The value attached to female chastity is so high that even where a woman is a survivor of sexual abuse, the typical community response is to isolate and stigmatize her. The shame and stigma attached to gender-based violence against women, and the lenient penalties meted out on offenders in formal and traditional judicial systems, silence victims.

Many governments have committed themselves to prevent and end gender-based violence by ratifying international conventions and declarations, thus acknowledging the seriousness of the problem. Despite these efforts, violence against women is still rampant, hence the need to continuously conduct research in order to expose the hidden problem and suggest strategies that violence against women and girls against women and children, but also prescribe how the victims can be compensated and supported. States have an obligation to promote and protect all human rights and fundamental freedoms of all citizens, and they must exercise due diligence to prevent, investigate and punish acts of violence against women and children. The state also has a duty to protect victims of any form of violence, a responsibility for which it ought to be held to account.

The nature and extent of specific types of violence against women and girls vary across the different cultures in Kenya. Examples of violence against women and girls as has already been discussed in the introduction to this article include, but are not limited to sexual violence; sexual exploitation and abuse; forced prostitution; domestic violence; human trafficking; forced or early marriage; and harmful traditional practices such as female genital mutilation, honour killings, widow inheritance, among others. In Kenya, as in other places around the

world, violence against women and girls occurs in diverse forms across all socio-economic and cultural backgrounds and women are socialised to accept, tolerate and even rationalise it.<sup>102</sup>

The 2008-09 Kenya Demographic and Health Survey (KDHS) reveals that about 39 per cent of women have experienced some form of violence against women and girls since they were 15 years old.<sup>103</sup> This data further reveals that experience of violence against women and girls in all forms – emotional, physical and sexual – rises with age as well as with the number of living children she has.<sup>104</sup> The survey urges that 39 percent of women have experienced physical violence and 21 percent have experienced sexual violence.<sup>105</sup> Marital violence contributes to the majority of violence against women and girls.<sup>106</sup> Violence that may begin with threats may end in forced ‘suicide’, death from injuries or homicide.<sup>107</sup> Moreover, familial violence is the next biggest contributor to physical violence in Kenya as more than two thirds of women who report abuse, report their abusers to be husbands or other relatives.<sup>108</sup> Women who are employed are more likely to experience violence against women and girls than those who are unemployed.<sup>109</sup>

Rape is an acknowledged widespread problem but statistics are not certain due to societal pressures which impress the importance of chastity and honour.<sup>110</sup> However, the statistics from police headquarters show that 2005 women and children were raped in 2002; these figures rose to 2908 in 2004.<sup>111</sup> The reporting of rape is difficult as many women do not have the education or economic capacity to negotiate the legal system. Raped women are often

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<sup>102</sup> Kenya National Bureau of Statistics ‘The Demographic and Health Survey 2008-2009’ June 2010 Kenya National Bureau of Statistics 240.

<sup>103</sup> (n 10 above) 241.

<sup>104</sup> The survey indicates that the Percentage of women who have ever experienced physical violence since age 15 is as follows: 15-19 (26.9%) 20-24 (37.5%) 25-29 (42.2%) 30-39 (43.7%) 40-49 (43.5%). Analysis by marital status reveals that women who are divorced, separated, or widowed are more likely to be exposed to violence (60%) than their married (42%) and never-married (25%) counterparts.

<sup>105</sup> UNFPA (2006). “Kenya: Creating a Safe Haven, and a Better Future, For Maasai Girls Escaping Violence” Chapter 5. Programming to Address Violence Against Women: 10 Case Studies 50.

<sup>106</sup> (n 10 above) 241.

<sup>107</sup> Advocates for teen mothers (2003). *Breaking the Cycle of Gender Violence*. [www.globalgiving.com/pfil/1644/projdoc.pdf](http://www.globalgiving.com/pfil/1644/projdoc.pdf) accessed 28 February, 2014.

<sup>108</sup> UNAIDS (2006). *Violence Against Women and Children in the Era of HIV and AIDS: A Situation and Response Analysis in Kenya* 13.

<sup>109</sup> (n 10 above) 258-259.

<sup>110</sup> P Kameri-Mbote (2002). *Violence Against Women in Kenya: An Analysis of Law, Policy and Institutions*. <http://www.ielrc.org/content/w001.pdf> accessed 1 March 2014.

<sup>111</sup> L Kangara “Sexual Violence Among Adolescents in Kenya” (MA Development Studies) Egerton University. [www.planetwire.org/get/6283](http://www.planetwire.org/get/6283) accessed 1 March 2014.

traumatised and stigmatised and can be abandoned, divorced and declared unmarriageable. The low status of women contributes to their vulnerability in the wider society and within the home.

Traditional practices, such as widow inheritance, are widespread. A survey completed by UNAIDS found that 16 percent of married women are in polygamous marriages and 10 percent of girls between 15 and 19 are married compared to 1.3 percent of boys.<sup>112</sup> Thus girls are often married to older men leaving them vulnerable to unequal power relations. Female Genital Mutilation (FGM) is widely practiced in many Kenyan communities. It involves either partial or total removal of the external female genitalia or other injury to female organs for cultural reasons.<sup>113</sup> According to the 2008-9 KDHS there was a 7 percent decline recorded from 2003 to 2008, and the proportion of women circumcised increases with age. Therefore there has been a decline in the practice of female circumcision over the past two decades. A higher proportion of rural women (36 percent) than urban women (21 percent) have been circumcised. Moreover there is a strong relationship between education level and circumcision - 58 percent of women with no education are reported to be circumcised and only 21 percent of educated women.<sup>114</sup> Religion also plays a part in the practice of FGM, with one-half of Muslim women circumcised as compared to one-third of non-Muslim women. This links to the practice of female genital cutting across ethnic groups within Kenya which widely varies. It is almost universal among Somali (97 percent), Kisii (96 percent) and Maasai (93 percent) tribes.<sup>115</sup> Levels are lower among Kikuyu (34 percent) and Kamba (27 percent) women.

Violence against women and girls increased during the post-election violence in 2007-08 in Kenya as there was limited protection of women and girls from violence.<sup>116</sup> A collapse in social order exacerbated sexual violence as sexual violence was used as a tool to terrorize individuals. During this period, however, documentation of such reports was not being taken seriously.<sup>117</sup> As a result, this escalated health concerns. The challenges of data collection related to violence against women and girls and pin-pointed shame and fear as the reasons why people did not report<sup>118</sup>. This was because people subjected to violence against women and

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<sup>112</sup> UNAIDS (n 16 above) 12.

<sup>113</sup> (n 16 above) 250.

<sup>114</sup> As above.

<sup>115</sup> (n 16 above) 251.

<sup>116</sup> A Rapid Assessment of Gender-Based violence during post- election violence undertaken by UNFPA in 2008- The report gives details of SGBV experienced during the post-election violence such as sexual violence, sexual exploitation among others.

<sup>117</sup> Kenya Demographic Health Survey (KDHS) - (2008-09) recognizes the fact that SGBV had not been taken seriously in terms of documentation as a health concern.

<sup>118</sup> (n 10 above) 270.

girls hardly reported to the police and therefore there was a problem of under reporting for those that were available. Notable from was the fact that most women who are subjected to violence against women and girls preferred to seek help from the family members.<sup>119</sup>

### **3.2.3 Causes and Impact of violence against women and girls in Kenya**

The causes of gender-based violence are many, complex and varied depending on the types of violence. Traditional attitudes towards women around the world help perpetuate the violence. Stereotypical roles in which women are seen as subordinate to men constrain a woman's ability to exercise choices that would enable her end the abuse. A study undertaken by Odhiambo reveals that the causes of violence against women and girls varied and range from political, economic, legal, social and religious dimensions.<sup>120</sup> Indeed Rhonda Capelon asserts that violence against women and girls against women is systematic and structural, a mechanism of patriarchal control of women that is built on male superiority sex stereotype and expectations, and economic, social and political dominance of men and dependency of women.<sup>121</sup>

Similarly, violence against women and girls is as a result of many socio-economic variables such as the social position, employment, status, financial circumstances and self-concept and personal as well as community values as contributing factors to the violence. From the above statements violence against women and girls is therefore occasioned by and persists due to a number of factors and no single or major cause can be attributed to the prevalence of violence against women and girls against women which transcends class or ethnic or race divisions.<sup>122</sup> According to UNICEF, causes of violence against women and girls can be

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<sup>119</sup> Women who reported the violence to the family accounted for 63% while report to the police was 5%. Report to the medical doctors stood at a paltry 2%.

