



KENYA STUDY ON OPPORTUNITIES FOR REPARATIONS FOR SURVIVORS OF CONFLICT- RELATED SEXUAL VIOLENCE



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ACRONYMS

ARV	Antiretrovirals	KEPHRA	Kenya Parliamentary Human Rights Association
AU	African Union	KES	Kenyan Shillings
AUTJP	The African Union Transitional Justice Policy	KHRC	Kenyan Human Rights Commission
ACHPR	African Commission on Human and Peoples' Rights	KNCHR	Kenyan National Commission on Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	KNDR	Kenya National Dialogue and Reconciliation
CEDAW	Convention on the Elimination of Discrimination Against Women	NHIF	National Hospital Insurance Fund
CIPEV	2008 Commission of Inquiry into the Post-Election Violence, also known as the Waki Commission	NPS	National Police Service
CSO	Civil Society Organisation	NVSN	National Victims and Survivors Network
CRSV	Conflict-Related Sexual Violence	ODM	Orange Democratic Movement
DPP	Director of Public Prosecutions	OHCHR	Office of the High Commissioner for Human Rights
ERSV	Electoral-Related Sexual Violence	OMCT	Organisation Mondiale Contre la Torture
FIDA	Federation of Women Lawyers	PEV	Post-Election Violence
FGM	Female Genital Mutilation	PTSD	Post-traumatic stress disorder
GBV	Gender-Based Violence	RJF	Restorative Justice Fund
HIV/AIDS	Human immunodeficiency virus infection and acquired immunodeficiency syndrome	SGBV	Sexual and Gender-Based Violence
HRW	Human Rights Watch	SLDF	Sabaot Land Defence Force
ICC	International Criminal Court	SONA	State of the Nation Address
ICCPR	International Covenant on Civil and Political Rights	STI	Sexually Transmitted Infections
ICESCR	International Covenant on Economic, Social and Cultural Rights	TFV	Trust Fund for Victims
ICJ	International Commission of Jurists	TJRC	2009-13 Truth, Justice and Reconciliation Commission
IDP	Internally Displaced Person	UN-CHRSS	United Nations Commission on Human Rights in South Sudan
IMLU	Independent Medico-Legal Unit	UNICEF	United Nations International Children's Emergency Fund
ITCJ	International Center for Transitional Justice	UNMISS	United Nations Mission in South Sudan
		UPR	Universal Periodic Review



View of Nairobi, Kenya.
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EXECUTIVE SUMMARY

Between December 2007 and February 2008, Post-Electoral Violence (PEV) in Kenya resulted in the deaths of at least 1,200 people. Thousands of people were sexually assaulted, mutilated and an estimated 660,000 were displaced from their homes.¹ This Study found that conflict-related sexual violence (CRSV) has punctuated Kenyan history at key intervals, more recently connected to multi-party elections. Although there has been a considerable focus on the 2007-8 PEV, there is a history of politically motivated CRSV, dating back to the independence struggles, the Mau Mau war, and other political events including the massacres during the Shifita War. The Kenyan National Commission on Human Rights (KNCHR) has also documented *“premeditated acts of sexual violence meted out on residents by both the security agents and the civilians”* during and after the 2017 general election.²

Notably, and for cultural reasons, CRSV has targeted both women and men. Survivors interviewed in relation to this Study were acutely aware of their rights, particularly those who reside in urban areas. A number of survivors were already involved in survivor networks and advocacy efforts. An analysis of the demographics of the participating survivors indicated that while their knowledge and agency varied depending on education levels, long-term impacts, including social stigma and trauma, transcended all social and demographic distinctions.

Despite the time which has elapsed since the 2007-8 violence, survivors emphasized their acute reparative needs, including urgent medical assistance, psychological support, legal services, and economic support due to the losses directly resulting from the sexual violence they experienced. They demanded social reintegration through community awareness programs to address stigma and blame, as well as protection and security against reprisals.

Fifteen years since the 2007-8 PEV, the conversations about reparation remain a disenfranchising process for the survivors whose rights were violated. To survivors,

reparation is synonymous with freedom – something that they need to become whole again. A vague apology for ‘past wrongs’ was delivered in the president’s national address in 2015, but survivors did not feel that this was adequate or included them. They continue to feel neglected, as they have never been recognised as victims of PEV. Additionally, survivors have no guarantees that the violence will not be repeated, to the effect of heightening anxieties among them with each new election.

Children born of CRSV have particularly acute needs. They suffer from devastating stigma, rejection, discrimination and neglect, as well as both physical and verbal abuse from their peers, family, and community. The treatment of children born of rape feeds into the anxiety of many mothers, as they feel unable to fulfil their children’s needs.

The 2009-13 Truth, Justice and Reconciliation Commission (TJRC) presented its final report to President Kenyatta in 2013, but it was never formally debated in the National Assembly. The report recommended a reparations framework, which informed the drafting of a Policy and Regulations to manage and implement a Historical Injustices Fund in 2017, which were never implemented (see Section 7.1 below). International efforts at justice through the International Criminal Court were also thwarted, with cases targeting those at the highest political levels. The cases were withdrawn in 2014 due to witness intimidation and tampering with evidence.

Following the 2007-8 violence, some government initiatives sought to address the plight of Internally Displaced Persons (IDPs), though these have been criticised for failing to meet their expectations due to ineffective implementation. The government’s narrative during the August 2022 elections emphasised a need to ‘move on’. There are minimal expectations that the new government, elected in August 2022, will address the rights of survivors of CRSV or other categories of victims unless there are concerted efforts by local and international actors to continue to push for accountability and government action.

1 CIPEV, ‘The Commission of Inquiry into Post Election Violence Report’ (2008) <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

2 KNCHR, ‘Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Election’ (2018) p 42 https://www.genderinkenya.org/wp-content/uploads/2018/12/KNCHR_Silhouettes_of_Brutality.pdf accessed 31 January 2021.

Stigmatisation, gender discrimination, and the fear of reprisals from those in power including the police, create a highly challenging environment for survivors' advocacy. However, in December 2020, the High Court of Kenya at Nairobi favourably ruled upon the strategic constitutional petition, granting rights to half of the petitioners, renewing hope for accountability and the will to overcome 'survivor fatigue'. There have also been positive commitments from a few allies in the Government after the June 2021 'Survivors Speak' advocacy event. An active civil society with well-established survivors' organisations, focused on CRSV, may create momentum towards reparation for survivors that the government can act on and implement.

This Study offers key recommendations regarding reparation. For full reparation, the Office of the Attorney General and Department of Justice should investigate and prosecute CRSV committed in

2007-8 and 2017, while the President should publicly recognise the status of survivors, acknowledge the harm that they have suffered through an apology, and publish the full TJRC report. The report also recommends the establishment of a survivor-led task force for provision of holistic reparations, prioritising survivors with disabilities. To ensure satisfaction and non-repetition, the report recommends the Government operationalises the 2014 National Policy on Prevention and Response to GBV and the Victim Protection Act, provide security, psychosocial support, socio-economic assistance, legal aid and referral services for victims and survivors of sexual violence. In relation to survivors' right to access reparation, the report recommends sustained and urgent action by state authorities in supporting survivor-led initiatives such as trauma healing, and amplifying the advocacy campaigns that target duty bearers at county and national levels (for the detailed list of recommendations, see section IX).



I. BACKGROUND AND METHODOLOGY

| 1.1. About the project

The Global Survivors Fund (GSF), Grace Agenda, and The Civil Society Organisation Network (CSO Network) conducted the Kenya Reparations Study to identify the reparative needs of survivors of CRSV in Kenya in relation to the 2007-8 PEV and other conflict contexts. The Study presents and analyses survivors' perceptions and expectations for reparations. It explores the opportunities to seek and deliver reparation to survivors through judicial and administrative processes, offering practical, concrete, and context-specific recommendations to policymakers and other actors at national and global levels to inform the design and delivery of survivor-centred reparation in Kenya. The Kenya Study further aims to increase the understanding and awareness of survivors' rights to reparation and to create increased momentum for the delivery of meaningful survivor-centred reparation to CRSV survivors in Kenya.

The Kenya Reparations Study is part of a Global Reparations Study launched by GSF in 2020, which focuses on the status of and opportunities for reparation for survivors of CRSV in over 20 countries. The Global Reparations Study is a multi-actor effort led by GSF in collaboration with over 40 local and international partners, including survivors' networks and groups. It makes recommendations for further action based on survivors' needs and aspirations and identifies potential support available, as well as concrete action to enhance access to reparation for CRSV survivors around the world.

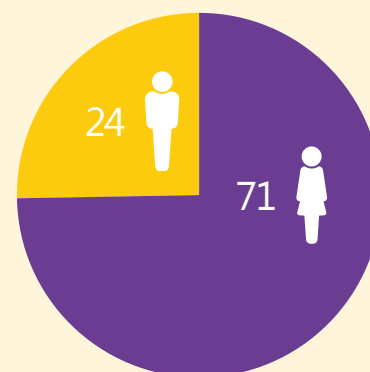
| 1.2. Research methodology

This Study was informed by a series of focus group discussions and semi-structured interviews involving 95 survivors from various locations across Kenya, including Kisumu, Busia, Siaya, Kibera (Nairobi),

Naivasha, Homabay, Nyamira, Kisii, Migori, Vihiga, Nakuru and Mombasa.³ A pre-defined questionnaire developed by GSF was used, focusing on survivors' personal experiences, views, and expectations. Analysis of the data involved a mixed-methods approach combining qualitative analysis of survivors' experiences and views as well as quantitative data relating to survivors' demographic profiles.⁴

Coded citation references are used throughout the Study to protect the identities of respondents and interviewees. The codes integrate the partner, data collection method (INT for Interview, FGD for Focus Group Discussion) and a sequence number. The date is also provided. It is important to note that CRSV is grossly underreported in Kenya—there are a significant number of survivors who have not come out and reported their experiences, either due to a fear of reprisals or ongoing trauma. Additionally, many survivors have changed their identities and do not wish to revisit their past. The findings of this Study thus give an important cursory overview of the human rights abuses committed in Kenya, especially around the 2007 general election.

GENDER OF SURVIVOR PARTICIPANTS



³ Eight Focus Group Discussions and twelve Semi-Structured Interviews were conducted, with a total of 95 survivors participating.

⁴ The data was systematised through Kobo Forms and analysed using descriptive statistics with RStudio. The qualitative information was analysed using NVivo software. The focus group discussions resulted in 463 pieces of code that refer to the categories mentioned in the methodology and that are analysed in Section IV. Survivors' Perceptions, Needs, Priorities and Risks.

A desk-based review of existing open-source materials,⁵ coupled with in-person and remote bilateral interviews with a range of stakeholders, also informed this Study. Consultations from October to December 2020 identified the need to bring stakeholders together to take stock of survivors' journeys in pursuit of reparation through the Kenyan justice system, to assess the status, initiatives, and priorities of survivors in their struggle to obtain effective recognition, remedies, and reparation for past post-electoral violence, particularly in relation to the 2007-8 and 2017 electoral violence.

A Round Table was held in January 2021, organised in collaboration with the International Center for Transitional Justice-Kenya (ICTJ-Kenya), which facilitates the Kenyan Transitional Justice Network. Invaluable support was provided by Lydia Muthiani and Christine Alai, legal representatives of victims in the Constitutional Petition 122 of 2013. Other key players in the Round Table included Jaqueline Mutere of Grace Agenda, Betty Abade-Okero of CSO Network (Kisumu), the United Nations Office of the High Commissioner for Human Rights Kenya (OHCHR Kenya), the National Victims & Survivor's Network, Wangu Kanja Foundation, Physicians for Human Rights, Human Rights Watch Kenya,

Kenyan Human Rights Commission (KHRC), Kenyan National Commission on Human Rights (KNCHR), International Commission of Jurists - Kenya (ICJ-Kenya), Independent Medico-Legal Unit (IMLU) and Federation of Women Lawyers - Kenya (FIDA-Kenya).

The project continued into a Survivors' Meeting followed by an Advocacy Event titled "Survivors Speak", organised to commemorate the International Day for the Elimination of Sexual Violence in Conflict (19 June 2021), in Nairobi with remote connections to Kisumu and other locations due to COVID-19 travel restrictions. A successful media campaign, including a live streaming and video campaign on Facebook showed commitments made at the event, including the commitment expressed by Nairobi County Women Representative, Hon. Esther Passaris, to take survivors' personal letters, that demand justice and accountability, to the President of Kenya.

Once the draft report was made, the project culminated with two validation workshops held in Nairobi and Kisumu in April 2023, where 21 survivors participated in the former and 25 survivors in the latter. The survivors reviewed the contents of the report and affirmed its veracity. All of their feedback was then incorporated into the report prior to launch.



Credit / Source: © Global Survivors Fund

5 Open-source materials included Government reports, UN reports and resolutions, NGO reports, legislation, and international and national-level policy documents.

| 1.3. About the project partners



GSF was launched in October 2019 by Dr Denis Mukwege and Ms Nadia Murad, 2018 Nobel Peace Prize laureates. Its mission is to enhance access to reparation for survivors of conflict-related sexual violence around the globe, thus seeking to fill a gap long identified by survivors. GSF acts to provide interim reparative measures in situations where states or other parties are unable or unwilling to meet their responsibilities. GSF also advocates for duty bearers, as well as the international community, to develop reparation programmes and provides expertise and technical support to guide states and civil society in the design of reparation programmes. GSF's survivor-centric approach is the cornerstone of its work. For more information, visit www.globalsurvivorsfund.org.



Grace Agenda is a community-based organisation that was initiated by Jaqueline Mutere as a response to her personal experience of conceiving a child from rape during from the 2007-08 Post Election Violence. Children who were born out of those human rights violations inspired the walk towards justice, Reparation, healing, and memorialisation. Together with partners in civil society, Grace Agenda has consistently tried to engage with the Office of the Attorney General, the National Assembly, the Senate and other government institutions, in a bid to actualise the KSH 10 billion Restoration Justice Fund set up by the President during his State of the Nation address in March 2015 for assisting the victims of human rights violations and historical injustices. Among other projects, Grace Agenda has assisted in drafting regulations that would provide a legal framework for the distribution of the said fund to secure Individual Reparation, thus striving to ensure survivors of sexual violence access reparation in the form of monetary compensation, medical psychosocial/psychological care, managing disabilities, education for their children born out of rape, and for those who dropped out of school. Grace Agenda uses strength to build the capacity of survivors for self-agency, and walks with them, especially those with children born from the violation. For more information, visit Grace Agenda's [Facebook page](#).



The **Civil Society Organisation Network** is a registered non-profit organisation operating in Western Kenya with offices in Kisumu and Migori Counties. CSO Network works closely with other organisations and has built partnerships that have been developed over time through the implementation of joint activities. CSO Network's thematic areas of focus include:

1. Good governance, democracy and human rights;
2. Protection of the rule of law and citizen's economic, social and political rights;
3. Prevention of gender based violence, reparations and transitional justice;
4. Women's economic empowerment and gender equality; and,
5. Promotion of sexual and reproductive health rights for women and girls.

For more information, visit <http://www.cso-network.org>.

| 1.4. About the authors

The Kenya Reparations Study was led by **Mariana Goetz**, Director of Rights for Peace. Mariana is a human rights practitioner with over 25 years of experience in post-conflict justice, including at the Rwanda Tribunal and Special Court for Sierra Leone, where she was a Legal Adviser, and later at REDRESS where she was Deputy Director, having been its Post Conflict Justice Adviser working on transitional justice cases and projects with affected communities in the Democratic Republic of the Congo, Northern Uganda, Kenya, and Central African Republic.