<sup>120</sup> Odhiambo R.A.A (2000), *Intimate terror: A case study of the law versus lived realities of battered wives among the Luo Community living in Nakuru, Kenya*. PGD Thesis: University of Zimbabwe 16.

<sup>121</sup> R Capelon 'Intimate terror: Understanding Domestic Violence as Torture' in R.J. Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 20.

<sup>122</sup> Female Genital Mutilation for instance has been construed as rite of passage, ensuring marriageability, family honour, controlling sexuality, religious requirement as well as a cultural and ethnic identity. *See* Government of Kenya (2010), *The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, available at <http://www.gender.go.ke/index.php/Download-document/20-CEDAW-7th-Country-Report-Kenya.html>, accessed last on 19 February 2014.

categorised into four broad categories as being: socio-cultural causes; economic causes; legal causes; and political causes.<sup>123</sup>

Socio-cultural causes, include gender-specific socialization; cultural definitions of appropriate sex roles; expectations of roles within relationships; belief in the inherent superiority of males; values that give men proprietary rights over women and girls; notion of the family as the private sphere and under male control; customs of marriage (bride price/dowry); and acceptability of violence as a means to resolve conflict.<sup>124</sup> Economic causes include women's economic dependence on men; limited access to cash and credit; discriminatory laws regarding inheritance, property rights, use of communal lands, and maintenance after divorce or widowhood; limited access to employment in formal and informal sectors; and limited access to education and training for women.<sup>125</sup>

Legal causes include lesser legal status of women either by written law and/or by practice; laws regarding divorce, child custody, maintenance and inheritance; legal definitions of rape and domestic abuse; low levels of legal literacy among women; as well as insensitive treatment of women and girls by police and judiciary.<sup>126</sup> Political causes include underrepresentation of women in power, politics, the media and in the legal and medical professions; violence against women and girls not taken seriously; notions of family being private and beyond control of the state; risk of challenge to status quo/religious laws; limited organization of women as a political force; and limited participation of women in organized political system.<sup>127</sup>

For a long time, men have assumed superiority over women in all aspects of life. This superiority has known no limits and women have been at the behest of all manner of violence executed by men. The question that must therefore be asked is: what makes men believe that they have a right to exercise violence against women? In an attempt to answer this question, Kivutha Kibwana argues that from the cradle to the grave, men are exposed to several myths and excuses which are used to justify and rationalize violence against women.<sup>128</sup> Kibwana further contends that a man who identifies with these myths which constitute the motive force

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<sup>123</sup> United Nations Children's Fund (UNICEF) (2000), *Domestic Violence Against Women and Girls*, Innocenti Research Center: Florence, Italy.

<sup>124</sup> UNICEF (n 31 above).

<sup>125</sup> As above.

<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> K Kibwana *Law and the Status of Women in Kenya* (1996) 160.



of ill-treatment of the opposite sex and embarks on demystifying and negating them, stands a chance of developing a proper attitude and relationship towards women, an attitude and relationship which cannot permit perpetration of violence.<sup>129</sup>

The effects of Gender-based violence can be devastating and long lasting. They pose danger to a woman's reproductive health and can scar a survivor psychologically, cognitively and interpersonally. A woman who experiences domestic violence and lives in an abusive relationship with her partner may be forced to become pregnant or have an abortion against her will, or her partner may knowingly expose her to a sexually transmitted infection such as HIV/AIDS.

### **3.3 Legal & Policy Framework Addressing Women Peace and Security in Kenya**

#### **3.3.1 International Instruments**

In all crisis situations, whether non-international or international armed conflict, public emergencies or foreign occupation or other situations of concern, such as political strife, women's rights are guaranteed by an international law regime that consists of complementary protections under the Convention and international humanitarian, refugee and criminal law

The substance and nature of violence against women and girls can be so severe that it is a clear and unquestionable violation of the basic human rights of the victim.<sup>130</sup> Violence against women and girls in its innumerable forms is a manifestation of discrimination against women and a violation of their substantive rights, including the right to life, the right to liberty and security of the person, the right to be free from torture and the right to health.<sup>131</sup>

Violence against women and girls has been acknowledged as being an express violation of human rights particularly the rights of women.<sup>132</sup>

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<sup>129</sup> Kibwana (n 36 above) 162.

<sup>130</sup> TG Ondicho 'Battered Women: A Socio-Legal Perspective of Their Experiences in Nairobi' (2000) 21 1 *African Study Monographs* 35-44.

<sup>131</sup> BSN Khutsoane 'Gender-based Violence and the Convention on the Elimination of All Forms of Discrimination Against Women' in Center for Human Rights (ed) (Undated) *Gender-based Violence in Africa* Pretoria: Centre for Human Rights' Gender Unit 3.

<sup>132</sup> C Romany 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 85. See also RB Bilder 'Rethinking International Human Rights: Some Basic Question' (1969) 1969 *Wisconsin Law Review* 174.

International law is an instrument employed by states to resolve global issues. These global issues are not only those affecting the state parties in their 'national' capacity, but also individual issues bordering on express or implicit violation of human rights.<sup>133</sup> The surfeit of international legal instruments and statements dealing with violence against women suggest that international bodies and states have identified violence as a global rights concern. Until very recently, violence against women generally was not thought of as a proper subject for international human rights law.<sup>134</sup> The main achievement of the international instruments therefore, is to recognize violence against women and girls as a human rights violation.

Various thematic resolutions of the Security Council, in particular 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960(2010) and 2106 (2013), in addition to resolutions such as 1983 (2011), which provides specific guidance on the impact of HIV and AIDS on women in conflict and post-conflict contexts, are crucial political frameworks for advancing advocacy regarding women, peace and security.

Therefore internationally and regionally there exist a series of instruments meant to protect women and girls against violence against women and girls.<sup>135</sup> This in turn has aptly helped recognize violence against women and girls as a human right violation. Of great importance is the principle of due diligence as enounced under international law principles.

The due diligence principle provides a standard of care used to determine whether a state has complied with its international obligations.<sup>136</sup> In several international conventions and

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<sup>133</sup> B Meyersfeld *Domestic Violence and International Law* (2010) 32.

<sup>134</sup> L Hasselbacher 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8 2 *Northwestern Journal of International Human Rights* 192. See also AK Wing 'A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women' (1997) 60 *Albany Law Review* 944.

<sup>135</sup> See for instance Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR)), Vienna Declaration and Programme of Action: World Conference on Human Rights (adopted 12 July 1993 UN Doc. Conf. 157/23); Declaration on Elimination of Violence Against Women (adopted 20 December 1993 UNGA Res 48 /104) (DEVAW); UN Resolution on Elimination of Domestic Violence Against Women (adopted 19 February 2004 UNGA Res 58/147); Beijing Declaration and Platform for Action (adopted 17 October 1995, UN Doc A/Conf. 177/20) (BPFA); the Convention on Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 UNGA Res 34/180) CEDAW and regionally, African Charter on Human and People's Rights (adopted 27 June 1981 UN Doc CAB/LEG/67/3) (ACHPR) and Protocol to the African Charter on Human and peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003) (Maputo Protocol) among other recognizes that violence against women is an impediment to women's right to peace and development. The instruments roots for elimination of all forms of violence against women and obligates state to take legislative, policy or other appropriate measure to end violence against women in line with their international obligations.

<sup>136</sup> BA Garner *Black's Law Dictionary* (9th ed) (2009) 488.

accords, there has now been explicit acknowledgment of the state's responsibility for human rights violations by private actors in both the public and private spheres. A state has both negative and positive obligations towards her citizens. One of the duties is to refrain from acts of violence against women as well as to prevent and protect women from violence. Similarly, a state has a duty to punish perpetrators and compensate victims of violence. The state may be held responsible under international law for failure to provide reasonable and adequate measures to prevent or address women's rights violations.<sup>137</sup>

CEDAW establishes international standards for guaranteeing equality between women and men within the family as well as between the family and the state.<sup>138</sup> The essence of this convention, as of the UDHR, is respect for human dignity and respect for the human capacity to make responsible choices. The 1993 World Conference on Human Rights in Vienna brought together women's non-governmental activists with UN and human rights leaders.<sup>139</sup> Together they agreed to further insist that state and local biases in the implementation of CEDAW, due to so-called religious and cultural interpretations or reservations, be eliminated.<sup>140</sup>

In particular, these accords reinforce CEDAW principles which establish that states be held responsible for failing to demonstrate 'due diligence' in averting or punishing violence against women that occurs either in the public or the private sphere. As a result, these Conventions and Agreements have created space in which practices that were once considered as private issues like domestic violence, which is a form of violence against women and girls, can now be understood as human rights violations of public concern. The growing use and widespread application of human rights discourse itself has begun to dissolve the public-private divide, and has further provided a moral momentum for direct response by national governments and non-governmental sectors.