Perpetua Akoth Adar is a human rights lawyer with 15 years of experience in international criminal justice, transitional justice, elections and governance. For over four years at Kenyans for Peace with Truth and Justice (KPTJ), she coordinated the pursuit of redress for the 2007-8 Post Election Violence (PEV) and advocated for reparation for survivors of PEV. This included research and strategic litigation to address the structural causes of Kenya's governance issues. Perpetua provided human rights law expertise to the Global Disinformation Index and consulted as Special Advisor to the UN Independent Expert on Human Rights.

Vishnu Varatharajan works as a Research Officer for GSF, mainly supporting the work of the Global Reparations Study, including coordination with partner organisations on data management, statistical and thematic analysis, and support with the drafting process. Vishnu holds a master's degree in Political Science and is currently pursuing his PhD at the Graduate Institute of International Relations and Development Studies, Geneva, Switzerland.

| 1.5. Acknowledgements

GSF would like to thank its Kenyan co-partners Grace Agenda and CSO Network, who have been instrumental in delivering this project. We would also like to thank the many individuals and organisations with whom bilateral discussions were held, those who shared advice and information, particularly Lydia Muthiani, legal representative of the victims in Constitutional Petition 122 of 2013, who gave invaluable support and advice in the early stages of the research, as well as all those who participated in

the January 2021 Round Table and September 2021 "Survivors Speak" event.

At GSF, the authors would like to thank Danaé van der Straten Ponthoz and Delia Sánchez del Ángel for their leadership and unconditional support to the Global Reparations Study. We thank Johanna Amaya Panche who designed the process of systematisation, coding, and analysis of information from survivors, Aravind Ganapathi for coding the interviews and focus group discussions, Berta Fernández Rosón and Marie Perrault for their timely support during the different phases of the Study. We thank Christine Alai for the external expert review, and thank Hugo van der Merwe and Pallavi Singh for organising the validation workshops and the launch of this Study. Most importantly, we would like to thank the survivors for their courage and determination in participating in the Study. In bravely coming forward to raise their voices, share their experiences, and advocate for their rights, they have shed important light on the lived reality of those affected by CRSV in Kenya and contributed to the movement for change.



II. INTRODUCTION

Conflict-related sexual violence refers to “*rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.*”⁶ This may include post-conflict settings or in the context of political conflict.⁷

CRSV has grave physical, psychological, and socioeconomic impacts for survivors, their children and communities. Survivors have a right to a remedy and reparation to redress the wrongs and harms suffered and restore their rightful places in society. Reparation measures aim to “*redress violations of human rights by providing a range of material and symbolic benefits to victims or their families as well as affected communities.*”⁸

Full, adequate, and effective reparation may require a range of measures to address the multiple aspects of the harm suffered, harm which is compounded over time due to delays in giving effect to victims’ rights. Forms of reparation can include:⁹

- Restitution, which refers to measures that – whenever possible and advisable – aim to restore the victim’s situation prior to the violation, such as restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment, and return of property;
- Compensation, which is provided for economically assessable damage, such as physical or mental harm, lost opportunities, material damages, moral damage, and costs required for medical and legal assistance;
- Rehabilitation, which includes measures to ensure medical and psychosocial care, as well as legal and social services;

- Satisfaction, which include measures that are aimed at putting a stop to violations, full and public disclosure of the truth, public apologies, official acknowledgement of harms, memorialisation, or searching for the disappeared; and
- Guarantees of non-repetition, which refer to measures aimed at addressing the structural causes of the violation that can contribute to preventing further violations, such as effective civilian control of security forces, strengthening the independence of the judiciary, and raising awareness on codes of conduct and ethical norms.

As a direct consequence of the failure to provide reparation, survivors are forced to endure the unmitigated consequences of the harms they suffered. This Study carries out an assessment of CRSV in Kenya, its impacts on survivors, their needs, and expectations in relation to accessing reparation, and how these can be met. It takes stock of the scope of CRSV and the obstacles and opportunities survivors face to secure reparation, making recommendations on the ways forward. The Study is divided into ten sections. Sections I to III provide an overview of CRSV perpetrated in Kenya, looking at the profile of survivors and perpetrators. Section IV examines the consequences CRSV has had on both survivors and the wider community and presents survivors’ perceptions, needs, and priorities for reparation, as well as the associated challenges of making such priorities a reality. Section V explores current survivor access to interim assistance and relief, in the absence of any existing reparation schemes in Kenya. Section VI analyses the legal frameworks for reparation under international, regional, and domestic law that are relevant to reparation in Kenya. Sections VII to X of the report explore the opportunities and challenges in accessing reparation in Kenya, and conclude with key recommendations.

6 UN Security Council, ‘Conflict-Related Sexual Violence Report of the United Nations Secretary-General’ S/2019/280 (29 March 2019) para 4 available at <https://digitallibrary.un.org/record/3799661?ln=en> accessed 6 August 2022.

7 UN Security Council, ‘Conflict-Related Sexual Violence Report of the United Nations Secretary-General’ S/2019/280 (29 March 2019) para 16 available at <https://digitallibrary.un.org/record/3799661?ln=en> accessed 6 August 2022.

8 OHCHR, ‘Reparations’ <https://www.ohchr.org/en/transitional-justice/reparations> accessed 6 August 2022.

9 UN Basic Principles and Guidelines on Victims’ Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, GA Resolution 60/147 <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.



Map of Kenya

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III. CONFLICT-RELATED SEXUAL VIOLENCE

3.1. Background and context

Colonialism in Kenya fostered inequality and ethnic conflict through the practices of a divisive administrative system. The distribution of wealth, representation in local administration and choice of labourers were decided along ethnic lines. Ownership and control of land were central to inciting ethnic conflict. Deep divisions were further entrenched through colonial and racial dispossession, which displaced some groups and favoured others with access to fertile lands that were close to new infrastructure and opportunities. After independence in 1963, Kenya maintained the status quo of privilege along ethnic lines, and the Kenyan government did very little to rehabilitate the survivors who suffered from generations of colonial atrocities.¹⁰ The independence struggles including the Mau Mau war in the 1950s involved the horrific use of sexual violence. As highlighted in the TJRC Report:

"Sexual violence was by far the most common violence against women. British soldiers, policemen and Home Guards were responsible for inexplicable acts of sexual violence."¹¹

Kenya's political leadership instrumentalised this practice to amass wealth, thereby institutionalising ethnic-based politics. Unresolved grievances over land, corruption, regional inequalities, and inequitable distribution of resources are some of the drivers of ethnic, political, and electoral-related violence since independence.

Once seen as a beacon of stability in the Great Lakes region, the Kenyan political, economic and humanitarian crisis of 2007-08 saw an unprecedented level of violence, which was *"by far the deadliest and the most destructive violence ever experienced in Kenya"*.¹² Between December 2007 and February 2008, post-election violence (PEV) resulted in the deaths of an estimated 1,400 people.¹³ The OHCHR led a Fact-Finding Mission in the immediate aftermath of the violence, revealing that:

"The Government acknowledged that out of the reported 1,220 people killed during the post-election violence, 123 were killed by the police. The OHCHR Mission believes that there is credible information to indicate that this figure might be higher."¹⁴

During the 2007-08 PEV, thousands were sexually assaulted, mutilated and an estimated 660,000 were displaced from their homes.¹⁵ The Commission of Inquiry into Post Election Violence (CIPEV, or Waki Commission), was established in the same year to investigate the circumstances of the 2007-8 PEV and to provide recommendations. The 2008 CIPEV Report contextualised sexual violence during key periods and events such as forced evictions, security operations, and electoral-related violence after the establishment of multi-party politics in 1992. The report estimated that at least 900 women, girls, men, and boys, were sexually violated in the context of the 2007-08 PEV. Sexual violence included rape, sexual assault and forced male circumcision/genital mutilation.

10 Perpetua Akoth Adar, 'Domestic accountability through strategic litigation: Towards redress and reparations for Kenya's 2007-2008 post-election sexual and gender-based violence' (2022) 22 African Human Rights Law Journal 223 <https://www.ahrj.up.ac.za/adar-pa> accessed 6 August 2022.

11 TJRC, 'Final Report – TJRC Report Volume 2C' (2013) Chapter 1, paras 217 – 218 <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=tjrc-core> accessed 26 March 2023.

12 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) vii. <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> accessed 1 March 2023.

13 Al-Jazeera reported "as many as 1,400 deaths in the span of 59 days". James Brownswell, 'Kenya: What went wrong in 2007' (Al-Jazeera, 3 March 2013) <https://www.aljazeera.com/features/2013/3/3/kenya-what-went-wrong-in-2007>.

14 OHCHR, 'Report from OHCHR Fact-finding Mission to Kenya Report, 6-28 February 2008' 11 <https://www.ohchr.org/sites/default/files/Documents/Press/OHCHRKenyaReport.pdf> accessed 29 September 2022.

15 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> accessed 1 March 2023. See also TJRC, 'Final Report- TJRC Report Volume 2C' (2013) para 255 <https://digitalcommons.law.seattleu.edu/tjrc-core/4/> accessed 27 April 2023.

These reported cases were considered to be only the “tip of the iceberg” as they represent survivors who came forward or who could access medical care with 72 hours of the violence occurring (See Section 3.2.2.1).¹⁶

The Waki Commission Report identified perpetrators as state and non-state actors, such as state police and gangs, as well as civilians such as “neighbours, relatives, supposed friends, and humanitarian workers working in IDP camps”.¹⁷

The TJRC Act of 2008 recognised that “[a]ny person who is of the opinion that he has suffered harm as a result of a gross violation of human rights may apply to the Commission for reparation in the prescribed form.”¹⁸ Operational from 2009-12, the Truth, Justice and Reconciliation Commission (TJRC) was mandated to inquire more widely into gross human rights and historical injustices from independence in 1963 to 2008.¹⁹ Like the CIPEV, the TJRC reported sexual violence as prevalent during the colonial period, used as a systematic tool of oppression in times of ethnic, political, and electoral-related violence.²⁰ Previous incidents of systemic sexual violence that amounted to ethnic cleansing include, the Shifta war (1963-67), Bulla Karatasi Massacre (1980) and Wagalla Massacre

(1984), among other massacres. The TJRC report also noted men’s and women’s experiences of sexual violence in land and ethnic disputes during the re-emergence of multi-party politics in the 1990s.²¹

In relation to the reoccurrence of electoral-related violence in 2017, the Kenyan National Commission for Human Rights (KNCHR) reported “premeditated acts of sexual violence meted out on residents by both the security agents and the civilians” during and after the 2017 general election.²² It recorded cases of sexual violence in nine counties of Nairobi, Kisumu, Vihiga, Kakamega, Migori, Siaya, Busia, Homa Bay, Bungoma, Machakos and Uasin Gishu. It also noted that most cases of sexual violence were significantly under-reported, and the 201 cases it recorded represented a small “record of survivors who courageously came out to [...] share their ordeals”.²³

On 28 October 2022, Noordin Haji, the Director of Public Prosecutions issued a press statement in relation to the re-occurrence of PEV in 2017, indicating that law enforcement officers “commit[ed] various atrocities as part of a systematic and widespread attack against the civilian population” in various settlements in 2017.²⁴ Haji stated that:

“Further evidence points to the systematic use of violence, including killing, torture, rape and other forms of sexual violence, against civilians, all of which constitute serious human rights violations and crimes against humanity. Importantly, this is the first case of crimes against humanity charged under Kenyan domestic law, using the International Crimes Act, and also the first criminal prosecution of electoral-related sexual violence.”²⁵

16 Ibid, Chapter 6, 248.

17 Ibid 252.

18 TJRC, ‘The Truth, Justice and Reconciliation Act, 2008’ (2008) article 42(1) <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1011&context=tjrc-core> accessed 31 January 2021.

19 Ibid article 5.

20 TJRC, ‘Final Report- TJRC Report Volume 2A’ (2013) v <https://digitalcommons.law.seattleu.edu/tjrc-core/6> accessed 31 January 2021.

21 TJRC, ‘Final Report- TJRC Report Volume 2C’ (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/4/> accessed 31 January 2021.

22 KNCHR, ‘Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Election’ (2018) 42 https://www.genderinkenya.org/wp-content/uploads/2018/12/KNCHR_Silhouettes_of_Brutality.pdf accessed 31 January 2021.

23 Ibid xv.

24 Office of the Director of Public Prosecutions Kenya, ‘Press Statement: International Crimes Committed by Police Officers during the 2017 Post-Election Period’ (28 October 2022) para 8 <https://partnersinjustice.org/wp-content/uploads/2022/10/Press-statement-Baby-Pendo.pdf> accessed 19 February 2023.

25 Ibid para 9.

3.1.1. The culture of impunity

The Waki Commission found that the unprecedented PEV of 2007-8 took place within a culture of impunity and 'state capture', characterised by the personalisation of the Presidency and deliberate weakening of public institutions.²⁶ It also indicated that the *"widespread belief that the presidency brings advantages for the President's ethnic group makes communities willing to exert violence to attain and keep power."*²⁷

It was generally known since the 1990s that high-level perpetrators as well as security forces were committing violence, including sexual violence.²⁸ The failure to properly investigate and prosecute the widespread criminality has institutionalised a culture of impunity. One of the recommendations from the CIPEV was to establish a hybrid Special Tribunal to hold high-level perpetrators to account, failing which the evidence collected would be handed over to the Office of the Prosecutor of the ICC.²⁹

After repeated failures to set up the Tribunal and the lack of credible domestic investigations, the ICC confirmed charges against three high-profile Kenyans in 2012. However, the cases against the three accused collapsed, with the Prosecutor citing the Kenyan governments' failure to cooperate as well as witness intimidation, interference, and politicisation of the Court (see Section VI).

Despite attempts to put in place measures to prevent the recurrence of PEV before the 2017 elections, negative gender norms, victim shaming, and blaming have created an environment of tolerance for sexual and gender-based violence (SGBV). The state's failure to prosecute violations during the 2007-8

PEV and establish effective measures for timely and safe reporting further strengthened impunity³⁰ and emboldened perpetrators, leading to the recurrence of widespread CRSV in the 2017 general election.³¹ At the time, President H.E. Uhuru Kenyatta, through the Director of Police Operations, commended the National Police Service for a job well done during that period.³² It was not until late 2022 that there was an official acknowledgement of the 2017 violence by the Inspector General of Police. In a positive development, the Director of Public Prosecutions (DPP), has investigated and issued rape charges *"with a realistic prospect of conviction"* under the International Crimes Act, No. 16 of 2008.³³

3.1.2. Gender inequality, culture and stereotypes influencing CRSV

It is accepted that structural gender inequalities and discrimination are central to the *"differential impact that conflict has on women, men, boys and girls."*³⁴ Kenya is a patriarchal society where religious and socio-cultural norms create gender imbalance and inequality. Despite efforts to redress this imbalance with equality and non-discrimination rights in Kenya's Bill of Rights and Kenya's 2010 Constitution, many progressive provisions remain unimplemented. For instance, Kenya's 2010 Constitution requires that *"not more than two-thirds of elective public bodies shall be of the same gender."*³⁵ However, more than ten years later, effective action to meet this requirement has yet to be taken, despite calls from the Chief Justice of Kenya to dissolve the parliament in accordance with Article 261(7) of the constitution, for failing to enact legislation in compliance with a court order.³⁶

26 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) 28-30 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report>.

27 Ibid viii.

28 Ibid.

29 Ibid 472-475.

30 OHCHR, PHR and UN Women, 'Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral-Related Sexual Violence' (31 December 2019) <https://reliefweb.int/report/kenya/breaking-cycles-violence-gaps-prevention-and-response-electoral-related-sexual-violence> accessed 19 February 2023.

31 KNCHR, 'Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Election' (2018) https://www.genderinkenya.org/wp-content/uploads/2018/12/KNCHR_Silhouettes_of_Brutality.pdf accessed 31 January 2021.

32 Ibid 17.

33 Office of the Director of Public Prosecutions Kenya, 'Press Statement: International Crimes Committed by Police Officers during the 2017 Post-Election Period' (28 October 2022) para 11 <https://partnersinjustice.org/wp-content/uploads/2022/10/Press-statement-Baby-Pendo.pdf> accessed 15 March 2023.

34 UN Security Council, 'Conflict-Related Sexual Violence Report of the Secretary General' UN Doc S/2019/280 (29 March 2019) para 3.

35 Constitution of Kenya (2010), art 27 (3), 81(b) and 100.

36 D K Maraga, 'Chief Justice's Advice to the President Pursuant to Article 261(7) of the Constitution' (21 September 2020) <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/09/Copy-of-CJs-Advice-to-President.pdf> accessed 22 February 2021.

Male dominance and female subordination are reinforced through social norms and manifest in both physical and sexual violence against women. In a 2021 government analysis, it was stated that *"harmful gender norms, which rigidly define and enforce gender roles, and support the right of men over women's bodies and sexuality, perpetuate Gender-Based Violence (GBV)."*³⁷ There is a pervasive acceptance of and silence in relation to violence against women and girls, including practices such as perpetrating violence to discipline women and children and to settle interpersonal disputes. These accepted social practices contribute to high levels of physical and sexual violence and an under-reporting of GBV.³⁸ According to a 2014 survey, 47% of women aged 15-49 years have experienced either sexual or related physical violence at some point in their lives.³⁹ Fewer men (6%) report having ever experienced sexual violence.⁴⁰ It becomes clear that the status of women and girls in Kenyan communities, has transformed their bodies into sites of conflict, that see to them bear the brunt of ethno-political violence. Additionally, CRSV survivors report hate speech alongside sexual violence, with perpetrators referencing their gender, ethnicity and/or perceived political affiliation.

SOCIO-CULTURAL NORMS AND SEXUAL VIOLENCE AGAINST MEN

Regarding sexual violence against men, two noteworthy socio-cultural norms are relevant. Traditionally, circumcision is a rite of passage for the male members of the Kikuyu community to transition into manhood. Conversely, the Luo community does not practice circumcision. The forced circumcision and penile amputation of Luo men by a Kikuyu ethnic militia group (*Mungiki*) during the 2007-8 PEV, was designed to degrade, dominate, and frustrate the

status of Luo men. It is an illustration of the violent intersection between gender norms and socio-cultural norms during the 2007-8 PEV.⁴¹

The second socio-cultural norm relates to homosexuality – largely unaccepted in Kenya. Male survivors of sexual violence fear coming forward due to acute social stigma, being perceived as weak or labelled as homosexual following rape. This leads to low numbers of recorded male survivors.⁴² Nonetheless, among the 1,103 statements given before the TJRC commission, 103 were from male victims and survivors, reporting forced circumcision, penile mutilation, and rape.⁴³

3.2. Nature and scope of conflict-related sexual violence

3.2.1. Nature of crimes

The nature of CRSV that occurred during the colonial period was systemic— a method of discipline, humiliation and means to instil fear in potential dissidents.⁴⁴ After independence, CRSV has occurred in the context of ethnic, political and/or electoral violence throughout the presidencies of Jomo Kenyatta (1963-1978), Daniel Arap Moi (1978-2002), Mwai Kibaki (2002- 2013)⁴⁵ and Uhuru Kenyatta (2013 - 2022).⁴⁶ Electoral-related sexual violence (ERSV), has become a recurring feature of Kenya's elections from 1992 to 2017, described as a *"form of sexual violence, including rape, gang rape, sexual assault and defilement, associated with electoral processes and/or intended to influence or achieve a political end within an electoral process."*⁴⁷ Also, sexual violence is perpetrated with impunity in other conflict

37 Republic of Kenya, 'Generation Equality Forum: Kenya's Roadmap for Advancing Gender Equality and Ending Gender-Based Violence and Female Genital Mutilation by 2026' (2021) 7.

38 Ibid.

39 KNBS AND ICF International, '2014 Kenya Demographic and Health Survey Key Findings' (2015).

40 Ibid.

41 Jessica Auchter, 'Forced Male Circumcision: Gender-based violence in Kenya' (2017) 93 International Affairs 1339.

42 Amrita Kapur and Kelli Muddell, 'When No-one Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts' (International Centre for Transitional Justice, 2016) 6 https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf accessed 2 May 2023.

43 Ibid.

44 TJRC, 'Final Report- TJRC Report Volume 2A' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/6> accessed 31 January 2021.

45 Ibid.

46 KNCHR, 'Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Election' (2018) https://www.genderkenya.org/wp-content/uploads/2018/12/KNCHR_Silhouettes_of_Brutality.pdf accessed 31 January 2021.

47 OHCHR, PHR and UN Women, 'Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral-Related Sexual Violence' (December 2019) 1 <https://reliefweb.int/report/kenya/breaking-cycles-violence-gaps-prevention-and-response-electoral-related-sexual-violence> accessed 19 February 2023.

contexts where there is a breakdown of social order, such as forced evictions, security operations, and in the context of IDPs.⁴⁸

3.2.2. Scale, scope, forms, and pattern of crimes

3.2.2.1. SCALE AND SCOPE

The TJRC reported that during the struggle for independence, thousands of men and women were sent to detention camps. At one time, camps held more than 70,000 detainees.⁴⁹ Both men and women survivors reported rape, gang rape, sexual torture, castration, and other forms of sexual violence. In the landmark *Mau Mau* case, where over 5,000 survivors successfully sought compensation from the United Kingdom for the actions of the British colonial administration during the Mau Mau rebellion (1952-1963), it was estimated that as many as 150,000 suspected Mau Mau members and sympathisers were detained across Kenya.⁵⁰ In terms of the scale of the colonial era violence, it can be inferred that there were several hundreds of thousands of CRSV survivors from the colonial era alone. It has been stated that:

*"there is no record of how many people died as a result of torture, hard labour, sexual abuse, malnutrition, and starvation [...] Hundreds of thousands of men and women have quietly lived with the damage – physical, psychological, and economic – that was inflicted upon them during the Mau Mau war."*⁵¹

Testimony given before the Waki Commission for the 2007-08 PEV estimated that there were at least 900

cases of CRSV, based on the number of individuals treated across Nairobi Women's Hospital's branches and its partner health facilities.⁵² The testimony given by the Chief Executive Officer of the Hospital revealed that this figure only reflected the number of survivors who received comprehensive care at their facilities within 72 hours following the occurrence of sexual violence.⁵³ Additionally, 31 victims testified or submitted testimonies to the Waki Commission; CARE International and FIDA documented 40 cases of sexual violence in IDP camps (See Section V); and Kenyatta Hospital documented 147 cases of sexual violence PEV-related cases between December 2007 and June 2008.⁵⁴

There are some later estimates as high as 3,000 incidents of rape during this period.⁵⁵ The TJRC also revealed that there are significant numbers of children born of rape as further victims in the period covered by its mandate (1963-2008).⁵⁶ A study conducted at three health facilities in hot-spot areas (Eldoret, Naivasha and Nakuru) indicated that *"the post-election violence period was also associated with an 18 percentage-point increase in survivors waiting [more than] 1 month to report to a healthcare facility."*⁵⁷ In some cases, survivors reported the violence after 9 months when they went to deliver their children who were born as a result of rape.⁵⁸ Such instances affirm that the scale of PEV-related violations in 2007-08 far exceeds the actual figures recorded by the Waki Commission.

The TJRC did not estimate the total number of survivors of human rights violations during its mandate period, let alone CRSV survivors. Some of the challenges cited include differences in official and unofficial reporting and fears of reprisals.

48 TJRC, 'Final Report- TJRC Report Volume 4' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/2> accessed 31 January 2021.

49 TJRC, 'Final Report- TJRC Report Volume 2A' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/6> accessed 31 January 2021.

50 Leigh Day, 'The Mau Mau Claims' <https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/the-mau-mau-claims> accessed 5 July 2021.

51 Ibid.

52 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> accessed 31 January 2021.

53 Ibid.

54 Ibid.

55 Coalition On Violence Against Women (COVAW), '2007/08 Post Election Violence Sexual and Gender Based Violence Public Interest Litigation Case Project' (2013) <https://covaw.or.ke/200708-post-election-violence-sexual-and-gender-based-violence-public-interest-litigation-case-project/> accessed 31 January 2021.

56 TJRC, 'Final Report- TJRC Report Volume 4' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/2> accessed 31 January 2021.

57 Micheal P. Anastario and others, 'Time Series Analysis of Sexual Assault Case Characteristics and the 2007-8 Period of Post-Election Violence in Kenya' (August 2014) 9 (8) PLOS One 1 <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0106443&type=printable> accessed 27 April 2023.

58 Ibid 9.

The TJRC found that “due to shame and stigma associated with sexual violence, many victims did not report sexual violence to the Commission.”⁵⁹

CRSV in Kenya has been widespread and has targeted victims not only based on their gender but also social status, ethnicity, and perceived political affiliation. In terms of scope, the TJRC reported conflict in all eight former provinces (Nairobi, Central, Coast, Western, North, Nyanza, North-Eastern, and Rift Valley) at different events/periods from 1963 until the 2007-8 PEV.⁶⁰ Most of the ERSV in 2007-8, occurred in Nairobi, Central, Coast, Western, Nyanza and Rift Valley Provinces. In a sample study by the Kenya National Commission on Human Rights (KNCHR) on the 2017 general election, ERSV was recorded in areas such as Nairobi, Uthiru, Kibra, Dandora, Mathare, Ngomongo, Kariobangi, Kawangware, Baba Dogo, Huruma and Waithaka.⁶¹ Other sites of violence include Migori, Kakamega, Vihiga, Bungoma, Homabay, Kisumu, Machakos, Siaya and Nandi County.⁶² KNCHR documented 201 cases of varied sexual violations during the 2017 electoral violence, with the acknowledgement that many more cases remain unreported.⁶³

- ruling political party strongholds;
- opposition strongholds; and
- historically disputed lands where perpetrators seek to drive away or target a particular ethnic group.

The forms of CRSV throughout Kenya's episodes of violence and conflict include rape, defilement, sodomy, gang rape, sexual mutilation (including forced circumcision and penile amputation). Incidents of being forced to watch or take part in sexual violence against family members were also reported.⁶⁴ There are several survivors and witnesses who described perpetrators inserting “guns, sticks, bottles and other objects into women's vaginas” or beating their genitals with objects.⁶⁵ It was concluded that the patterns of sexual violence from 2007-8 PEV, particularly gang rape, were consistent with patterns of mass rape documented in conflict settings elsewhere in the world.⁶⁶ In a report on the 2007-8 PEV, “most survivors interviewed by Human Rights Watch were raped by more than one perpetrator and many of the cases [...] documented involved more than four perpetrators and, in a few instances, more than ten.”⁶⁷

3.2.2.2. FORMS AND PATTERNS OF CRIMES

With the enactment of the Constitution of Kenya in 2010, the provincial system was replaced by 47 Counties. In addition to similar ethno-geographic localities of crimes, the forms, and patterns of crimes from the 2007-8 PEV were similar to the 2017 election. The pattern indicates that the sites of the violence include:

Testimony to the CIPEV indicated that 80% of the victims treated in hospitals during the 2007-8 PEV suffered rape or defilement.⁶⁸ In the KNCHR sample study of 2017 ERSV, attempted rape, gang rape and rape accounted for 77.9% of forms of sexual violence.⁶⁹ Other recorded forms of 2017 ERSV include indecent acts at 9.7%, defilement and attempted defilement at

59 TJRC, ‘Final Report- TJRC Report (Newspaper Supplement)’ (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/1> accessed 31 January 2021.

60 TJRC, ‘Final Report- TJRC Report Volume 2A’ (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/6> accessed 31 January 2021.

61 KNCHR, ‘Silhouettes of Brutality, An Account of Sexual Violence During and after the 2017 General Election’ (2018).

62 OHCHR, PHR and UN WOMEN, ‘Breaking the Cycles of Violence: Gaps in Prevention of Response to Electoral Related Sexual Violence’ (December 2019) <https://www.ohchr.org/en/documents/reports/breaking-cycles-violence-gaps-prevention-and-response-electoral-related-sexual> accessed 2 March 2021.

63 KNCHR, ‘Silhouettes of Brutality, An Account of Sexual Violence During and after the 2017 General Election’ (2018) xv.

64 CIPEV, ‘The Commission of Inquiry into Post Election Violence Report’ (2008) 348 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

65 HRW, ‘I Just Sit and Wait to Die: Reparations for Survivors of Kenya's 2007-2008 Post-Election Sexual Violence’ (2016) 32 <https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait-die/reparations-survivors-kenyas-2007-2008-post-election> accessed 2 May 2023.

66 Ibid.

67 Ibid 31.

68 CIPEV, ‘The Commission of Inquiry into Post Election Violence Report’ (2008) 248 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

69 KNCHR, ‘Silhouettes of Brutality, An Account of Sexual Violence During and after the 2017 General Election’ (2018) 37.

9.2%, sodomy at 1.6%, and sexual assault at 1.6%.⁷⁰ In the same report, it was noted that perpetrators of gang rape ranged between 2 to 6 persons taking turns to violate the victims.⁷¹

3.2.3. Profile and mapping of survivors

Women, men, boys, and girls are all reported victims of CRSV throughout Kenya's episodes of violence and conflict. In all the periods, women and girls bear the brunt of the violence. However, contrary to popular belief, men and boys were also targeted.⁷² The elderly and those with disabilities were not spared and were also particularly vulnerable victims of CRSV. In the 2007-8 PEV, some of the ERSV victims were pregnant or had just given birth when they were raped.⁷³

In the context of ethnic and political violence, CRSV was used to "intimidate, degrade, humiliate, discriminate against and control those belonging to particular ethnic communities or 'tribes' perceived to be in support of the 'wrong' side of the political divide."⁷⁴

Therefore, survivors were targeted due to their known or assumed ethnic and/or political affiliations. For

example, in a sample of survivors from the 2017 ERSV, most of the survivors affected in the mapped counties were from the opposition strongholds.⁷⁵

3.2.4. Profile of perpetrators

The profile of perpetrators varies depending on the conflict. The Waki Commission reported on sexual violence perpetrated by British soldiers during the struggle for independence, as well as by African officers working for the colonial administration under explicit or implicit approval of the colonial administration.⁷⁶ Post-independence, documented perpetrators also include government security agents in security operations drawn from the General Service Unit, the Anti-Stock Theft Unit, the military, the Administration Police as well as the regular Kenya Police. Other perpetrators in the context of ethnic, political and/or election related violence include organised militia groups, youth gangs, humanitarian aid workers, officials in IDP camps, and other civilians known or unknown to the survivors. It is noteworthy that, high-level perpetrators in 2007-8 PEV were identified by the ICC, as explored in Section VI of this Study.