The UN Security Resolution 1820 which was adopted in June 2008 by the UN Security Council notes: "Women and girls are particularly targeted by the use of sexual violence, including in some cases as "a tactic of war to humiliate, dominate, instill fear in, and disperse and/or forcibly relocate civilian members of a community or ethnic group."

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<sup>137</sup> Article 4 of DEVAW.

<sup>138</sup> B Meyersfeld *Domestic Violence and International Law* (2010) 32..

<sup>139</sup> B Burton et al Justice, *Change, and Human Rights: International Research and Responses to Domestic Violence* (2002) 22.

<sup>140</sup> Burton (n 48 above) 24.

The UN Security Resolution 1325 reaffirms “the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction. The Resolution stresses the importance of women’s equal participation and full involvement in all efforts for the maintenance and promotion of peace and security”. The UN resolution 1325 urges “all actors to increase the participation of women and incorporate gender perspectives in all United Nations peace and security efforts. It calls on all parties to conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict”.

According to UNESCO, war starts to be constructed in the minds of men and to ensure sustainable peace, then it is in the minds of men that peaceful co-existence must start. This means that both men and women must be involved in conversations around peace building.

The issue of violence against women in conflict situations is being addressed through the adoption of the Kenya National Action Plan for implementation of UN Security Resolution 1325 and 1820.

### **3.3.2 Constitutional Framework on the Promotion Of Women Peace And Security**

On 4th August 2010, Kenyans ratified the proposed Constitution at a national referendum held on that day. This ratification was followed by the promulgation on 27th of the same month. At last, Kenya began its transition to good governance, characterized by democracy, public participation, accountability, equity, equality and adherence to the rule of law. For many decades Kenya had been grappling with a moribund of challenges with regards to issues of democracy, rule law, equity and equality. The constitution review journey, including the setting up of the review bodies such as the Constitution of Kenya Review Commission and the Committee of Experts, entailed a struggle to ensure gender equality and equity.

The review and harmonization processes were crafted to ensure representation of women. Gender activists had for a long time questioned many of the constitutional provisions that did not guarantee women equal rights with men. For example, until 1997, section 82 of the Kenyan constitution dealing with the question of discrimination excluded “sex” as an

objectionable ground for discrimination. However, the revision of the Constitution in 1997 included “sex” as an objectionable ground for discrimination in section 82(3) but did not include it in section 82(4) which made the prohibition of discrimination inoperative in matters of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law and customary law. This left women open to discrimination in the very areas where they were most vulnerable.

The Bill of Rights in the Constitution of Kenya 2010 under Chapter 4 thus gives guarantees for a wide range of rights and fundamental freedoms. The Constitution provides the greatest opportunity to the people of Kenya to advocate for their rights founded on the provisions of the Constitution and also welcome in a new era of institutional overhaul. The Constitution further recognizes a number of important general principles that are of importance to gender equality and that have a general bearing on gender-based violence in the Country. These principles were either not given recognition by the previous Constitution or were given inadequate treatment.

Article 10 (2) (b) sets out the national values and principles of governance to include, among others, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Article 19 (2) states the purpose of recognising and protecting human rights and fundamental freedoms as being to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. This general proposition is important and relevant to women’s struggle for gender equality and gender equity. Further, the Constitution imposes a positive duty on the State and all State organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.<sup>141</sup>

Also significant is Article 2 (5) and (6), which provides that the general rules of international law as well as any, treaty or convention ratified by Kenya form part of the law of Kenya. These two provisions may be interpreted to mean that international law becomes directly applicable by Kenyan courts, regardless of whether parliament has enacted specific implementing legislation to incorporate the international laws in question. Notable is Article

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<sup>141</sup>See Article 21 (1) of Constitution

21 (4) which imposes on the State the obligation to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

Besides the fundamental change that has come about with the demise of Section 82(4), the 2010 Constitution contains a very detailed clause on equality and freedom from discrimination.<sup>142</sup> From a gender equality perspective, this clause is commendable on four limbs. First, it states explicitly that men and women have the right to equal treatment and equal opportunities in the 'political, economic, cultural and social sphere'.<sup>143</sup> Second, the grounds on which the state is not to discriminate are much broader than existed under the old constitution, and they include pregnancy, marital status, health status, disability and dress.<sup>144</sup> Third, it is not only the state that may not discriminate- the prohibition of discrimination applies horizontally among all persons<sup>145</sup> Lastly, for the first time there is constitutional provision for the principle of affirmative action, in order to 'give full effect to the realization of the rights guaranteed under this Article'<sup>146</sup>. The Constitution therefore recognizes that in order to give full effect to the right to full equality before the law, it may be necessary to take measures to redress past patterns of discrimination, such as those that relate to gender relations.

The Constitution further provides for the security of the person and protection against all forms of violence.<sup>147</sup> The relevant Article provides that every person has right to freedom and security of their person which includes the right not to be subject to any form of violence from either public or private sources, any form of torture whether physical or psychological or cruel, inhuman or degrading treatment. The right to security means that the Constitutions safeguards women's right against violence against women and girls and any other related form of gender-based violence. However, violence against women and girls is premised on power imbalance which is supported and sanctioned by culture. The Constitution does not provide for how the embedded culture can be dealt with to free women from violence, neither has it provided for mechanisms for educating people to shun culture that perpetuate violence.

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<sup>142</sup> See Article 27 of the Constitution.

<sup>143</sup> See Article 27(3) of the Constitution

<sup>144</sup> See Article 27(4) of the Constitution.

<sup>145</sup> See Article 27(5) of the Constitution.

<sup>146</sup> See Article 27(6) of Constitution.

<sup>147</sup> See Article 29 of the Constitution.

### **3.3.3 The Legislative Framework**

Kenya, like many African societies is a patriarchal society. Although there are still many gender related challenges facing the country, a few strides in form of policy developments and enactment of key legislation have been undertaken in the recent past geared at gender equality and protection. These include among others, the Sexual Offences Act<sup>148</sup>; the Children's Act;<sup>149</sup> in addition to key gender Bills awaiting enactment by parliament, in particular the Domestic Violence Bill. Other than changes to the Constitution, which is Kenya's supreme law, the government has also undertaken several amendments of laws that relate to women's rights.

Although most issues that affect women and girls are addressed in the legal framework discussed below, only a few legislations have been enacted. This is attributed to delays in debate, long legislation processes and limited commitment to ensure that legislation that give women equal opportunities in society are given parliamentary priority. Although the government has articulated a strong commitment to achieving gender equity, this is yet to be demonstrated through effective enactment and implementation.

#### *3.3.3.1 Sexual Offences Act*

The Sexual Offences Act was enacted in response to curb the escalating sexual violence. Primary purpose was to ensure complainants of sexual offences get justice commensurate to the harm caused to them. It makes provisions for the sexual offences, their definition, prevention and protection of all persons from harm arising from unlawful sexual acts. It provides for minimum sentence as opposed to the Penal Code which gave magistrates too much discretion on sentencing a signal of government's commitment to eradicate sexual violence. It prohibits all manner of sexual offences from defilement to attempted defilement, rape to attempted rape, sexual harassment and sexual exploitation. This is the first legislation in Kenya's legal history, to recognize sexual harassment as a crime. It has also prohibited child trafficking, prostitution and sex tourism. It recognizes also sexual offences of mentally impaired. It has not however criminalized marital rape in Kenya.

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<sup>148</sup> Act 3 of 2006.

<sup>149</sup> Act No. 8 of 2001

The enactment of the Sexual Offences Act has not been matched with adequate training and dissemination of the Act to law-enforcement officers and relevant justice system agents. Most of the awareness created on the Act has been conducted by Civil Society Organizations yet it is the government's role to ensure that its citizens are made aware of any new laws. This means that most people are still not aware of the existence of the Act. Furthermore poor investigation of cases results in the lack of conviction of offenders thus denying justice to survivors of violence. The Act did not criminalize FGM for women above the age of 18 years thus rendering them vulnerable to negative cultural practices but this has been hitherto cured by Anti FGM Act 2011.

### *3.3.3.2 The Penal Code<sup>150</sup>*

The Penal Code prohibits all acts of violence in its provisions. It however does not sufficiently address violence against women and girls which is prevalent within the Kenyan society. Violence against women and girls, for instance, is only inferred by virtue of interpreting the vice as an assault as provided for under section 250<sup>151</sup> and 251<sup>152</sup>. There is no specific offence such as wife battery/ husband battery. The inadequacies for addressing violence against women and girls present challenges to the fight against the vices.

### *3.3.3.3 Children's Act<sup>153</sup>*

The Children's Act makes provisions for the safeguards of the rights and welfare for the children. The Act stipulates that all activities done on behalf of children should be in the best interest of the child. Violence meted against children therefore does not constitute best interest of the child. Section 13 guarantees children (both girls and boys) the right to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction. Under section 14 children are protected from female circumcision, early marriage or other cultural rights, customs, or traditional practices which are harmful to the child's development. The Act also explicitly prohibits sexual exploitation of

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<sup>150</sup> The Penal Code Cap 63 Laws of Kenya

<sup>151</sup> Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided for in this code, is liable for imprisonment for one year.

<sup>152</sup> Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable for imprisonment for five years.

<sup>153</sup> No. 8 of 2001



children as well as actions that expose children to torture or cruel or inhuman treatment such as circumcision or child marriages.

### **3.3.4 Policy Framework**

Kenya has put in place several policies that have contents promoting peace and security of women, as below:

#### ***3.3.4.1 National Guidelines on the Management of Sexual Violence<sup>154</sup>***

This guiding policy framework is critical as it spells out the essential procedures and services for management of survivors of sexual violence and explicitly recognizes sexual violence as a serious human rights and health issue which calls for imperative attention by all concerned. The guideline is a response to the devastating effects of sexual violence to the survivors and hence the need to be treated with dignity and respect to minimise the harm already occasioned.

The guidelines provide elemental information on management of sexual violence in a multi-pronged manner. It gives medical practitioners information on steps to be taken when treating a survivor of sexual violence,<sup>155</sup> preservation of evidence for court use,<sup>156</sup> issues of psycho-social support and other ethical issues related to the management of health-related problems of sexual violence.<sup>157</sup> This is a completely new development. Unlike the previous invasive and unfriendly process in the old P-3 form system the guideline has improved in the documentation of evidence for sexual offences and ensured that it is done in a more friendly and comprehensive manner.<sup>158</sup> In a nutshell, the guideline advocates for a holistic approach to addressing the problem through a comprehensive care provision system that brings all the relevant stakeholders under one roof.

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<sup>154</sup>Ministry of Public Health & Sanitation Ministry of Medical Services 'National Guidelines on the Management of Sexual Violence' (2009) (2<sup>nd</sup> ed).

<sup>155</sup>Ministry of Public Health & Sanitation Ministry of Medical Services (n 65 above) 8.

<sup>156</sup> As above.

<sup>157</sup>Ministry of Public Health & Sanitation Ministry of Medical Services (n 65 above) 18-24.

<sup>158</sup>Ministry of Public Health & Sanitation Ministry of Medical Services (n 65 above) 24.

### ***3.3.4.2 National Framework toward Response and Prevention of Gender Based Violence in Kenya<sup>159</sup>***

The framework is a specific strategy to coordinate the various state and non-state actors' responses to domestic violence in Kenya. It was borne of the realization that there are various actors in the fight violence against women and girls, but their responses are uncoordinated. The framework therefore provides guidance for coordination mechanisms among the various actors, including the government, non-governmental organisations, the police and the civil society among others, aimed at eliminating duplication as well as strengthening and enhancing the effectiveness of intervention in a cohesive and comprehensive manner.

The framework creates an environment for understanding violence by highlighting the various forms of sexual and gender based violence in Kenya in detail. It has analyzed the existing legislative and policy responses, community interventions as well as their efficacy and weakness and given directions for future actions to end domestic violence in Kenya. The framework is emphatic of the need for an aggressive and multi-dimensional approach to addressing domestic violence in Kenya in line with international legal instruments. The framework has been aligned to the international instruments such as CEDAW, BPFPA, and the Nairobi Forward-Looking Strategy. The framework takes cognizance of the feminist argument that violence against women and girls is complex and varied and therefore requires a multi-faceted approach.

The framework also makes provision for the enhancement of capacity of the Kenyan police to respond adequately to cases of sexual and gender-based violence. This is a tacit acknowledgment of the police's failure to provide effective protection to victims of violence against women and girls as is evidence in the 160 girls case already alluded to.

### **3.4 The Extent to Which the Lack of Implementation of the Legal and Policy Framework Has Contributed To Derogation of Peace and Security of Women**

It is indisputable that, while all civilians are adversely affected by armed conflict, women and girls are primarily and increasingly targeted by the use of sexual violence, "including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group" and that this form of sexual

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<sup>159</sup> National Framework toward Response and Prevention of Gender Based Violence in Kenya 2nd Edition 2009.

violence persists even after the cessation of hostilities (Security Council resolution 1820 (2008)).

However, despite the existence of policies, legislative reforms, plans and programmes, gender disparities still exist in legal, social, economic and political levels of participation in decision making, as well as access to and control of resources, opportunities and benefits. Overall, the implementation of policies and laws has been slow; a situation attributed to gaps in the laws, delayed enactment of gender related legislation and lack of comprehensiveness in content of the same laws, for example, the Sexual Offences Act and the Children Act. These gaps have already been referred to in the various laws discussed above. However, there still exist other challenges as below.

#### **3.4.1 Weak Coordination, Harmonization and Networking among Actors At All Levels**

In order to effectively deal with the myriad of issues related to violence against women and girls, it is important that all the relevant players participate fully in the process.<sup>160</sup> This means that both government and private entities consistently engage each other in an attempt at eradicating the vice. This has not been the case, however, as there have been disjointed efforts at dealing with issues relating to violence against women and girls. The government has failed to effectively engage the civil society and other private actors in dealing with violence against women and girls, more so at the grassroots level.

#### **3.4.2 Inadequate Resources**

Lack of and/or inadequate resources, both human and financial have led to watered down efforts in terms of dealing with violence against women and girls. Resources, especially manpower and fiscal, are needed to deal with cases of violence against women and girls are more prevalent. This is because there is need to disseminate information through organisation of workshops, training programmes and sponsoring gender-related courses in schools in order to create awareness on the highlights and consequences of violence against women and girls to

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<sup>160</sup> Importance of strong coordination, harmonization and networking among all actors has been recognized by the Kenya government. It is pivotal in mainstreaming women's rights to protect them from SGBV.

the entire community. This cannot be done where the resources are either limited or are not there completely.

### **3.4.3 Limited technical capacity and capacity consistency due to deployment transfers**

Technical capacity means the ability of the relevant players to adequately meet policy requirements, including technical knowledge and personnel capability. The process of creating awareness about the scourge of violence against women and girls requires highly trained and skilled personnel. Sometimes it is not easy to get persons who can easily be part of policy and programme implementation programmes. The effect of this is to have policies and programmes which are frustrated *ab initio*. Even in situations where the required personnel are obtained, the constant deployment and re-deployment of officers means that the implementation process can be frustrated at times.

### **3.4.4 Lack of Monitoring and Evaluation (M&E) framework**

There lacks a proper mechanism in place to follow up on the implementation processes. The projects and programmes on the ground need to be constantly monitored and evaluated in order to ensure that policy implementation agencies do not veer off the right course. The consequence or absence of or ineffective monitoring and evaluation frameworks is that the projects and/or programmes risk not achieving the intended goal or waning along the way.

### **3.4.5 Access to Justice**

Despite legislation and programmes addressing violence against women and girls, there are still some inconsistencies in terms of judicial actions. Women also are not aware of their rights, and that enforcing such rights is thus a huge challenge.<sup>161</sup> Attempts to come up with gender sensitive legislation have received inadequate support due to traditional cultures and practises as well as a male-dominated parliament which is gender insensitive and un-responsive.<sup>162</sup>

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<sup>161</sup> The 7th CEDAW Periodic Report (n 5 above) Para 78. See also Federation of Women Lawyers (FIDA) Kenya

<sup>162</sup> The current parliament is divided into two houses – the National Assembly and the Senate. The National Assembly has a total of 349 members out of which only 61 are women. The Senate has a total of 68 members out of which 18 are women. This brings the total to only 79 women in parliament as compared to men who make up 338 of the representation. See <http://www.parliament.go.ke/plone/national-assembly/members-of-the-national->

Marital rape remains a source of controversy within sexual violence legislation and court's interpretation of the same. Grounded in traditional notions of women as property, customary laws in many countries have long defined sex within marriage as necessarily consensual,<sup>163</sup> leading to the 'conceptual impossibility' of a man raping his wife. This conception underlies the 'marital rape exception' that still exists in many jurisdictions.<sup>164</sup> Indeed, the 'defense of marriage' remains a legal defense in at least 53 countries, including Kenya.<sup>165</sup> However, many local courts continue to grapple with the task of defining the act of rape, determining whether marital rape can and/or should be criminalized, and clarifying where consent ends and force begins. National sentencing practices violence against women and girls cases vary greatly, and thus have been subject to criticism on several grounds. Despite these challenges, the jurisprudence of sexual violence continues to evolve to better acknowledge and redress the horrific experiences of victims.