In preparation for the 2017 election, the Kenyan government deployed over 180,000 officers to provide security. These officers were drawn from the National Police Service (NPS), Kenya Prisons Service, Kenya Wildlife Service, Kenya Forest Service, and the National Youth Service.⁷⁷ From a sample of 2017 ERSV survivors interviewed, 54.6% described security agents as their perpetrators, and 45.5% identified civilians.⁷⁸

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² TJRC, 'Final Report- TJRC Report Volume 4' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/2> accessed 31 January 2021.

⁷³ HRW, 'I Just Sit and Wait to Die: Reparations for Survivors of Kenya's 2007-2008 Post-Election Sexual Violence' (2016) 31 <https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait-die/reparations-survivors-kenyas-2007-2008-post-election> accessed 2 May 2023.

⁷⁴ TJRC, 'Final Report- TJRC Report Volume 2A' (2013) para 85 <https://digitalcommons.law.seattleu.edu/tjrc-core/6> accessed 31 January 2021.

⁷⁵ KNCHR, 'Silhouettes of Brutality, An Account of Sexual Violence During and after the 2017 General Election' (2018) 39.

⁷⁶ TJRC, 'Final Report- TJRC Report Volume 2A' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/6> accessed 31 January 2021.

⁷⁷ KNCHR, 'Silhouettes of Brutality, An Account of Sexual Violence During and after the 2017 General Election' (2018) 44.

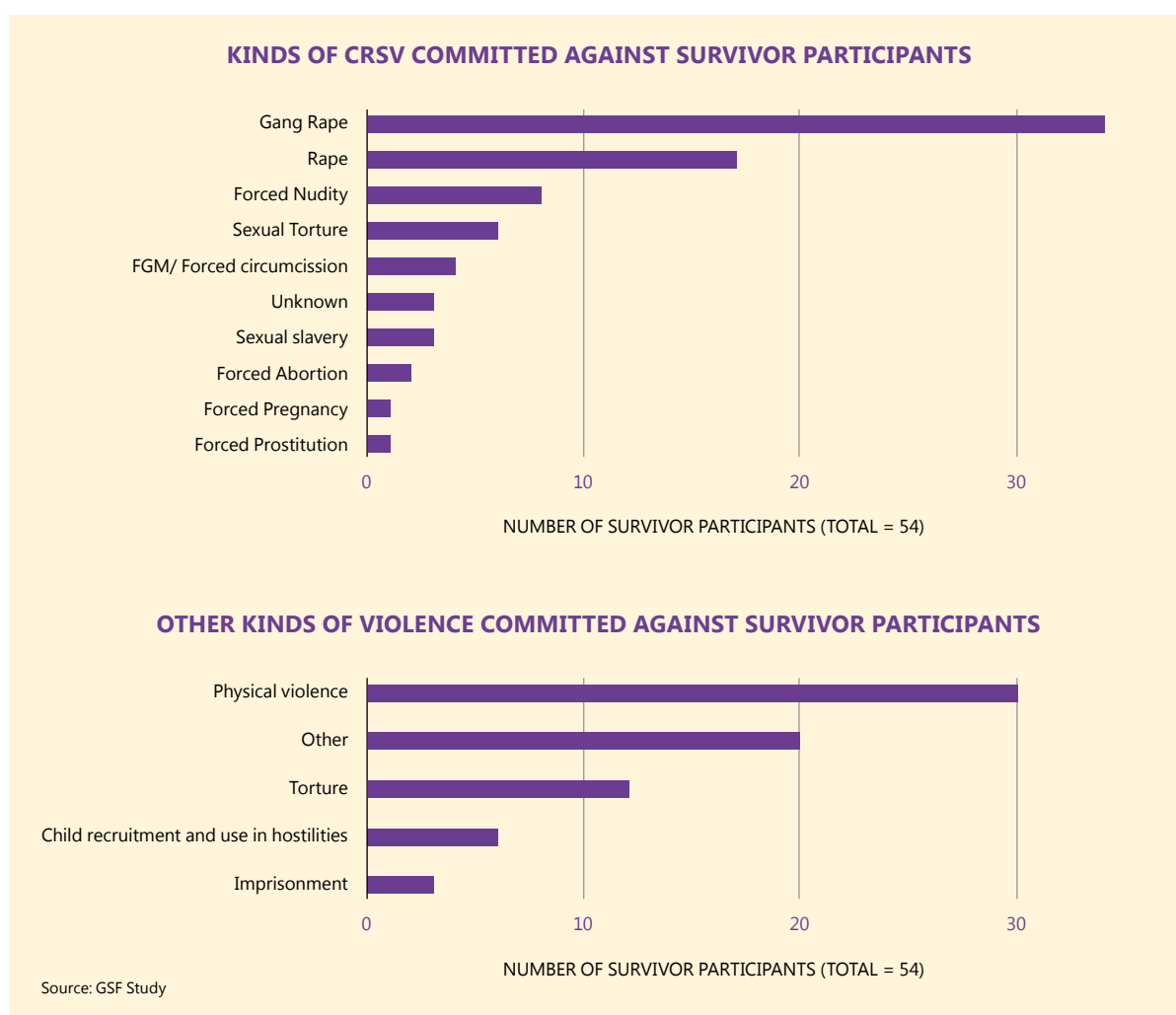
⁷⁸ Ibid 43.



IV. SURVIVORS' PERCEPTIONS, NEEDS, PRIORITIES AND RISKS

Survivors participating in the Study experienced multiple forms of CRSV, often in conjunction with other conflict-related crimes.⁷⁹ Female respondents reported being gang raped during the 2007-8 PEV, while men also suffered sexual violence, including forced circumcision. The impacts of the violence are deep and long-lasting. Most suffer from emotional and psychological stress because of the humiliation

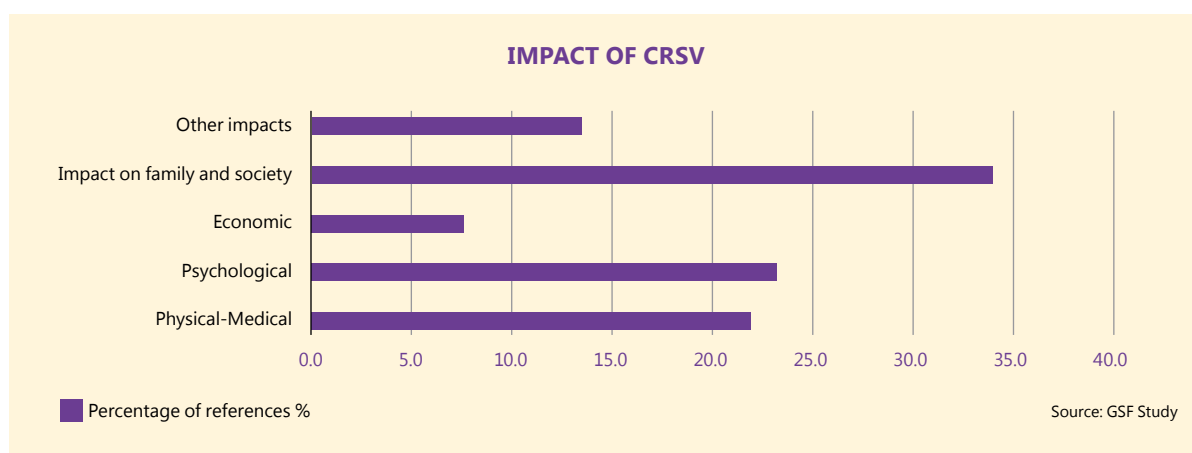
against them, perpetrated by family, peers, and community members.⁸⁰ The impacts have been aggravated by events after the occurrence of CRSV, including displacement, the loss of housing, livelihood, and the disruption of societal and family ties. [Other forms of violence include burning of properties, unspecified psychological violence, and unspecified GBV.]



79 83 survivors participated in focus group discussions, and 12 participated in semi-structured interviews. 54 demographic profiles were collected and systematised through Kobo Forms and analysed using RStudio for descriptive statistics. The qualitative information was analysed using NVivo.

80 CSOBS02.

4.1. Impact of conflict-related sexual violence on survivors, families, and communities



4.1.1. Physical impacts

Physical impacts suffered by survivors include chronic physical injuries, such as fistula, resulting in urinary incontinence, chronic pelvic injuries, repeated miscarriages, gastro-intestinal disorders, and other disabilities or conditions resulting from stress.⁸¹

These impacts result from brutal rape, defilement, sodomy, gang rape, sexual mutilation, and the use of weapons such as machetes, causing the survivors to bleed out of their sexual organs.⁸² One survivor stated that:

“[My sexual organ] was badly cut in a bid to teach a lesson”.⁸³

Another survivor of gang rape suffered a miscarriage when she was almost due for delivery.⁸⁴

Large numbers of survivors also contracted HIV/AIDS,⁸⁵ as they could not get to the hospital in time to receive Post-Exposure Prophylaxis (PEP), a drug which prevents HIV infection if administered in time. While others who were already infected with HIV/AIDS were unable to get their daily doses of anti-retroviral drugs to manage the disease.⁸⁶

Many survivors became pregnant because of the violations, and in many cases, pregnancies led to ruptured family dynamics, domestic violence, separation, and abandonment.

Some of their children born of rape were born with disabilities due to traumas during pregnancy or the impacts of CRSV affecting childbirth,⁸⁷ to the effect of creating intergenerational victimisation. The physical impacts carried by children born of CRSV require long-term treatments and rehabilitation in addition to the socio-economic impacts discussed below.

⁸¹ CSOFGD03 (28 April 2021).

⁸² CSOFGD03 (28 April 2021); CSOFGD01 (21 May 2021); CSOBS01; GAIINT01 (13 Sep 2021).

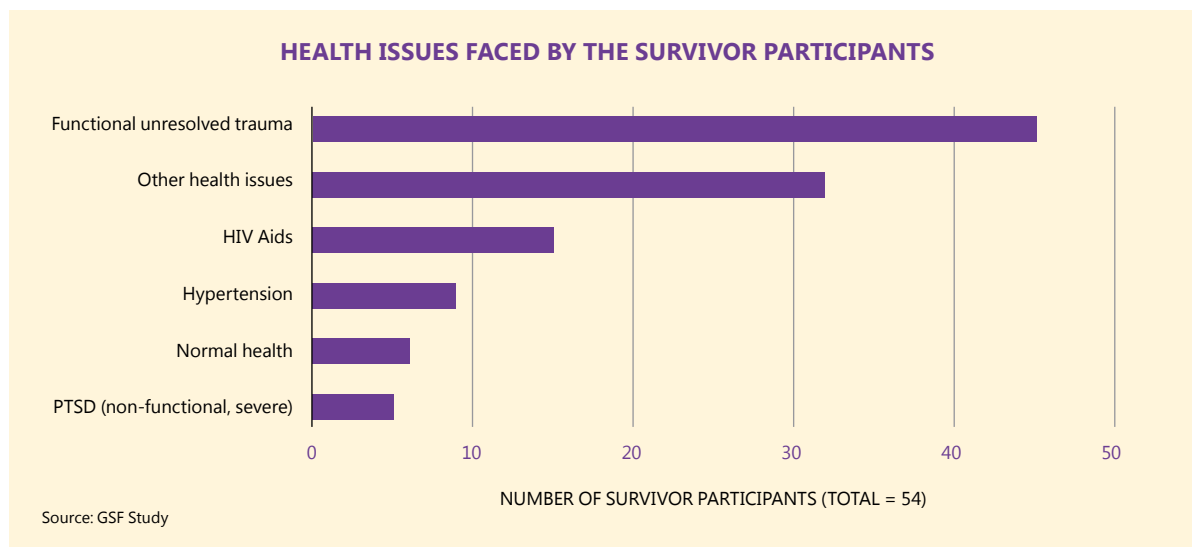
⁸³ CSOFGD03 (28 April 2021).

⁸⁴ CSOFGD05 (22 May 2021).

⁸⁵ Information from the demographic profiles.

⁸⁶ CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) 245 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

⁸⁷ GAIINT01 (13 Sep 2021).



[Other health issues include asthma, back ache, pneumonia, memory loss, arthritis, disability, abdominal and uterus pain, urinary tract infections, visual impairment, and other chronic diseases.]

4.1.2. Psychosocial impacts: being less than human

Most of the survivors suffer from emotional and psychological stress because of the humiliation and stigma within their families and communities,⁸⁸ expressing that:

“[W]e are considered less human.”⁸⁹

Anxiety, depression, insomnia, and destruction of self-worth are serious challenges for survivors.⁹⁰ Many are left isolated, and forsaken by their families:

“Things are just not working out for me and I get panic attacks almost every day.”⁹¹

“I have no one to run to, my past follows me everywhere. I have lost respect in the community.”⁹²

Women survivors talk about being severely ostracised in community spaces like the local church and market. In church, neighbours do not sit near them or involve them in church activities. The smell due to chronic urinary incontinence is a contributory factor in some cases. In the market, fellow traders whisper and nudge their clients not to purchase from them. Survivors say that the violence has reduced them to less human in the eyes of their community members.⁹³

“What will she tell people? Will she point and talk of me as ‘this woman who sleeps with men’?”⁹⁴

Almost all the women who participated in the Study were abandoned by their husbands and rejected by their families.⁹⁵ Those who still have husbands suffer physical and verbal abuse.