In comparison, the South African violence against women and girls jurisprudence, with the help of the courts, has become much more developed than that of Kenya. This became especially more pronounced with the coming into effect of a new constitutional dispensation in South Africa which sought to promote the rights of women in all relational spheres. For instance, South Africa has legislation enacted the Domestic Violence Act<sup>166</sup> to deal with domestic violence. The Court in the case of *Omar v The Government of the Republic of South Africa and Others*<sup>167</sup> noted that the Act serves an important social and legal purpose in addressing the scourge of domestic violence and South Africa's obligations under the Constitution and international law to combat domestic violence. The Bill of Rights under the South African Constitution has been emphasized repeatedly in judgments recently handed down by the Constitutional Court. The recent decision in *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC), is indicative of recognition by the court that the goal

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[assembly/members](#) (accessed 27 February 2014). See also <http://www.parliament.go.ke/plone/senate/senators-of-the-senate/senators> (accessed 27 February 2014). Similarly, Kenya's 10th Parliament had a total of 222 members out of which only 21 are women. See <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament> (accessed 27 February 2014).

<sup>163</sup>Helene Combrink,(2010) "Rape law reform in Africa: More of the same of new opportunities," In *Rethinking Rape Law: International Perspectives*, pp 123.

<sup>164</sup>See Helene Combrink,(2010), Ibid

<sup>165</sup>See Helene Combrink,(2010), Ibid

<sup>166</sup> Act No.116 of 1998, came into force in on 15<sup>th</sup> December 1999 as per Government Gazette 20469 No. R 97 dated 13<sup>th</sup> September 1999.

<sup>167</sup> CCT 47/04

of equality will not necessarily be achieved by the *identical* treatment of different social groups in all circumstances.

The Kenyan courts have recently adopted the approach in protecting the rights of women as was observed in *C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others*<sup>168</sup> where the petitioners had sought the assistance of the court to declare that the effect of the respondents, that is the police, failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement violated the petitioners' fundamental rights and freedoms.

While this case provided a positive starting point in terms of protecting the rights of both women and children against sexual and gender-based violence, a lot still needs to be done to be up to standard as what is happening in South Africa.

### 3.4.6 Legal Illiteracy

In recent years, the focus of literacy has changed from an emphasis on levels of schooling to a focus on functional skills. Most lay people are not alive to the realities of the legal environment. Knowledge of the law is power and helps in self-realization. Laird Hunter suggests that people who use the legal system must be able to guide themselves through a process that they understand and, at appropriate places along the way, they are able to recognize that they have a legal right or responsibility, so as to enable them to exercise or assume it.<sup>169</sup> Legal literacy also involves the ability to recognize when a problem or conflict is a legal one and when a legal solution is available; know how to take the necessary action to avoid problems, and where this is not possible, how to help themselves appropriately; know how and where to find information on the law, and be able to find information that is accessible to them, know when and how to obtain suitable legal assistance; have confidence that the legal system will provide a remedy, and understand the process clearly enough to perceive that justice has been done.<sup>170</sup>

Where people are not alive to their rights, this becomes a good breeding ground for all forms of injustices. Women become the biggest victims as they are more vulnerable to abuse by men. It is through awareness of the laws and the objectives served by them that citizens,

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<sup>168</sup> High Court Petition of 2012.

<sup>169</sup> <http://www.johnhoward.ca/document/litcou/english/page05.htm#Definition> (accessed 13 February 2014).

<sup>170</sup> As above.

particularly marginalized or underprivileged groups, can obtain the benefits that law seeks to offer them. Taking into consideration the present scenario, issues like empowerment of women and making them aware of their rights, which they can use to fight injustices, become a distant dream in the absence of legal literacy.<sup>171</sup> Lack of awareness and education are the main causes for injustices being meted out to the marginalized populations, especially women.<sup>172</sup>

In 1995 the Fourth United Nations World Conference on Women was held in Beijing with the object of achieving equality for women in various walks of life. The conference adopted the BPFA which emphasized the need for access to free or low-cost legal services, including legal literacy, especially focusing on women living in poverty.<sup>173</sup> It also noted that women's poverty was connected to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance, limited access to education and support services and women's minimal participation in the decision-making process.<sup>174</sup>

Part of this illiteracy is the erroneous understanding of most laypersons of the concept of 'gender' is that gender is synonymous with 'women.'<sup>175</sup> This means that most people would easily dismiss gender workshops or training programmes as dealing with women-related issues only as opposed to issues touching on 'men and women' as well as boys and girls. This is highly detrimental to the implementation process. In order to effectively implement gender policies, gender must be understood for what it is, that is, a concept referring to social and cultural constructs which society assigns to behaviours, characteristics and values attributed to men and women, reinforced by symbols, laws and regulations, institutions, and perceptions.<sup>176</sup>

Legal literacy programmes have also been credited with helping women to understand the link between their rights and other aspects of their lives, and in demonstrating that cost-effective initiatives can be undertaken to help women obtain those rights.<sup>177</sup>

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<sup>171</sup> The 7th CEDAW Periodic Report (n 5 above) para 250.

<sup>172</sup> As above.

<sup>173</sup> Paras 58 & 61 of Declaration.

<sup>174</sup> Para 51 of Declaration.

<sup>175</sup> The Bureau for Crisis Prevention and Recovery 'Gender Approaches in Conflict and Post-Conflict Situations' United Nations Development Programme (2002) 9.

<sup>176</sup> 'Gender Analysis' [http://www.aocwomen.org/gemkit/en/understanding\\_gem/genderanalysis.htm](http://www.aocwomen.org/gemkit/en/understanding_gem/genderanalysis.htm) (accessed 25 February 2014).

<sup>177</sup> Para 227 of Declaration.

## **CHAPTER FOUR: CONCLUSIONS & RECOMMENDATIONS**

### **4.1 Introduction**

Chapter four is the summary of findings, conclusion and recommendations of the research study.

### **4.2 Summary of Findings**

#### **4.2.1 International and Regional Frameworks in Promoting Gender Based Peace and Security**

The international community is committed to eliminating violence against women and girls<sup>20</sup> and has recognized – in various global and regional legal and policy instruments – the important role of prevention towards this end. States' obligations are elaborated in international and regional human rights treaties, documents emanating from United Nations conferences and summits, as well as resolutions adopted by United Nations bodies. The research project finds that there are several instruments establishing state responsibilities for national police and armed forces on women's rights and eliminating violence against women.

Above all, State responsibility for prevention of violence against women and girls through social and behavioral change is supported by the foundational treaty on women's human rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which establishes signatories' legal obligation to take 'all appropriate measures [to] modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'<sup>178</sup> General Recommendation 19 of the CEDAW Committee defines violence as a form of discrimination against women, and establishes the obligation of States to act with 'due diligence' to prevent and respond to violence against women and girls.

The Declaration on the Elimination of Violence against Women enhanced the definition of violence against women and also included protection of women from violence committed in the private domain as being an obligation of the state.<sup>179</sup> Responsibilities of the State to prevent violence, abuse and neglect of girls are further supported by the Convention on the Rights of

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<sup>178</sup> United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) GA res. 34/180, art 5(a). Similar requirements exist in the Beijing Declaration and Platform for Action

<sup>179</sup> United Nations Declaration on the Elimination of Violence Against Women, A/RES/48/104.



the Child, requiring States parties to ‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’ including ‘forms of prevention,’<sup>180</sup> along with its two Optional Protocols.<sup>181</sup>

The Beijing Declaration and Platform for Action (BPfA), adopted at the Fourth World Conference on Women in 1995, recognised the complexity of the underlying causes of violence against women and girls, and the need to link prevention and response activities.<sup>182</sup>

The UN Security Council Resolutions on Women Peace and Security (1325, 1820, 1888/9 and 1960) all have articles relevant to prevention. For example, Resolution 1325 – the first to link women to the peace and security agenda – ‘calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.’<sup>183</sup> Resolution 1820 – recognising conflict-related sexual violence as a matter of international peace and security – calls for effective steps to prevent and respond to acts of sexual violence as a way of contributing to the maintenance of international peace and security. Article 3 ‘demands that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety.’ Finally, Resolution 1889 addresses obstacles to women’s participation in peace processes and peace-building, of critical importance for the prevention of violence against women and girls in post-conflict settings.