88 CSOBS01; CSOBS02; CSOFGD05 (22 May 2021).

89 Ibid.

90 GRFGD01.

91 CSOBS01.

92 CSOBS02.

93 CSOBS02.

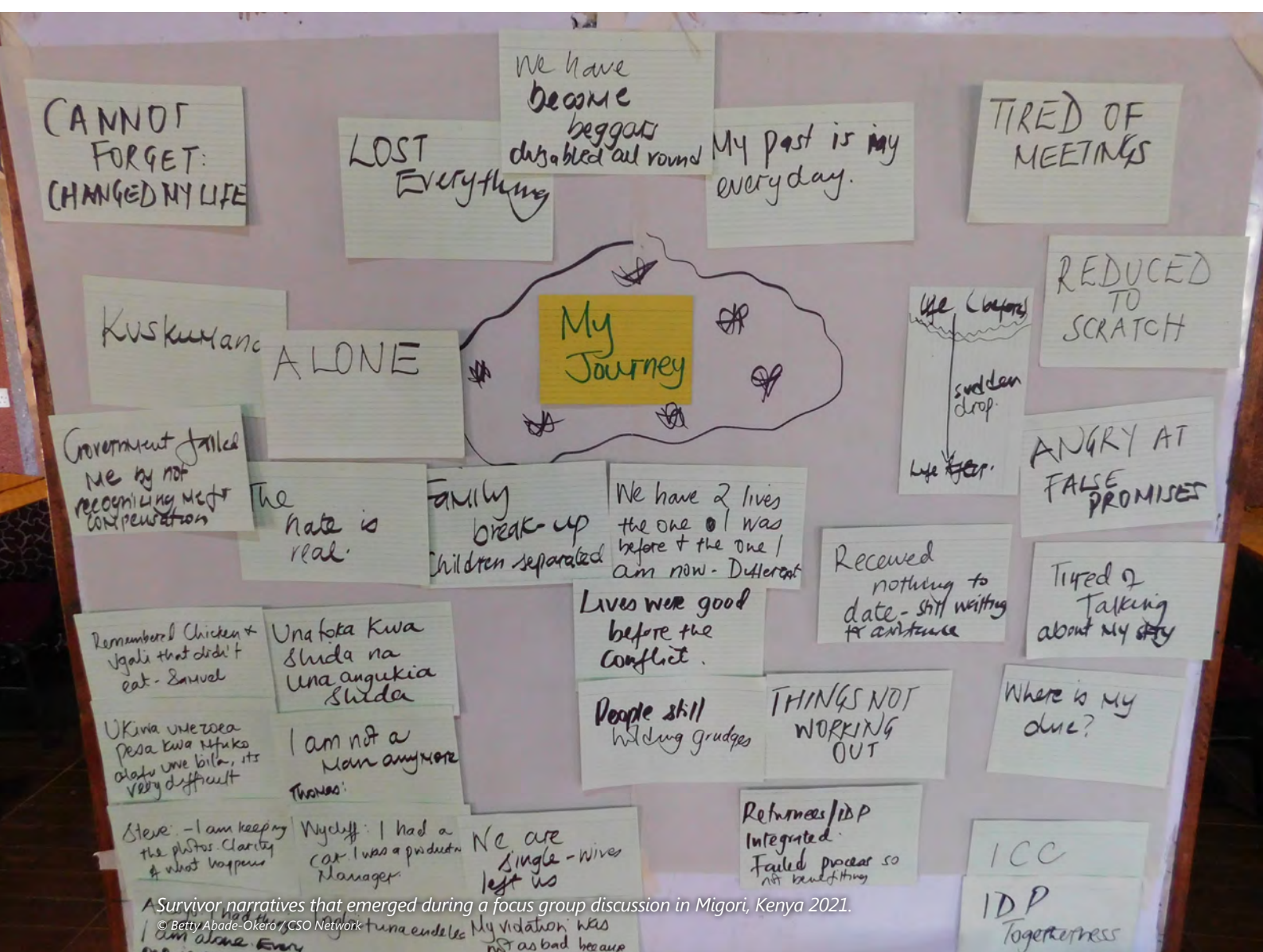
94 Ibid.

95 Ibid.

"Every time I have conflict with my husband, he uses it to humiliate me. Everyone knows and it is used to put me down".⁹⁶

Women survivors from Migori, Busia and Siaya shared how they were abandoned by their husbands after the rape, and that they were left with permanent shame

and mental anguish. One survivor also developed chronic substance abuse and drug addiction after the violence, affecting their family life.⁹⁷ Many survivors question the value of their lives.⁹⁸ Almost all have said that they contemplated suicide, indicating how the specific violence has had life-altering impacts generating serious mental distress.⁹⁹



A Survivor narratives that emerged during a focus group discussion in Migori, Kenya 2021.

© Betty Abade-Okero, CSO Network

⁹⁶ Ibid.

⁹⁷ GAFGD17.

⁹⁸ Ibid.

⁹⁹ CSOBS01, CSOBS02.

4.1.3. Coming back empty handed: hate, blame and stigma

Some survivors were displaced, but eventually returned to their communities. They describe the hatred towards them by their communities as continuing after having returned, partly, because they came back empty handed.¹⁰⁰ Their communities were not prepared for their return or their multiple needs.

“People in the community constantly use bitter words to bring us down. If we could be compensated, perhaps that would help heal some of our wounds”, they said.¹⁰¹

They explain that if they had returned to their community with some form of compensation or state recognition, this might have changed their status and how others perceived them. Survivors reiterate that they are repeatedly blamed.

“You must have known your perpetrators; it is your fault.”¹⁰²

The blame comes from spouses, family members, neighbours, and even healthcare workers who hold positions of authority in society. One survivor stated,

“Rape is my new identity, it’s my new name. My husband shares my story with my co-wives and they use it against me”.¹⁰³

As a result, the survivors find it very difficult to speak up about the injustice inflicted upon them. They fear that what they say could be used against them. Many survivors carry a sense of shame and self-hatred and have given up on their dreams.

“My husband became like poison towards me. They refer to us as ‘wenye walirepiwa’ (those who were raped). My husband just looks at me, it is there and present, but we don’t talk about it. I am tired of talking about my story. My life is full of disrespect and difficulties. My past is my every day. I will not forget 8 January 2008. It changed my life completely”.¹⁰⁴

Survivors have expressed the fundamental need to raise awareness of their situation. Conversations are needed about sexual violence during conflict, to emphasise that these acts are crimes for which society and the state must respond with protection, support, and holistic reparation measures. Survivors explained how they carry the burden of repairing their own image. They raised the need for elders, politicians, and stakeholders to engage in destigmatising current views and attitudes surrounding rape.¹⁰⁵

4.1.4. Stigma and impact on male survivors

Some male survivors have felt emasculated as they were unable to provide for their families due to trauma and physical injuries. Male survivors of forced circumcision, castration and rape, explained that they lost respect from their communities, and suffer from the intense stigma.

¹⁰⁰ CSOBS02.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.



Child of a survivor, who witnessed CRSV. She faces difficulty reading and writing.
© Jaqueline Mutere

“I hear women whispering to one another saying look at ‘long lilo’ (empty trousers) whenever I pass around”, stated one survivor.¹⁰⁶

They feel incapable of asserting their presence or “authority” in the house, sometimes leading to toxic relationships.¹⁰⁷ One survivor explained that once when he tried to “talk” (speak with authority), his wife retorted that she would take him back to Naivasha “to your fellow men”, referring to the perpetrators who sexually violated him.¹⁰⁸

Many male survivors consider themselves to be single men, as their wives left them because they were no longer able to be sexually intimate with them. On the other hand, the loss of traditionally defined masculine authority due to CRSV, has sometimes resulted in male survivors adopting controlling behaviour towards their wives, such as trying to prevent them from working outside their homes.

4.1.5. Impact on child witnesses and children born of rape

4.1.5.1. CHILD WITNESSES OF THE VIOLENCE

Many children of survivors have witnessed the sexual violations against their parents and have been traumatised by the experience or knowledge that their parents are survivors, and that their family and community members ostracise them and gossip about them freely.¹⁰⁹

“Our children are destroyed. A new generation that saw what was done to their parents cannot forget”.¹¹⁰

There is intense grief and guilt among survivors about the impact of CRSV on their children:

“I always worry that my children saw what happened.”¹¹¹

4.1.5.2. CHILDREN BORN OF RAPE

Children born of rape are probably the most stigmatised and mistreated of all, by communities, families and by their very own mothers who find it challenging to love them and separate the child from the brutality that brought them into the world. Many mothers recounted the difficulties in bringing up these children, telling stories of neglect and abuse. As one survivor put it:

“What are you going to do to not associate the child with what happened? It is extremely, extremely mentally challenging because you have to manage the child and be careful not to abuse the child.”¹¹²

These children suffer years of abuse, neglect, malnutrition, and poor health care,¹¹³ making them more vulnerable to mental health challenges, including post-traumatic stress disorders and anxiety.

4.1.6. Socio-economic impact: destitution

A key impact of the violence has been economic damage, such as the destruction of property or attacks on survivors’ homes. Some were dispossessed of their lands:

“I lost all that I had in life,” said one survivor.¹¹⁴

¹⁰⁶ Ibid.

¹⁰⁷ CSOBS02.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ CSOBS02.

¹¹² GAIN01 (13 Sep 2021).

¹¹³ CSOBS01, CSOBS02.

¹¹⁴ CSOFGD02 (28 Apr 2021).



Disabled survivor embracing her grandchild who was born of rape.
© Jaqueline Mutere

On a day-to-day level, both men and women survivors suffer from hunger and financial difficulties in supporting themselves and their children, often no longer able to educate their children. This is a direct result of their physical injuries and mental health issues. Another survivor said:

"Before violence erupted, we were living a good life. We had our businesses, we had jobs and our children were going to school. We could save money even in banks, we used to feed and dress well. Our children knew their fathers. There was love, peace and respect in our families and communities."¹¹⁵

The sense of economic loss, destitution and lack of agency often instils panic, with acute fears that if reparation is not provided within the next two years, they may not be alive to receive justice. Many of them are unsure that they will survive the next five years.¹¹⁶ The COVID-19 pandemic has further aggravated their uncertainties.

"Since coronavirus emerged, by end month you might not manage to save even five hundred shillings. Business has gone down. Now we are selling lemons, there are no people who want to buy tea", said one survivor.¹¹⁷

Many survivors said that they lacked basic housing or lived in houses that were too small for their families. Some still live with their children in their relatives' homes where they have no peace.¹¹⁸ This leads to further stigmatisation of survivors within their communities, as community members are unable to comprehend the survivor's familial circumstances.

"Community members see our poverty as us being stupid and lazy", said one survivor.¹¹⁹

4.2. Survivors' current needs

Various kinds of reparative needs were raised by the survivors, including accountability, medical assistance, psychological support, legal services, social services, livelihoods support, capacity building to strengthen their agency, raising awareness in their communities to facilitate their re-integration, as well as protection and security against further harm.

4.2.1. Psychosocial services

Very few survivors have received any kind of psychological support.¹²⁰ A 2012 report found that *"less than 10% of females and males who experienced sexual, physical, or emotional violence as a child [have] actually received some form of professional help."*¹²¹ Instead of a one-time session, they need to be scheduled and spread out over a period of time for an effective psychological treatment for the trauma they have endured.¹²²

"I have to be constantly on medication to cope with the situation".¹²³

In addition to children and mothers needing counselling, other family members who have the responsibility to care for them also need support. Husbands, grandparents and other relatives need support to process and comprehend the circumstances that brought the child into the world, undo narratives of blame and stigma and ensure acceptance of the child. Survivors have frequently called for community awareness programs to facilitate their own and their children's re-integration into their communities.

115 CSOBS02.

116 CSOBS01.

117 CSOFGD01 (21 May 2021).

118 CSOBS02.

119 Ibid.

120 CSOBS01.

121 UNICEF Kenya Country Office, U.S. Centres for Disease Control and Prevention's (CDC), and the Kenya National Bureau of Statistics (KNBS), 'Violence against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioural Consequences of Violence Experienced in Childhood' (2012) <https://reliefweb.int/report/kenya/violence-against-children-kenya-findings-2010-national-survey>

122 CSOBS01.

123 CSOFGD03 (28 Apr 2021).



Survivors of conflict-related sexual violence during a focus group discussion in Migori, Kenya, 2021.

© Betty Abade-Okero / CSO Network

4.2.2. Medical needs

Survivors suggested being granted medical insurance under which they could receive medical services at no cost.¹²⁴ Some survivors require emergency surgery for fistula repair, but are unable to afford it, and continue to have serious medical needs and unresolved complications¹²⁵ years later:

*"The compensation I need is for checking my body so as to restore it, put us on a medical cover like the NHIF [National Hospital Insurance Fund] so that we can be able to access medical services easily", a survivor suggested.*¹²⁶

The CIPEV found that survivors did not have awareness about Gender Violence Recovery Centres (GVRs) that have been established in the government hospitals, and they recommended the need for extensive awareness campaigns. The Commission also recommended that existing GVRs be established as separate departments "with their own staff, facilities, and budget", as they currently rely on other departments "for funding as well as personnel, which reduces their prominence and ability to provide services."¹²⁷

4.2.3. Child-specific services

The need for child-specific services for children born with disabilities was frequently raised.¹²⁸ Many survivors indicated that their children require physiotherapy since some of them were "meant to be aborted" but were born with disabilities due to complications before childbirth.¹²⁹ Survivors have also felt that they require regular visits to a counsellor as the task of raising a child with disability is "demanding".¹³⁰

4.2.4. Accountability, recognition, and reparation

As perpetrators of CRSV include militia groups and members of the security forces, survivors look to the government for accountability. The lack of action from the government heightens their distress, worsening unresolved trauma. Survivors question whether they will ever find justice through reparation.

*"I am angry and even more when I think that I still have to continue dealing with this pain", one survivor stated.*¹³¹

Survivors voice reparation as their right, because they were wronged,¹³² and because the government publicly committed to support those who were affected.¹³³ They believe that compensation will go a long way to restoring their dignity and acceptance within their families and communities. Some also demand reparation as necessary to address social and economic losses.

*"I was a plant manager in Naivasha in Nakuru county and had my own vehicle, but the violence has reduced me to scratch".*¹³⁴

The government has not used the term 'victims' or 'survivors' and has consistently referred to those affected as internally displaced persons (IDPs) or returnees, denying any recognition or responsibility for atrocities, or conflict related sexual violence. As there were some compensation schemes for IDPs, this raised survivors' expectations, with hopes that next time survivors of CRSV may also receive reparative payments. However, survivors affirm that even though there have been avenues for financial assistance (for IDPs), it does not seem to reach them, as they feel there is room for people to "jump the queue".¹³⁵

¹²⁴ Ibid.

¹²⁵ GRPSR01.

¹²⁶ CSOFGD03 (28 Apr 2021).

¹²⁷ CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) 245 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

¹²⁸ GAIINT01 (13 Sep 2021).

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² CSOBS02.

¹³³ Human Rights Council, 'Report of the Working Group on Universal Periodic Review' (20 March 2020) UN Doc A/HRC/44/9, para 142.136.

¹³⁴ Ibid.

¹³⁵ CSOBS02.

4.3. Survivors' views and priorities on forms and modalities of reparation

4.3.1. Recognition is a precondition

Survivors of CRSV believe that the government has failed them by not recognising them as beneficiaries under the IDP compensation programme. Compensation to IDPs has also been patchy, not reaching all areas. It has made survivors question whether the country is in favour of everyone, considering that some communities have benefited, while they continue to be treated differently.¹³⁶ For many survivors, satisfaction through 'acknowledgement' and 'recognition' is almost a precondition to other forms of reparation having any meaning.

4.3.2. Urgent interim measures

Survivors' needs are urgent, and as a result, they call for urgent interim measures prior to a long-term government programme:

*"We need physiotherapy. We have got children who have had a disability because some of them are meant to be aborted. And then the abuse of the abortion backfired. And then the child came out with a disability or with a limitation. GSF is perhaps able to, you know, to support that kind of thing and for ladies, perhaps for women to give just the interim support or maybe something just like 10,000 shillings a month for a given period for a number of survivors, just to see how it affects their lives and for them to know that it is actually an interim (not a government process) but a civil society process to add value to their lives and to build the capacity and to build their resilience for them to develop the associations."*¹³⁷

In terms of modalities and priorities, these will vary depending on individual circumstances. Nevertheless, addressing physical, psychological, and social rehabilitation is generally a top priority:

*"Number one is school fees. Number two is some good lifestyle, just the same as before, then healthcare."*¹³⁸

4.3.3. Holistic support: a 'Social Fund' for interconnected needs

Survivors explain that their needs are interconnected. One need affects the other, and some needs are incomplete without others:

*"No, I would not be satisfied. Food alone is not enough."*¹³⁹

For instance, there are children who are born with HIV and their mothers are psychologically traumatised both by the incident and the fact that their children are also suffering its consequences, to the effect of triggering anxiety attacks.¹⁴⁰ This creates dysfunctional family relationships and consequently, an improper maintenance of the household resulting in poor hygiene and irregular meals.

Some survivors lost their homes as a result of the sexual violence. They live in public places such as shopping centres.¹⁴¹ Their children are being sent home from school as they are unable to pay the tuition fees. Their situation is dire, despite having relatives who are wealthy but are unwilling to help due to stigma.