Other major treaties and conventions similarly uphold the right of women and girls to live free from violence, such as the Convention on the Rights of Persons with a Disability, Article 6 of which notes the multiple forms of discrimination experienced by women and girls

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<sup>180</sup> Article 19.

<sup>181</sup> United Nations Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2002) A/RES/54/263, and Optional Protocol on the Involvement of Children in Armed Conflict (2002) A/RES/54/263.

<sup>182</sup> United Nations Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

<sup>183</sup> Article 10

with a disability and the obligation of States to take appropriate measures addressing this, and Article 16 of which notes the gender-based aspects of violence and abuse experienced by people with a disability and places an obligation on states to ‘prevent the occurrence of all forms of exploitation, violence and abuse.’<sup>184</sup>

The ‘Durban Declaration’ of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, notes ‘that racism, racial discrimination, xenophobia and related intolerance reveal themselves in a differentiated manner for women and girls, and can be among the factors leading to a deterioration in their living conditions, poverty, violence, multiple forms of discrimination, and the limitation or denial of their human rights’<sup>185</sup> It calls for specific reforms to include a gender dimension in all programmes of action against racism, racial discrimination, xenophobia and related intolerance, for instance in immigration policies and legislation to ensure that migrant women and girls in abusive relationships have the programmatic and legislative support to free themselves from these.<sup>186</sup> The Declaration on the Rights of Indigenous Peoples also calls on States to adopt measures, in conjunction with indigenous peoples, to ensure that women and children enjoy the full protection and guarantees against all forms of violence and discrimination.<sup>187</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organised Crime calls on signatories not only to implement security and border control measures to prevent trafficking, but also broader socially-focused prevention strategies, such as research, advertising and social or economic support.<sup>31</sup> The Durban Declaration further affirmed ‘the urgent need to prevent, combat and eliminate all forms of trafficking in persons, in particular women and children,’ and additionally recognised ‘that victims of trafficking are particularly exposed to racism, racial discrimination, xenophobia and related intolerance.’<sup>188</sup>

Other international frameworks relevant to the prevention of violence against women include the 1958 International Labour Organisation’s Discrimination (Employment and Occupation) Convention, which protects workers from violence and harassment (including sexual harassment) and outlaws discrimination on the grounds of sex, race, colour, religion,

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<sup>184</sup> United Nations Convention on the Rights of Persons with a Disability (2008) UNTS 2515/3

<sup>185</sup> United Nations, Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001.

<sup>186</sup> Ibid, para 30(h).

<sup>187</sup> Article 22 (2).

<sup>188</sup> United Nations, Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001, para 30.

political opinion, national or social origin; and the 2011 International Labour Organisation's Domestic Worker's Convention, which binds members to taking 'measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence' and to ensure that minimum age requirements are met.<sup>189</sup> The Geneva Declaration on Armed Violence and Development, outlines guidelines and programming for reducing the armed violence that can exacerbate and intensify some forms of violence against women and girls.<sup>190</sup>

Many regional instruments have also identified the requirement for preventing violence against women and girls, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (The Maputo Protocol);<sup>191</sup> the African Charter on the Rights and Welfare of the Child (1999);<sup>192</sup> the ASEAN Declaration on the Elimination of Violence Against Women;<sup>193</sup> the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belem do Para) (1994);<sup>194</sup> and the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011) ('the COE Convention');<sup>195</sup> and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2010) ('the Lanzarote Convention').<sup>196</sup>

#### **4.2.2 Promotion of Peace and Security of Women and Girls in Kenya**

While Kenya has largely been viewed as an island of peace, when it comes to gender based violence things are not the same. During electioneering periods, women in Kenya have suffered all forms of violence. They have also not been safe during the inter-ethnic conflicts

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<sup>189</sup> Articles 5 and 4 respectively.

<sup>190</sup> See <http://www.genevadeclaration.org/en/measurability/monitoring-armed-violence/indicators-of-violence-against-women.html>. A number of other international conventions and agreements target different aspects of armed violence and make repeated reference to the negative impact of armed violence on sustainable human development. Some focus on controlling the availability of illicit small arms and light weapons while others emphasize the protection of human rights and vulnerable groups. Important instruments include the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects of July 2001; the World Health Assembly resolutions on the prevention of violence; and the Declaration on the Elimination of Violence against Women

<sup>191</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

<sup>192</sup> African Charter on the Welfare and Rights of the Child (1990) OAU Doc. CAB/LEG/24.9/49.

<sup>193</sup> Association of Southeast Asian Nations Declaration on the Elimination of Violence against Women in the ASEAN Region (2004), Articles 4 and 6.

<sup>194</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para) (1994), Articles 7 and 8

<sup>195</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) CETS 210, Chapter 3

<sup>196</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2010) CETS 201.

including those that involve cattle rustling as well as fights over pasture and water. Different forms of gender based violence are perpetuated at different stages of conflict. However, in almost all instances, it's noted today, sexual violence including rape is almost always there. This is what is playing out in communities that are fighting in the Rift Valley Province, specifically Turkana and Pokot, who previously would protect women during ethnic violence.

The issue of violence against women in conflict situations is being addressed through the adoption of the Kenya National Action Plan for implementation of UN Security Resolution 1325 and 1820.

However, Kenya lacks a national action plan on women peace and security. One of the many ways through which national governments are implementing the Women, Peace and Security resolutions is the development of National Action Plans. A National Action Plan is a document that details the actions that a government is currently taking, and those initiatives that it will undertake within a given time frame to meet the obligations contained in resolution 1325. National Action Plans (NAPs) on women, peace and security (WPS) is one among many methods for States to implement the resolutions in their specific national context. Stand-alone NAPs are not the only means of doing this. The key elements of the WPS resolutions can be integrated as relevant to priority plans of national Ministries of Defense, Interior, Justice, Economic and Social Development, Gender, Development and Foreign Affairs. Alternatively the development process of a NAP can be used to trigger budget allocations and actions within each such Ministry and relevant departments so as to promote women, peace and security objectives.

However, and without prejudice to the foregoing, Kenya has passed various laws, led by the new constitution, which has lofty principles and standards for reduction of marginalization and promoting protection of women.

#### **4.2.3 Challenges of Compliance**

A comprehensive legal framework exists at the international level to provide protection to women and girls during armed conflict and its aftermath, and this legal framework has been increasingly responsive to the experiences of women and girls in this context, in particular where sexual violence is concerned. The international criminalization of activities in non-international armed conflicts has been of great significance, as have gender sensitive prosecutorial policies and procedural innovations that address the singular experiences of

women and adolescent girls in the enforcement process. Another major advance has been the determination of command responsibility for many of the offences involving sexual violence against women and girls in armed conflict,<sup>197</sup> which has undermined the culture of impunity that previously pervaded in this context.

It is essential that these positive developments are maintained and further advanced. Although there is now a greater understanding of the use of sexual violence against women and girls in armed conflict, other important aspects of women's experience in this context must also be recognized and acknowledged adequately in the legal regime. Significant attention must also be paid to improving compliance with existing international norms. Steps must be taken to ensure that the requirements of international humanitarian and human rights law are widely known and applied, particularly at the national level. Here measures are required at international, regional and national levels to ensure that perpetrators are punished for violations of international standards in this area. Measures are also required to ensure that violations are prevented. This latter objective is affected significantly by the changed nature of armed conflict, with a large number of actors, including non-State actors, private militias and children taking part as combatants. Many of these actors are unaware of the rules of international human rights, international humanitarian and international refugee law which provide minimum protection for women and girls in conflict, or if they are aware of these rules they disregard or openly flout them. In particular, many of these actors target civilians, including women and girls, often in gender-specific ways.

Further, confronting existing social and gendered realities that continue to use arguments based on culture, customs and 'traditional' values and practices to justify discrimination and violence against women and girls, and treat them as subordinate and second-class citizens, remains a major challenge in addressing the social and cultural environments that permit violence against women and girls to flourish with impunity.

#### **4.3 Recommendation**

The study recommends various strategies to promote gender security and peace in conflict situations:

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<sup>197</sup> Prosecutor v Delalic and Others, Case No IT-96-21, Judgement (16 November 1998).

### **4.3.1 Incorporating Gender Perspectives in Peace and Security**

Gender refers to the socially constructed roles as ascribed to women and men, as opposed to biological and physical characteristics. Gender roles vary according to socio-economic, political and cultural contexts, and are affected by other factors, including age, race, class and ethnicity. Gender roles are learned and are changeable. Gender equality is a goal to ensure equal rights, responsibilities and opportunities of women and men, and girls and boys, which has been accepted by Governments and international organizations and is enshrined in international agreements and commitments.<sup>198</sup>

The post-conflict electoral reform and constitution-building process represents a crucial opportunity to lay the foundations for gender equality in the transition period and beyond. Both the process and substance of these reforms can set a precedent for women's participation in social, economic and political life in the post-conflict period, in addition to providing a legal base from which women's rights advocates can demand other types of gender-responsive reform that unfolds in transitional periods. The importance of a gender perspective in post-conflict electoral and constitutional reform is also emphasized in Security Council resolution 1325 (2000).

Gender mainstreaming is the strategy established by Member States of the United Nations to achieve gender equality. Gender mainstreaming is defined in the Economic and Social Council agreed conclusions 1997/2 as: *"the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes in all areas and at all levels. It is a strategy for making the concerns and experiences of women and men an integral dimension of design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality"*. Gender mainstreaming entails bringing the perceptions, experience, knowledge and interests of women and men to bear on policy-making, planning and decision-making. Mainstreaming does not replace the need for targeted, women-specific policies and programmes, and positive legislation; nor does it do away with the need for gender units or focal points.

This also calls for government to ensure that all tribunals for the purposes of addressing conflict situations include judges and advisers with legal expertise on specific issues, such as

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<sup>198</sup> United Nations Office of the Special Adviser on Gender Issues and Advancement of Women, *Gender mainstreaming: An overview* (New York, United Nations, 2001), p. 1.

violations of the rights of women and girls, including gender-based and sexual violence; ensure that prosecutors of such ad hoc international tribunals respect the interests and personal circumstances of women and girls victims and witnesses and take into account the nature of crimes involving gender-based violence, sexual violence and violence against children.

The Beijing Platform for Action notes, in paragraph 141, that “in addressing armed and other conflicts, an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively”. A focus on gender mainstreaming in conflict and post-conflict situations involves recognizing that women, girls, men and boys participate in and experience conflict, peace processes and post-conflict recovery differently.

These differences and inequalities should be understood and taken into account in all responses to conflict prevention, conflict situations and post-conflict rehabilitation and reconstruction.<sup>199</sup>

The increased participation of women within humanitarian, peace building and peacekeeping operations is crucial if the United Nations goals and mandates regarding gender equality, non-discrimination and human rights are to be realized. Because of under-representation of women, particularly at decision-making levels, efforts are required to promote gender balance in United Nations work on peace and security.

The United Nations is committed to a goal of 50:50 gender-balance in all posts at the professional level and above.<sup>200</sup>

#### **4.3.2 Recognition of Rights Abuses**

There is need to recognize the extent of violations of the human rights of women and girls during armed conflict; take measures to prevent such violations; provide appropriate redress and prosecute perpetrators; provide support to victims; and ensure that awareness of these violations informs planning and implementation in all peace support operations, humanitarian activities and reconstruction efforts. The government, at both national and county levels, must condemn all violations of the human rights of women and girls in situations of armed conflict; take all necessary measures to bring to an end such violations; and call upon

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<sup>199</sup> Women 2000, “Sexual violence and armed conflict: United Nations response”. (United Nations Division for the Advancement of Women, New York, April 1998). 19 Report of the Secretary-General on rape and abuse of women in the territory of the former Yugoslavia (E/CN.4/1994/5).

<sup>200</sup> General Assembly resolution 47/226.

all parties involved in conflict to adhere at all times to their obligations under principles of international humanitarian law, human rights law and refugee law, in particular in regard to women and girls.

But in addition to recognition, there is need to prosecute all perpetrators of crimes of gender-based and sexual violence directed at women and girls in situations of armed conflict, including government personnel.

The Constitution of Kenya has provided expressly for the freedom and security of the person.<sup>201</sup> The same article also protects all persons from any form of violence from either public, or private sources<sup>202</sup>, and any manner of torture whether physical or psychological<sup>203</sup>. The new Constitution places the duty to ensure that the bill of rights is followed on the state and its organs. This duty is also placed on all public officers. The state and the public officers are required to address the need of vulnerable groups within the society including women, older members of the society, persons with disabilities, children, youth, members of minorities or marginalized communities and members of particular ethnic, religious or cultural community.<sup>204</sup>

The Constitution also requires the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.<sup>205</sup> The new Constitution also provides for the right to any person to institute court proceedings claiming that a right or fundamental freedom has been infringed or denied.<sup>206</sup> The high court has been given jurisdiction to hear and determine applications for redress of a denial, violation or infringement, or threat to a right or fundamental freedoms in the Bill of Rights.<sup>207</sup>

The effect of these provisions is that the state is given more responsibility to combat violence against women and girls, to prevent it and to prosecute it. The survivors of the violence not only have the right to have the perpetrators of violence against women and girls taken to court, they also have the right to institute proceedings against the public officers who are supposed to handle the cases if they do not uphold his/her rights. Again, one after showing

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<sup>201</sup> Article 29 of the Constitution.

<sup>202</sup> Article 29 (c) of the Constitution.

<sup>203</sup> Article 29 (d) of the Constitution.

<sup>204</sup> Article 21(3) of the Constitution.

<sup>205</sup> Article 21 (4) of the Constitution.

<sup>206</sup> Article 22 (1) of the Constitution.

<sup>207</sup> Article 23(1) of the Constitution.



cause can institute private proceedings upon leave of court. The promulgation of the Constitution therefore puts emphasis on accountability in the investigation and prosecution of violence against women and girls cases. This will also apply to the provincial administration, court officials, public health centres, etc. This is a great opportunity that may result in many persons being aware of their rights relating to violence against women and girls, and general knowledge of the bill of rights and demands for enforcement in case of violations.

### **4.3.3 Increased Awareness and Participation**

Security Council resolution 1325 (2000) on women, peace and security, guarantee women's meaningful participation in processes relating to the prevention, management and resolution of conflicts. Resolution 1325 uphold women's rights in conflict and their roles in peace and security. Despite signs of progress, the impact on women's lives and roles worldwide has been sporadic. Fifteen years on, the UN and Member States should use a formal review of the Women, Peace and Security agenda as a crucial opportunity to address key gaps. New commitments should focus on women's participation, preventing conflict and gender-based violence, monitoring and implementation, and financing.

Kenya as a community is developing intolerance with torture, forced labour and sexual violence especially of minors due to heightened awareness. As a result, the public is ready to report child molesters and have them prosecuted in court. The youth are actively involved in many NGO funded programs and activities aimed at aggressive public education, the changing of harmful attitudes, the training in positive masculinity and femininity and so on. The increased awareness is a good starting point in the fight against violence against women and girls as one of the most important factors that aid violence against women and girls is ignorance and complacency of the community.

Increase awareness of the risk for domestic violence and other threats to the personal safety of women and girls in post conflict contexts and develop capacity to prevent and address such threats, including by training of all government personnel and local police and military. There is a need to fund education of human rights in schools, with specific reference to promotion of wide knowledge of international humanitarian and human rights law, including at the local level; disseminate information on the procedures for redress at domestic and international levels for violations of the rights of women and girls – such as ad hoc tribunals, human rights treaty bodies and all other relevant mechanisms – to the public in local languages,

including to women's groups and NGOs; and take appropriate steps to ensure that individual women and girls, or others acting on their behalf, are not subjected to ill-treatment or intimidation as a consequence of accessing available domestic or international means of redress.

### **4.3.3 Empirical Based Interventions**

Identify and utilize local sources of information on the impact of armed conflict, and the impact of interventions – peacekeeping, peace-building, humanitarian operations, disarmament, demobilization and reintegration programmes, and reconstruction– on women and girls, and on the roles and contributions of women and girls in conflict situations, including through the establishment of regular contacts with women's groups and networks.

This should also involve the ability to incorporate information on the impact of armed conflict, and the impact of interventions – peacekeeping, peace-building, humanitarian, DDR, and reconstruction – on women and girls, and on the roles and contributions of women and girls in conflict situations, into all training provided to staff.

States parties should report on the legal framework, policies and programmes that they have implemented to ensure the human rights of women in conflict prevention, conflict and post-conflict. States parties should collect, analyse and make available sex-disaggregated statistics, in addition to trends over time, concerning women, peace and security. States parties' reports should address actions inside and outside their territory in areas under their jurisdiction, in addition to their actions taken individually and as members of international organizations as they concern women and conflict prevention, conflict and post-conflict situations. States parties are to provide information on the implementation of the Security Council agenda on women, peace and security, in particular resolutions 1325(2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010) and 2106 (2013), including by specifically reporting on compliance with any agreed United Nations benchmarks or indicators developed as part of that agenda.