*"For me all I would need is a place where I can build a home and plant crops so that the money that is used to pay rent can be used to do something else because right now, I am paying rent while I have no land or home."*¹⁴²

¹³⁶ Ibid.

¹³⁷ GAINOT1 (13 Sep 2021).

¹³⁸ CSOFGD05 (22 May 2021).

¹³⁹ GAINOT1 (13 Sep 2021).

¹⁴⁰ Ibid.

¹⁴¹ CSOBS02.

¹⁴² CSOFGD01 (21 May 2021).



"The Journey of My Life", an artwork by a survivor during a focus group discussion in Migori, Kenya, 2021
 © Betty Abade-Okero / CSO Network

Many survivors believe that a network that facilitates income generating activities could bring survivors together and ensure their collective healing, in a way that integrates psychosocial support with their livelihoods:

"Whenever you're feeling that you are vulnerable in any way, you can move on by engaging in some sort of activity".¹⁴³

As part of a holistic approach, health and psychosocial services would also be available:

"As for health services, whenever I get sick, I will call you and inform you which ward I am in and you will then follow up to confirm, ask for the bill and pay it",

one survivor mentioned when requesting the support of organisations to directly cover expenses incurred when accessing health services.¹⁴⁴

"We should be able to get good healthcare [for our children] whenever they fall sick, which we are unable to afford now. All that we can do is to buy paracetamol when they are sick".¹⁴⁵

It was suggested that economic, medical and psychosocial needs could form the basis for a collective rehabilitation programme where survivors and their families could collectively heal and reintegrate into their respective communities. One survivor expressed the need to track survivors' lives and progress as more measures are implemented, to ensure collective restitution and rehabilitation.¹⁴⁶

4.3.4. Compensation

Most of the survivors use the words 'compensation' and 'reparation' interchangeably referring to

government financial support for victims of PEV.¹⁴⁷ No survivor has a clear idea of how much money they are entitled to receive from the government. However, since some displaced persons received assistance, there is a general consensus that survivors should be entitled to receive at least the same amount. Survivors have emphasised that affected children have been left out of the compensation scheme.

"The government only recognizes us as IDPs but not our children. Therefore, if they compensate us well, we'll be able to cater for our children".¹⁴⁸

The so-called 'compensation' for IDPs does not amount to reparation, since reparation would need to repair the specific harms that emerge from the crimes. Nevertheless, most of the survivors interviewed indicated that they are in need of compensation and *"still waiting for the first instalment of 10,000 shillings"* that the government provided to some IDPs (See Section 7.2.1):

"We are still waiting and hoping to be compensated because it is our right, just as some people were compensated. It has been long overdue".¹⁴⁹

"There is nothing that I have received from the government as compensation even though we have children and other dependents".¹⁵⁰

Survivor's desire capital to start anew, to look forward to a fresh beginning, and to educate their children:

"I wish we could get some compensation to start a new life".¹⁵¹

"It goes really down to financial support [and] education for the children. [...] Without a doubt, it is about financial care and financial independence".¹⁵²

143 GAIN01 (13 Sep 2021).

144 CSOFGD01 (21 May 2021).

145 CSOFGD05 (22 May 2021).

146 GAFGD10 (19 June 2021).

147 CSOBS01.

148 CSOFGD05 (22 May 2021).

149 Ibid.

150 CSOFGD02 (28 Apr 2021).

151 Ibid.

152 GAIN01 (13 Sep 2021).

Another survivor said:

*"I would say that I need one million shillings to start my business and a part of it to open up a bank account and save for my child."*¹⁵³

4.3.5. Modalities: lump sum or a social fund?

Due to their complex and interconnected needs, one survivor suggested that she would prefer a lump sum, rather than monthly instalments, as they could not place trust on the government to provide monthly instalments or pensions.¹⁵⁴ Another issue raised, was to remove intermediaries who take a share of the money when it is released by the government.¹⁵⁵ One survivor suggested a "social fund" that can take care of their medical or other needs.¹⁵⁶

4.3.6. Direct payments

Survivors elaborated on the importance of eliminating intermediaries that are used to disburse benefits. They believe that the IDP assistance scheme turned into a means of making money off of the back of others:

*"It is a bridge for making money by people in government and fake IDP leaders, so what is given does not reach the people".*¹⁵⁷

They explained that when the government announced that their money was in the bank, many displaced persons did not find their names on the list when they visited the bank.¹⁵⁸ As a result of corruption, the IDP assistance money has not reached all its true beneficiaries. To address these issues, survivors suggested that reparation be given directly to the survivors, and not through third parties or other intermediaries.

4.3.7. Satisfaction and symbolic measures

As expressed by one survivor regarding the value of symbolic reparation:

*"Symbolic reparation it will really be first of all the recognition and acknowledgement".*¹⁵⁹

Remembering the incident and commemorating it is one way the survivors are advocating for justice. In this Study, the most popular form of symbolic measures desired by survivors was memorialisation, followed by public apologies:

*"Every year on the 10th of December, on International Human Rights Day, we have a candlelight vigil and a dinner for those who are available, and we have games for mothers of children born of rape [...] It is important to remember those days and those women who are lost and who are not heard of."*¹⁶⁰

4.3.8. Guarantees of non-repetition

With regard to guarantees of non-repetition, many survivors felt that they were neither recognised, nor taken into consideration due to the lack of accountability, reparation or compensation measures.¹⁶¹ As a result, they do not feel that any guarantees of non-repetition had been put in place. The police reform initiatives announced by the government were viewed as inadequate, and do not offer survivors any assurances of non-repetition.¹⁶² Survivors emphasise that reforms would not work unless there is a formal acknowledgement and recognition by the government in the first place, to reverse its culture of denial and impunity. These views echo the CIPEV, which recommended a "complete

153 CSOFGD05 (22 May 2021).

154 GAINOT1 (13 Sep 2021).

155 CSOBS02.

156 Ibid.

157 CSOBS02.

158 Ibid.

159 GAINOT1 (13 Sep 2021).

160 Ibid.

161 GRFGD01.

162 GAINOT1 (13 Sep 2021).



Survivors holding a candlelight vigil on the International Human Rights Day, Nairobi, 2021.

© Jaqueline Mutere

change in attitude" within the security forces, to better handle cases of sexual violence.¹⁶³ Without recognition and accountability, survivors will not have confidence in any reparative measures.

| 4.4. Risks and security assessment

4.4.1. Main risks faced by CRSV survivors

Survivors live in insecurity and express their frustrations with civil society profiteers harvesting information for

their own personal and organisational agendas. A key risk identified in relation to claiming or receiving reparation is immediate physical harm. One survivor felt that their children might be kidnapped, or harmed in some way as a result of having benefitted from monetary compensation:

*"I think some of the risk may be getting kidnapped because children are kidnapped so easily these days or getting harmed in some way because somebody may recognize that they've gotten some sort of money and therefore, you know, they will think they deserve it."*¹⁶⁴

¹⁶³ CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

¹⁶⁴ GAIN01 (13 Sep 2021).



Fear of reprisals is pronounced among survivors who speak out and demand justice. They are fearful that what they say may be used against them.¹⁶⁵ They fear immediate physical harm by unidentified attackers – for instance during an election. However, they also fear that their intimate partner, family members and communities can harm their quality of life.

One of the key concerns that survivors highlighted was the risk of reparation creating unwanted divisions among the survivors themselves.

“How will you monetize the pain? How will you quantify the pain? Money cannot quantify your pain”.¹⁶⁶

When being offered reparation, survivors thought that there would be criteria to determine the kind of reparation each survivor should receive. They expressed concerns that too many classifications could create unnecessary divisions among them, to the effect of risking their unity.

“Essentially a big risk would be making divisions amongst survivors.”¹⁶⁷

¹⁶⁵ CSOFGD03 (28 April 2021).

¹⁶⁶ GAIN01 (13 Sep 2021).

¹⁶⁷ Ibid.

Regarding repeated electoral violence, the lead-up to the Presidential election in August 2022 raised grave concerns:

*"The situation in Kenya is as heated and as polarised as it was in 2007. There are already some cases of sexual assault, online bullying, and verbal bigotry during the nomination process by unidentified perpetrators."*¹⁶⁸

The national police are developing a smartphone application for GBV reporting. The Directorate of Health of the Nairobi Metropolitan Services has established a toll-free hotline for all health emergencies, alongside the construction of temporary clinics. There are also other emergency numbers being set up, such as the one by the Federation of Women Lawyers (FIDA) and Centre for Rights Education and Awareness (CREAW). While there has been some contingency planning both from the Nairobi city administration and civil society, there has been no clear state strategy to counter electoral violence and no indication of punitive measures against it.¹⁶⁹

4.4.2. Mitigating measures

Data collected about the survivors indicates a correlation between high levels of stigma and perceived risks surrounding the implementation of

reparation. Survivors ask for community awareness programmes as a means of sensitising communities about their rights and needs, to reduce blame and antagonism towards survivors.

One survivor, who expressed that there was a risk of excluding certain groups from receiving reparation, emphasised the need for a survivor-centred approach as a mitigating measure. For this survivor, *"engagement at every level"* was crucial to managing the multiple dimensions of reparation including the risk of reprisals or manipulation.¹⁷⁰ A survivor-centred approach would prevent others from dictating the forms and modalities of reparation. While she appreciated the work being done by numerous organisations, any efforts without a survivor-centred approach was, according to her, *"just a way of getting around you, just asserting themselves"*.¹⁷¹

Another suggestion from survivors includes that banks could act as an efficient interface for them, by helping survivors manage their finances. Rather than banks just being points of compensation collection, a survivor suggested having certain checks and balances.¹⁷² For example, establishing withdrawal limits except for reasons such as medical emergency, which would allow them to have financial freedom and financial security, and mitigate the risk of survivors getting robbed after receiving compensation.¹⁷³

¹⁶⁸ Interview with Jaqueline Mutere, Director of Grace Agenda (7 July 2022).

¹⁶⁹ Ibid.

¹⁷⁰ GAI01 (13 Sep 2021).

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.



V. ACCESS TO ASSISTANCE OR INTERIM RELIEF

In the immediate aftermath of the 2007-8 PEV, the Gender Violence Recovery Centres in various branches of Nairobi Women's Hospital treated around 900 victims and survivors. Treatments also included the administration of Post-Exposure Prophylaxis (PEP), the drug previously mentioned which prevents HIV infection. Noting that survivors accessing the services were from various parts of Kenya, including Kiambu, Naivasha, Makeni, Machakos and Ongata Rongai, the Waki Commission report emphasised the concern of Dr. Sam Thenya, an obstetrician gynaecologist and Chief Executive Officer of the hospital, who warned that the numbers were merely the *"tip of the iceberg"*.¹⁷⁴

A few non-governmental organisations and international humanitarian agencies provided humanitarian support to survivors after the 2007-8 PEV. CARE International and FIDA conducted a study that included 40 CRSV survivors in IDP camps in Nairobi, Nakuru, Eldoret and Mombasa and provided them with psychological counselling.¹⁷⁵ The Centre for Rights, Education and Awareness (CREAW) documented the experiences of survivors of the 2007-8 PEV in the Rift Valley, amplifying their voices through a documentary.¹⁷⁶ CARE Kenya conducted a study in Kibera and Mathare and provided counselling

sessions and a workshop on the functions of the Commission, to encourage individuals to testify.¹⁷⁷

The International Committee of the Red Cross was also present in Kenya and provided services. However, as is expected in all conflict situations, many survivors were unable to reach hospitals for a range of reasons, including disruption to transport links and insecurity in the aftermath, as well as fear of stigma and reprisals.

For survivors, the situation continues to be desperate given the lack of official acknowledgement, recognition or specific programmes targeted at CRSV survivors in the 15 years since the 2007-8 PEV. Those who have received assistance mostly accessed relief through the goodwill and support of family and civil society actors.

The TJRC noted that when it comes to IDPs, people who have not received redress go back as far as the Shifta war in the mid-1960s. The TJRC report observed that *"the fact that a very high level of ethnic violence was witnessed in Kenya for the first time in 2007-8 and that it was largely prompted by land-related injustices should bring the need for resolution of all pending land issues to the fore of the government's agenda."*¹⁷⁸

174 Ibid.

175 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) 244 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> accessed 31 January 2021.

176 Ibid 240 and 241.

177 Ibid 240.

178 TJRC, 'Report of the Truth, Justice and Reconciliation Commission Volume 2B' (2013) <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1152&context=tjrc-core>





VI. AVENUES FOR REPARATION

6.1. International human rights obligations, legal and policy frameworks for reparation

Kenya's constitution provides that any treaty ratified by Kenya forms part of the law of Kenya.¹⁷⁹ Kenya is a party to a range of treaties which provide a legal framework relevant to CRSV and reparation. These include:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention on Elimination of all Forms of Discrimination Against Women (CEDAW);
- The Rome Statute of the International Criminal Court (Rome Statute);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- African Charter on Human and Peoples' Rights (ACHPR); and the
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

6.1.1. The International Criminal Court (ICC)

The ICC may issue a reparations order against a convicted person "*specifying appropriate reparations to, or in respect of, victims, including restitution,*

compensation, and rehabilitation."¹⁸⁰ Furthermore, an award for reparation can be made through the Trust Fund for Victims (TFV).¹⁸¹ The TFV has a dual mandate which, in addition to facilitating and implementing court-ordered reparation, is to provide survivors with physical, psychological and material support independent of its reparation mandate.¹⁸²

In 2010, the ICC prosecutor opened a *proprio motu* investigation on Kenya, focusing on "*alleged crimes against humanity committed during the events that took place between 1 June 2005 (i.e., the date of the Statute's entry into force for the Republic of Kenya) and 26 November 2009 (i.e., the date of the filing of the Prosecutor's Request).*"¹⁸³ Thereafter, on 23 January 2012, charges were confirmed against Uhuru Muigai Kenyatta, who subsequently became President of Kenya in 2013.¹⁸⁴ In a second case, charges were confirmed against William Samoei Ruto, who became Deputy President of Kenya in 2013 and in 2022, President of Kenya, as well as against the radio presenter Joshua Arap Sang.¹⁸⁵

The confirmation of these charges resulted in increasingly strained relations between African states and the ICC. Noteworthy, were the failed attempts to defer the cases through Article 16 deferral requests by the Kenyan government and the finding that the Kenyan government was guilty of non-compliance, preventing the "*Court from exercising its functions and powers under the Statute.*"¹⁸⁶

¹⁷⁹ Constitution of Kenya (2010), section 2(6).

¹⁸⁰ ICC Rome Statute, art 75 (2).

¹⁸¹ ICC Rome Statute, art 79.

¹⁸² ICC, 'Regulations for the Trust Fund for Victims', (2 December 2005) ICC-ASP/4/Res.3. See also ICC, 'Trust Fund for Victims (TFV): Background Summary' (August 2008) https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf accessed 27 April 2023.

¹⁸³ ICC, 'ICC Judges Grant the Prosecutor's Request to Launch an Investigation on Crimes Against Humanity with Regard to the Situation in Kenya' (ICC Press Release, 31 March 2010) <https://www.icc-cpi.int/news/icc-judges-grant-prosecutors-request-launch-investigation-crimes-against-humanity-regard> accessed 12 March 2021.

¹⁸⁴ ICC, 'Decision of the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute in the Case of The Prosecutor v Uhuru Muigai Kenyatta' (23 January 2012) https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF accessed 14 April 2021.

¹⁸⁵ ICC, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute in the case of The Prosecutor v William Samoei Ruto and Joshua Arap Sang' (23 January 2012) https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF accessed 9 March 2021.

¹⁸⁶ ICC, 'Second Decision on Prosecution's Application for a Finding of non-compliance under Article 87(7) of the Statute in The Prosecutor v Uhuru Muigai Kenyatta' (19 September 2016) para 3 https://www.icc-cpi.int/CourtRecords/CR2016_06654.PDF accessed 26 May 2021.

The strained relations between the African region and the ICC culminated in Burundi, South Africa and The Gambia announcing their intention to withdraw from the Rome Statute.¹⁸⁷ However, several African State Parties such as Botswana, Nigeria, Tanzania and Ghana among others, have called for support of the ICC and a structured dialogue to improve relations.¹⁸⁸ South Africa and The Gambia withdrew their notifications, but Burundi became the first nation to withdraw from the ICC in 2017.¹⁸⁹

The *Kenyatta* case included CRSV charges, such as rape, forcible circumcision and penile amputation, as crimes against humanity.¹⁹⁰ On 5 December 2014, the ICC Prosecutor withdrew the charges against Kenyatta without prejudice to a future indictment, citing witness interference and state obstruction to access to evidence.¹⁹¹ On 5 April 2016, the charges against Ruto and Sang were vacated, also without prejudice to a fresh prosecution in the future.¹⁹² An external expert review found that external factors, such as a lack of sufficient cooperation and witness tampering played a role in the outcome of the situation in Kenya, and that the engagement of witnesses was “constantly threatened by a pervasive witness interference campaign”.¹⁹³

The Legal Representative of Victims in the *Kenyatta* case documented the victims’ responses of “anger, betrayal and disbelief at the prospect that they were

*to be totally abandoned by the ICC.”*¹⁹⁴ Furthermore, the victims expressed that the “*withdrawal of charges in the Kenyatta case ends the only credible effort to provide justice to the survivors of rape and sexual violence during the PEV.*”¹⁹⁵

6.1.2. The ICC Trust Fund for Victims

When the ICC formally began its work in Kenya, there were expectations that the TFV would roll out an assistance programme. However, stakeholders in Kenya, including researchers and civil society actors noted that the TFV continued to raise the expectations of Kenyan victims for many years without offering any assistance.¹⁹⁶ On 21 March 2021, the TFV Board of Directors approved a two-year assistance programme in Kenya for CRSV survivors, allocating EUR 300,000.¹⁹⁷ In accordance with its assistance mandate, the TFV may provide medical, psychosocial and material support to those considered as ‘victims’ in accordance with the definition contained in Rule 85 of the ICC Rules of Procedure and Evidence.¹⁹⁸ On 1 April 2023, a TFV programme started in Kenya. The TFV selected the IMLU to partner with on the implementation of rehabilitation services to survivors of SGBV of the 2007/2008 PEV. The programme was publicly presented to civil society organisations on 10 May 2023.

187 ICC Assembly of States Parties, ‘Speech of the President of the Assembly of States Parties, Mr Sidiki Kaba, fifteenth session of the Assembly of States Parties, 16 November 2016’ (2016) https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ASP15-Opening-Statement-PASP-ENG.pdf accessed 6 July 2020.

188 ICC Assembly of States Parties, ‘General Debate - 15th session (16 - 17 November 2016)’ (2016) https://asp.icc-cpi.int/sessions/general-debate-GeneralDebate_15th_session accessed 6 July 2021.

189 BBC, ‘Burundi leaves International Criminal Court amid row’ (27 October 2017) <https://www.bbc.co.uk/news/world-africa-41775951> accessed 6 July 2021.

190 ICC, ‘Decision of the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute in the Case of The Prosecutor v Uhuru Muigai Kenyatta’ (23 January 2012) https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF accessed 14 April 2021.

191 ICC, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta’ (5 December 2014) <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-withdrawal-charges-against-mr> accessed 9 March 2021.

192 ICC, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding Trial Chamber’s Decision to Vacate Charges Against Messrs William Samoei Ruto and Joshua Arap Sang Without Prejudice to their Prosecution in the Future’ (6 April 2016) <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-trial-chambers> accessed 10 March 2021.

193 ICC, ‘Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation’ (26 November 2019) <https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf> accessed 6 July 2021.

194 ICC Trial Chamber V(B), ‘Victims’ response to the Prosecution’s notice of withdrawal of the charges against Uhuru Muigai Kenyatta’ ICC-01/09-02.11 (9 December 2014) para 7 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_09983.PDF accessed 26 April 2021.

195 Ibid para 52.

196 Ulster University and KPTJ, ‘Nairobi Principle on Accountability’ (January 2019) para 30 <http://kptj.africog.org/wp-content/uploads/2019/01/Nairobi-Principles-on-Accountability-ONLINE-version.pdf> accessed 27 May 2021.

197 TFV, ‘Decisions taken by the Board of Directors of the Trust Fund for Victims’ (21 March 2021) <https://www.trustfundforvictims.org/index.php/en/news/decisions-taken-board-directors-trust-fund-victims-september-december-2020> accessed 28 May 2021.

198 ICC, ‘Rules of Procedure and Evidence’ (2019) <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>.

6.1.3. The Human Rights Council

6.1.3.1. UNIVERSAL PERIODIC REVIEW

During the Human Rights Council's first Universal Periodic Review (UPR) cycle in 2010, Kenya stated its commitment to addressing impunity. It presented positive developments such as the establishment of human rights and transitional justice mechanisms. These included the establishment of the National Commission on Gender Development, a national framework on gender-based violence, and the CIPEV (discussed in 15.1).¹⁹⁹ Kenya stated that most of the recommendations of the CIPEV were being implemented.²⁰⁰ In the second UPR cycle in 2015, Kenya indicated that it would implement the TJRC recommendations, including reparation for victims (see further 15.3).²⁰¹ In 2020, in the third reporting cycle, the Kenyan government committed to:

"intensify efforts to secure redress for survivors of sexual violence following the 2007 and 2017 presidential elections, and establish mechanisms to ensure such crimes are never repeated,"²⁰² and to "acknowledge the violations of the rights of survivors of electoral-related sexual violence,"²⁰³ as well as ensure accountability and full reparation for survivors.

In the third reporting cycle, the UPR Working Group recommended that Kenya ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and Optional Protocol to the International Covenant on

Civil and Political Rights.²⁰⁴ These would support accountability efforts within the country. However, in every reporting cycle, these optional protocols were acknowledged by Kenya, but not accepted.

6.1.3.2. SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL

The UPR Working Group has recommended in every reporting cycle that Kenya work closely with the Special Procedures of the Human Rights Council.²⁰⁵

The Special Rapporteur on Torture, Sir Nigel Rodley was invited on a fact-finding mission to Kenya in 1999. He received information of the use of torture by the police. According to the information, the torture included *"rape and other genital abuses, such as inserting objects into the vagina and pulling of the penis or pricking it with pins."*²⁰⁶ Notably, torture was also used to dissuade and intimidate political activities, although to a lesser degree since the introduction of a multiparty political system in the early 1990s.²⁰⁷ The Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston visited Kenya in 2009. His report focused on the violence in Mount Elgon and 2007 PEV and noted that numerous cases of rape were perpetrated by the Sabao Land Defence Force militia (SLDF) and the government's security forces.²⁰⁸

In 2011, the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, conducted an official visit to Kenya. His report raised the need for more information on and attention to *"the incidents of sexual and gender-based violence in the context of the 2007-8 post-election violence and other displacement situations, including with a view to prevention."*²⁰⁹

199 UN Human Rights Council, 'Report of the Working Group on Universal Periodic Review' UN Doc A/HRC/15/8 (17 June 2010) paras 10, 11, 48.

200 Ibid para 107.

201 UN Human Rights Council, 'Report of the Working Group on Universal Periodic Review' UN Doc A/HRC/29/10 (26 March 2015) para 142.101.

202 UN Human Rights Council, 'Report of the Working Group on Universal Periodic Review' UN Doc A/HRC/44/9 (20 March 2020) para 142.136.

203 Ibid para 142.168.

204 Ibid para 142.12.

205 UN Human Rights Council, 'Report of the Working Group on Universal Periodic Review' UN Doc A/HRC/29/10 (17 June 2010) paras 101.37, 102.7, 102.10 and 102.11; UN Human Rights Council, 'Report of the Working Group on Universal Periodic Review' UN Doc A/HRC/29/10 (26 March 2015), paras 142.35 and 142.39 and UN Human Rights Council, 'Report of the Working Group on Universal Periodic Review' UN Doc A/HRC/44/9 (20 March 2020), para 142.23.

206 ECOSOC Commission on Human Rights, 'Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32' UN Doc E/CN.4/2000/9/Add.4. (9 March 2000), para 6.

207 Ibid para 15.

208 UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' UN Doc A/HRC/11/2/Add.6 (26 May 2009).

209 UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani' UN Doc A/HRC/19/54/Add.2 (6 February 2012), para 29.

6.1.4. The Human Rights Committee

Kenya ratified the International Covenant on Civil and Political Rights (ICCPR) in 1972 and submitted its first periodic report to the Human Rights Committee in 1987. The Human Rights Committee raised concerns that women do not benefit from adequate legal protection against widespread acts of sexual violence.²¹⁰ Kenya subsequently referred to the adoption of legislation and reforms, including the Sexual Offences Act of 2006 and the launch of a National Framework for Response and Prevention of Gender-Based Violence in Kenya in December 2009.²¹¹

During the third reporting cycle of the Human Rights Committee in 2011, TRIAL referenced numerous cases of inhumane treatment, rape and sexual violence in the Mount Elgon conflict and 2007-8 PEV.²¹² The Committee's concluding observations in 2012, while appreciating the government's efforts to provide humanitarian assistance to those who were displaced by the 2007-8 PEV, expressed concern at the slow pace of finding durable solutions.²¹³

In May 2021, the Committee concluded that the *"Public Finance Management (Reparations for Historical Injustices Fund) Regulations of 2017, designed to operationalise the Restorative Justice Fund, remained at the consultative stage, and as a result, victims were not able to access reparations"* (See further in Section 7.1).²¹⁴

A further concern, considering the 2022 elections, was the limited progress in ensuring access to justice and other guarantees of non-repetition. The Committee urged the Kenyan government to *"take concrete steps ahead of 2022 to address impunity from 2017, including the prosecution and punishment of all perpetrators, in particular police and security officers, and systemic reform to all relevant law enforcement agencies."*²¹⁵

6.1.5. The Committee Against Torture

Kenya has been party to the Committee Against Torture since 1997 and submitted its first State report in 2007. In 2008 the Kenya National Commission on Human Rights (KNCHR),²¹⁶ the World Organisation Against Torture (OMCT)²¹⁷ and Human Rights Watch (HRW)²¹⁸ raised allegations of widespread torture by government security forces deployed to Mount Elgon in Rift Valley Province, to quell the SLDF militia. Reportedly, both SLDF and Kenyan security forces were implicated in widespread human rights violations including the rape of women and girls in 1991, 1992, 1997, 2002, 2006-2008. In 2008, a joint police and military operation was launched to defeat the SLDF, wherein widespread abuse was documented, including rape and other sexual violence.²¹⁹ The Committee urged Kenya to *"take immediate action to ensure, prompt, impartial and effective investigations into all allegations [...], including sexual violence and gang rape, with the aim of prosecuting and punishing the perpetrators."*²²⁰ It also urged Kenya to take all the

210 UN Human Rights Committee, 'Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations adopted by the Human Rights Committee at its Eighty third session' UN Doc CCPR/CO/83/KEN (20 March 2020) para 11.

211 UN Human Rights Committee, 'Consideration of reports submitted by States parties under article 40 of the Covenant' in 'Third Periodic Report of States Parties-Kenya' UN Doc CCPR/C/KEN/3 (13 January 2011).

212 TRIAL, 'Alternative Report to the Human Rights Committee. Submission to the UN Human Rights Committee's consideration of Kenya's third periodic report' (29 July 2011) https://trialinternational.org/wp-content/uploads/2016/05/Kenya_-_Alternative_report_to_the_Human_Rights_Committee_-_July_2011-1.pdf accessed 26 April 2023.

213 UN Human Rights Committee, 'Consideration of reports submitted by States parties under article 40 of the Covenant' in 'Concluding observations adopted by the Human Rights Committee at its 105th session' UN Doc CCPR/C/KEN/CO/3 (31 August 2012), para 20.

214 UN Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Kenya' UN Doc CCPR/C/KEN/CO/4 (11 May 2021), para 8.

215 Ibid para 9 (c).

216 KNCHR, 'Presentation to the Committee Against Torture to Inform its Review of Kenya's Initial Country Report on the Implementation of the Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment (CAT)' (30 September 2008) https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KEN/INT_CAT_NGO_KEN_41_9384_E.pdf accessed 24 May 2021.

217 OMCT, 'Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya' (November 2008) <https://www.omct.org/en/resources/reports/kenya-alternative-report-to-the-cat-addressing-the-economic-social-and-cultural-root-causes-of-torture-in-kenya> addressed 27 April 2023.

218 HRW, 'Submission to 41st Session of the United Nations Committee Against Torture on Kenya' (15 September 2008) https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KEN/INT_CAT_NGO_KEN_41_9383_E.pdf accessed 24 May 2021.

219 Ibid.

220 UN Committee Against Torture, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention' in 'Concluding Observations of the Committee Against Torture on Kenya' UN Doc CAT/C/KEN/CO/1 (19 January 2009), para 19.

appropriate measures necessary to ensure that victims obtain redress, adequate compensation including “the means for as full rehabilitation as possible.”²²¹

In its second report on Kenya in 2013, the Committee recalled these recommendations, and urged the Kenyan government to strengthen efforts to ensure their realisation.²²² Concerns were raised about the prevalence of human rights violations such as SGBV by police and military operations in refugee camps, and counter-terrorism activities. The Committee drew attention to Kenya’s obligations, as explained in General Comment No. 3 (2012)²²³ to implement article 14 of the CAT, and provide effective remedies and reparation to victims.²²⁴ The Committee urged Kenya to publish and implement the TJRC report without delay.²²⁵ In its third report, published on 30 May 2022, the Committee regretted the lack of information on the status of implementation of the recommendations of the TJRC, as well as the limited progress made in ensuring reparation for victims of the post-election violence in 2017.²²⁶ According to KNCHR in February 2020, no progress had been made in investigating and prosecuting the 2007-8 sexual violence.²²⁷ Although the President declared the establishment of a Restorative Justice Fund in 2015, it has yet to be operationalised, and the TJRC report has not been fully implemented.²²⁸ The State Party’s report on the Follow-up to Concluding Observations is due on 13 May 2023.²²⁹

6.1.6. The Committee on the Elimination of Discrimination Against Women (CEDAW)

Kenya has fully ratified the Convention on Elimination of all forms of Discrimination Against Women (CEDAW). In 2011, the Committee considered Kenya’s 7th report and welcomed positive developments such as the adoption of a new Constitution and the establishment of the TJRC.²³⁰ However, the Committee has expressed concerns about the delay in the establishment of a tribunal to investigate and prosecute perpetrators of the 2007-8 PEV, noting that many of those who were internally displaced continued to experience SGBV and abuse within refugee camps.²³¹ The same issues were raised when considering the 8th periodic report. CEDAW’s concluding observations in 2016, *inter alia*, urged Kenya to “[e]nsure the effective implementation of the recommendations of the Truth, Justice and Reconciliation Commission, in a manner that prioritises women’s rights.”²³²

With respect to GBV against women, the Committee welcomed the adoption of the Protection against Domestic Violence Act of 2015.²³³ However, it remained concerned about “the high level of gender-based violence against women and girls and the widespread incidence of sexual violence, including rape, in the private and public spheres, [as well as] underreporting by victims, owing to, among other things, law enforcement and medical staff illegally

221 Ibid para 25.

222 UN Committee Against Torture, ‘Concluding Observations on the Second Periodic Report of Kenya, adopted by the Committee’ UN Doc CAT/C/KEN/CO/2 (19 June 2013), para 18.