Further, the government must take steps to ensure that women and girls, who are victims of gender-based and sexual violence and any other forms of violence during armed conflict, have the right to reparations for damages incurred. The government agencies must further ensure that national legal systems provide accessible and gender-sensitive redress for victims of armed conflict; that the mandates of domestic mechanisms of redress, such as truth

and reconciliation commissions, human rights commissions, clearly reflect gender perspectives, respond to the needs, concerns and experiences of women and girl victims of armed conflict, and include special measures for victim and witness protection, especially of sexual crimes and violence; and ensure during all stages of trials or other redress procedures, measures to protect their safety, physical and psychological well-being, dignity and privacy, and gender-sensitive care and protection during fact-finding, investigations, trials and post-judgement periods.

Such interventions should also include the creation of comprehensive care centres in the hospitals which are intended to offer all services needed by victims of violence at one stop. This move is intended to make the reporting and collection of evidence more effective. It is also meant to make it easier for the survivors to get all the treatment they need in the form of PEP, counselling, and follow ups/referrals in one stop, thereby maintaining the confidential nature of the cases and streamlining the treatment of survivors of sexual violence.

The creation of comprehensive care centres is likely to make it easier for survivors to report and get treatment for sexual violence. Further, the collection and recording of evidence will also be easier and more efficient which will lead to an increase in the number of convictions. With more convictions, may be a deterrent for the would-be offenders and in turn lead to a reduction in violence against women and girls.

#### **4.3.4 Collaboration**

The should be promoted, through existing executive bodies and inter-agency coordination mechanisms, such as the county government coordination agency, the implementation of the constitution commission, the governor's council, and the senate, the strengthening of collaboration and coordination on addressing the impact of armed conflict on women and girls, including through the exchange of information and good practice examples – for example on policies, strategies, guidelines and codes of conduct, and through increased monitoring and reporting on the implementation of gender mainstreaming in all peace support activities.

Women are not a homogenous group and their experiences of conflict and specific needs in post-conflict contexts are diverse. Women are not passive bystanders or only victims or targets. They have historically and continue to have a role as combatants, as part of organized civil society, human rights defenders, members of resistance movements and as active agents

in both formal and informal peace building and recovery processes. States parties must address all aspects of their obligations under the Convention to eliminate discrimination against women.

The UN resolution 1325 urges “all actors to increase the participation of women and incorporate gender perspectives in all United Nations peace and security efforts. It calls on all parties to conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict”. When women are allowed to participate in conflict prevention, conflict resolution, peace keeping and peace building, then this will enhance ways of ensuring peace and security.

Important to note is the greater co-operation between the non-state actors and an increased tendency to form alliances and networks regionally and nationally. This in turn gives the organization more lobbying power. This co-operation also allows for consultation between the bodies in different parts and the sharing of ideas in the fight against violence against women and girls. Co-operation therefore presents a united front and a bigger capacity to deal with violence against women and girls. As a result, the monitoring of the implementation of government policy regarding violence against women and girls is likely to be done in a uniform and coherent manner all over the country if there is effective coordination of activities of these actors. These connections and networks are also going to aid in the data collection in different regions and thus ensure the availability of better and up dated data in the trends in violence against women and girls. This will aid in research and in identifying the benchmarks in the fight against violence against women and girls.

#### **4.3.5 Amendment of the Sexual Offences Act**

Section 38 of the Sexual Offences Act, before amendment, provided that:

Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.

The effect of this section was to make it hard for victims of sexual abuse from coming forward to report cases of violence against women and girls and was therefore criticized for transgressing the United Nations Convention on the Rights of the Child and the African Charter

on the Rights and Welfare of the Child, both of which Kenya has ratified, has since been repealed.<sup>208</sup> The section was seen as going against the common law principles of fairness and equity and was further criticized for being too harsh and risked being viewed as one that imposed fear even to a complainant with a genuine complaint. Taking into account that most Kenyans, including those who have gone to school, do not understand legal issues, one may be persuaded to argue that a false allegation may include where an accused has been acquitted, erroneous as it may be or where a case is dismissed on a technicality. The amendment of this section is therefore a major achievement in advancement of women's rights in the fight against violence against women and girls.

Further, States parties are encouraged to ratify all international instruments relevant to the protection of women's rights in conflict prevention, conflict and post-conflict, including: (a) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999); (b) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000); (c) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (1977); Protocol CEDAW/C/GC/30 24/24 additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (1977); (d) Convention relating to the Status of Refugees (1951) and its Protocol (1967); (e) Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961); (f) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000); (g) Rome Statute of the International Criminal Court (1998); (h) The Arms Trade Treaty (2013).

#### **4.4 Conclusion**

Women and girls experience conflict in a very different way from men and boys, due to often very distinct roles that women and man perform in their communities in times of peace and conflict. Experience has shown that every conflict has a profound impact on gender relations and every effective and sustainable peace building endeavor must take this into account. It is up to each country to find the best way of implementing the women, peace and security agenda within the national context and/or on promoting gender equality and the

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<sup>208</sup> Section 33 of the Sexual Offences Act (Amendment) Act, 2012. The actual repeal was done vide The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012 Special Issue Kenya Gazette Supplement No. 72 (Acts No. 12) Date of Assent: 6th July, 2012; Date of Commencement: 12th July, 2012.

empowerment of women. Some countries have attempted to integrate WPS issues into their existing initiatives, laws, policies and plans on peace and security. Integrating the implementation of these resolutions with overarching national development plans (like Poverty Reduction Strategy Projects (PRSPs), national development plans (NDPs), and national security/defense strategies) can ensure comprehensive and sustainable implementation over the long term.

Resolution 1325, unanimously adopted by the Security Council in October 2000 under the Presidency of Namibia, represents a significant change in the way the international community approaches the prevention and resolution of conflict. This was the first time that the Security Council acknowledged that armed conflict affects women and girls differently from men and boys, requiring changes in the way the international community approaches conflict prevention, conflict resolution, peacekeeping, and peace building.

Whether women and girls are instigators, perpetrators, victims of conflict, or builders of peace, their different experiences of conflict require tailored responses in order to enable women to contribute to conflict resolution, to ensure that targeted violence against women is prevented and prosecuted, and to ensure women help to shape and benefit from recovery and peace building initiatives. The fact that Kenya has adopted the same indicates willingness to promote status of women peace and security.

It is important to ensure that all initial appraisals, assessments and fact-finding missions give attention to the situation of women and girls in conflict and post-conflict contexts so that analyses, data collection, planning processes which form the basis for the establishment of missions and programmes give adequate attention to their needs and priorities.

Sexual and gender-based violence does not only occur during times of national strife; it is rampant even where legal systems and institutions are working. Many different societies and their legal systems have grappled with the problem of violence against women and girls for eons. However, most societies have learnt and accepted to uphold and normalise practises and various forms of abuse against women. A feminist critical lens creates an encompassing form of analysis when considering the phenomenon of violence against women and girls. In regard to the controversy of sexual violence, the most glaring factor is gender.

The prevalence of violence against women and girls against women is alarming, especially in a continent that grapples with major issues of poverty and socio-political downfall. Although the trend recently has slightly shifted towards battering of men, statistics

still show that women are at the worst receiving end of this faux pas. This has been caused primarily due to biased cultural norms and gender insensitive legislations which have been enacted. Although international law standards require that states enact legislations that protect the interests of both men and women equally, little progress has been realized on this front. Even where such legislation is in place, it is marred with implementation challenges as discussed earlier. It would be sad to note that Kenya still does not have a particular legislation dealing with the societal menace of spousal abuse.

Kenya has since moved at a sluggish pace in its attempts at realizing equal opportunities for both men and women. This was more because of the constitutional position which allowed for discrimination against women. That position has since been changed with the advent of a new constitutional order after a successful referendum in 2010 which saw the realization of a new Constitution. The Constitution of Kenya 2010 has since sought to level the playing field for both men and women with propositions for legislations which are gender sensitive. A good example would be the Domestic Violence Bill 2012 which if enacted would see that women and children are protected from violence against women and girls, particularly domestic violence.

Finally, responsibility for implementing the women, peace and security resolutions lies primarily with United Nations (UN) Member States, but also with a range of stakeholders including civil society and international and regional security organizations.

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