223 UN Committee Against Torture, ‘General Comment No 3 of 2012’ on ‘Implementation of Article 14 by States Parties’ UN Doc CAT/C/GC/3 (13 December 2012).

224 UN Committee Against Torture, ‘Concluding Observations on the Second Periodic Report of Kenya, adopted by the Committee’ UN Doc CAT/C/KEN/CO/2 (19 June 2013) para 23.

225 Ibid.

226 UN Committee Against Torture, ‘Concluding observations on the third periodic report of Kenya’ CAT/C/KEN/CO/3 (30 May 2022) para 23.

227 KNCHR, ‘Report to the Committee Against Torture on the Review of Kenya’s Third Periodic Report on the Implementation of the Provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and/or Punishment’ (February 2020) para 206 <https://www.knchr.org/Portals/0/KNCHR%20Alternative%20Report%20on%20Implementation%20of%20The%20CAT.pdf> accessed 27 May 2021.

228 KNCHR, ‘Report to the Committee Against Torture on the Review of Kenya’s Third Periodic Report on the Implementation of the Provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and/or Punishment’ (February 2020) para 207 <https://www.knchr.org/Portals/0/KNCHR%20Alternative%20Report%20on%20Implementation%20of%20The%20CAT.pdf> accessed 27 May 2021.

229 UN Committee Against Torture, ‘Concluding observations on the third periodic report of Kenya’ CAT/C/KEN/CO/3 (30 May 2022) para 49.

230 UN Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations on the Eighth Periodic Report of Kenya’ UN Doc CEDAW/C/KEN/CO/7 (4 April 2011), paras 4 and 25.

231 Ibid, paras 25 and 26.

232 UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the eighth periodic report of Kenya’ CEDAW/C/KEN/CO/8 (22 November 2017), para 13.

233 Ibid, para 4.

charging victims for reporting forms, especially in the case of disadvantaged groups of women and women in informal settlements, and the low prosecution rate in cases of gender-based violence against women."²³⁴

The CEDAW Committee recalled its general recommendation No. 35 (2017) on gender-based violence, updating general recommendation No. 19, and recommended that Kenya:²³⁵

- Increase the investigation, prosecution, and conviction rates in cases of SGBV throughout the country, including in informal settlements and in camps for internally displaced persons and refugees;
- Ensure that victims, including disadvantaged groups of women, and women in informal settlements, are not charged for obtaining reporting and medical forms, including P3 forms (the P3 form is the medical examination report form and is free of charge);
- Establish and strengthen existing shelters run by non-governmental organisations, including through adequate financial support, and ensure their accessibility to women and girls who are survivors of GBV, especially in remote areas, and to those with disabilities;
- Provide the judiciary, prosecutors, police and other law enforcement officials with adequate training on women's rights and on gender-sensitive investigation and interrogation procedures in cases of GBV against women, and train all humanitarian, military and police personnel on the prevention of sexual violence and on codes of conduct with regard to sexual exploitation and abuse.

6.1.7. The African Union

The Constitutive Act of the African Union has been ratified and implemented by Kenya.²³⁶ As per articles

4(h) and 9(1)(d), the African Union (AU) can set up an *ad hoc* tribunal to deal with the situation in Kenya. However, this possibility was not explored and the passage of the International Crime Act has debarred the AU from taking a direct role in ensuring justice in Kenya. However, the AU could still specify that a failure to cooperate with the ICC could trigger the responsibility of the Union to establish an *ad hoc* tribunal to try suspects.²³⁷ There are issues to consider when looking at the potential role of the AU in addressing impunity, including a lack of political will, considering that the rhetoric has not been matched with action.²³⁸

6.1.7.1. MAPUTO PROTOCOL

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as Maputo Protocol, is an international human rights instrument under the African Union that came into effect in 2005, guaranteeing rights on women's reproductive health and ending female genital mutilation among other provisions.²³⁹ Kenya accessed the Protocol in 2010, and in 2021, submitted its periodic report to the African Commission on Human and Peoples' Rights (ACHPR) on the status of its implementation of the Maputo Protocol (See Section 6.1.8).²⁴⁰ While highlighting the enactment of the Sexual Offences Regulations of 2012, the Marriage Act of 2014, Victim Protection Act of 2014, and the Domestic Violence Act of 2015, there was no mention of TJRC, or the Restorative Justice Fund. However, Kenya's periodic report noted that "[i]n light of Kenya's history of violence, [an] Organised Crimes Division should be established in [the] High Court, to provide a forum where perpetrators can be prosecuted and victims seek redress, including in relation to post-election violence of 2007 and 2008."²⁴¹

²³⁴ Ibid CEDAW Conclusions, para 22.

²³⁵ Ibid CEDAW Conclusions, para 23.

²³⁶ UN Treaties, 'Constitutive Act of the Union' (2001) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280089269> accessed 23 October 2020.

²³⁷ Japeth Biegion, 'Transitional Justice and Accountability for Sexual and Gender-Based Violence in Kenya: Issue and Approaches' in Waruguru Kaguongo and Godfrey F Musila (eds) 'Judiciary Watch Report: Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and Debates' (2009) Volume VIII, The Kenyan Section of the International Commission of Jurists 326 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379980 accessed 9 May 2023.

²³⁸ Ibid 327-328.

²³⁹ African Union, 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2005) https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf accessed 19 February 2023.

²⁴⁰ Republic of Kenya, 'Combined Report of The 12th And 13th Periodic Reports On The African Charter On Human And Peoples' Rights And The Initial Report On The Protocol To The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa' (Apr 2020) <https://statelaw.go.ke/wp-content/uploads/2020/11/COMBINED-REPORT-OF-THE-12TH-AND-13TH-PERIODIC-REPORTS-ON-THE-AFRICAN-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS-NOV-2020.pdf> accessed 19 February 2023.

²⁴¹ Ibid 18.

6.1.7.2. TRANSITIONAL JUSTICE POLICY

The African Union Transitional Justice Policy (AUTJP) is a mechanism dealing with *"not only the legacies of conflicts and violations but also governance deficits and developmental challenges"*.²⁴² The policy covers the issue of reparation, providing a list of what it entails, such as material reparation, truth, reconciliation, collective rehabilitation, and compensation.²⁴³ It recommends that its member states develop comprehensive and holistic policy frameworks for public reparation programmes, and that reparation should be *"prompt, adequate and effective in addressing the harm suffered by the victim."*²⁴⁴

6.1.8. The African Commission on Human and Peoples' Rights

The ACHPR and the African Court on Human and Peoples' Rights have jurisdiction in Kenya in cases where local remedies have been exhausted, or when it is evident that the procedure would be unduly prolonged.²⁴⁵ While Kenya is party to the Protocol to the African Court on the Establishment of an African Court on Human and Peoples' Rights, it has not submitted the declaration required in Article 34(6) of the Protocol, which would permit individuals and NGOs to directly petition the Court.²⁴⁶ However, the ACHPR may initiate cases involving the Government of Kenya or refer them to the African Court.²⁴⁷ At the time of drafting this report, the Court has yet to address a matter involving CRSV in Kenya.

In May 2017, the African Court issued a historic judgement concerning forced eviction of the Ogiek people by the Kenyan government. The Court found that Kenya had violated seven articles of the African Charter of Human and Peoples' Rights.²⁴⁸ Following the African Court's judgement, the ACHPR urged Kenya to engage and collaborate with the Ogiek people in meaningfully implementing the judgement on reparations.²⁴⁹ The ACHPR also called on the Kenyan National Human Rights Committee to play an active role in facilitating the implementation of the Court's order.²⁵⁰ In June 2022, the Court ordered measures of restitution, compensation, guarantees of non-repetition, and the establishment of a community development fund for the victims.²⁵¹

In November 2017, the ACHPR issued the 'Guidelines on Combating Sexual Violence and its Consequences in Africa', with a dedicated section on the right to holistic reparation, emphasising *"access to appropriate, efficient, accessible, timeous and long-lasting reparation"* with appropriate information regarding reparation mechanisms.²⁵² The Guidelines also strongly encourage member states to establish a dedicated National Fund for victims of sexual violence, with proper governance structures and transparency.²⁵³

Additionally, the Guidelines stress that there must be cooperation between these funds and relevant actors *"from the governmental, non-governmental, regional and international spheres in order to guarantee that the greatest possible number of victims is identified"*

242 African Union, 'Transitional Justice Policy' (Feb 2019) para 2 https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf accessed 19 February 2023.

243 Ibid paras 64-66.

244 Ibid para 66-iv.

245 African Charter on Human and Peoples' Rights, articles 50 and 56.5; Protocol to the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, article 6.

246 African Court of Human and Peoples' Rights, 'Jurisdiction' <https://www.african-court.org/wpafr/jurisdiction/> accessed 23 October 2020.

247 African Charter on Human and Peoples' Rights, articles 50 and 56.5; Protocol to the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, article 5.

248 African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Republic of Kenya', Application No. 006/2012 (2017)' Judgment (26 May 2017) para 227 https://www.escri-net.org/sites/default/files/caselaw/ogiek_case_full_judgment.pdf accessed 23 April 2023.

249 African Commission on Human and Peoples' Rights, 'The African Commission looks forward to Kenya's cooperation for the implementation of the judgement of the African Court on Reparations in Application 006/2012' (2017) <https://www.achpr.org/pressrelease/detail?id=644> accessed 17 March 2021.

250 Ibid.

251 African Court on Human and Peoples' Rights, 'African Commission On Human And Peoples' Rights V. Republic Of Kenya Application No. 006/2012' Judgment (Reparations) (23 June 2022) <https://www.african-court.org/cpmt/storage/app/uploads/public/62b/aba/fd8/62babafd8d467689318212.pdf> accessed 27 April 2023.

252 African Commission on Human and Peoples' Rights, 'The Guidelines on Combating Sexual Violence and its Consequences in Africa' (5 November 2017) para 53 <https://achpr.au.int/en/node/848> accessed 9 May 2023.

253 Ibid para 55.

and that they have access to appropriate reparation measures.”²⁵⁴ While detailing the principles, standards and measures for the fulfilment of the state’s reparation obligations, the Guidelines also highlight the spirit of co-creation in reparation programmes, urging states to ensure that survivors:

*“participate in designing, creating, implementing, monitoring and evaluating all reparation programs to guarantee that they meet the needs of victims”.*²⁵⁵

In August 2022, the ACHPR’s Rapporteurs on the Rights of Women issued a joint press statement, calling on the Government of Kenya to prevent the recurrence of election-related SGBV and to ensure accountability against any perpetrators ensuring effective remedies for victims.²⁵⁶ This was followed by an engagement with the Special Rapporteur on Women’s Rights, initiated by civil society organisations, led by Utu Wetu Trust and Grace Agenda.

6.2. Domestic legal and policy frameworks for CRSV and reparation

In Kenya, transitional justice and reparation are predominantly discussed in relation to the 2007-8 PEV. The end to the violence was brought about by the mediation of the AU and Panel of Eminent African Personalities who led the two main parties of the conflict into a peace accord aimed at achieving *“sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights”*.²⁵⁷ The parties signed the Kenya National Dialogues and Reconciliation Agreement (KNDR), which contained in item 4 of the Agenda, an undertaking to address long-term issues, including constitutional, legal and institutional reforms.²⁵⁸ In fulfilment of this agreement and to avoid a

repeat of 2007-8 PEV, efforts have been made to develop domestic legal and policy frameworks to tackle the unaddressed long-term historical injustices and human rights abuse that are believed to be behind the cycle of ethnic, political, and electoral-related violence since independence. This section will consider some of the key domestic frameworks in this effort including, the CIPEV and the TJRC. This section will also examine constitutional and institutional reforms as well as key legal and policy frameworks.

6.2.1. The Commission of Inquiry on Post-Election Violence (CIPEV)

The CIPEV (Waki Commission), named after the Commission Chair, Judge Philip Waki, was the outcome of the Kenya National Dialogues and Reconciliation (KNDR) Agreement signed on 28 February 2008. The mandate of the CIPEV included:²⁵⁹

- the investigation of the facts and surrounding circumstances related to the violence that followed the 2007 presidential election;
- the investigation of the role of state security agents during the violence; and
- making of recommendations for legal, political, and administrative measures considering its findings.

The CIPEV was established to operate for three months and was only able to obtain a 30-day extension to fulfil its mandate.²⁶⁰ This meant that the CIPEV was unable to conduct public hearings and investigations in key regions. Nevertheless, the report recorded 3,561 injuries, 1,133 deaths and heard testimony which estimated at least 900 sexual violence survivors for 2007-8 PEV.²⁶¹ The CIPEV also recognised that there were undoubtedly far more cases of CRSV than the reported 900 medical cases.²⁶²

²⁵⁴ Ibid para 55.4.

²⁵⁵ Ibid para 57.

²⁵⁶ African Commission on Human and People’s Rights, ‘Joint Press Statement on the need to prevent Sexual and Gender-Based Violence in the runup to the August 2022 Presidential Elections in the Republic of Kenya’ (4 Aug 2022) <https://guardian.ng/apo-press-releases/joint-press-statement-on-the-need-to-prevent-sexual-and-gender-based-violence-in-the-runup-to-the-august-2022-presidential-elections-in-the-republic-of-kenya/> accessed 9 May 2023.

²⁵⁷ South Consulting, ‘The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya’ (December 2011) para 1 <https://reliefweb.int/sites/reliefweb.int/files/resources/Background-Note.pdf> accessed 17 March 2021.

²⁵⁸ Ibid para 3.

²⁵⁹ CIPEV, ‘The Commission of Inquiry into Post Election Violence Report’ (2008) <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report> accessed 31 January 2021.

²⁶⁰ Ibid 3.

²⁶¹ Ibid 248, 334.

²⁶² Ibid 248.

Justice Philip Waki noted during the hearings that sexual violence was underreported, under-investigated and insufficiently addressed.²⁶³ The CIPEV recommended a *"complete change in attitude"* within the security forces, to better handle cases of sexual violence, as well as the need to pursue accountability for the 2007-8 PEV.²⁶⁴ To *"break the cycle of impunity"*, the CIPEV recommended a Special Tribunal with an international component consisting of non-Kenyan senior investigation and prosecution staff with the mandate to prosecute PEV-related crimes.²⁶⁵ This gave rise to the domestication of the Rome Statute through the International Crimes Act (ICA)²⁶⁶ and later the Kenya cases at the ICC as discussed in Section 6.1.1. The other key recommendations included the need to reform the Kenya Police Service and the Administration Police as well as establish an independent authority to investigate police conduct and provide civilian oversight.²⁶⁷

6.2.2. Constitutional and institutional reform

On 5 August 2010, the new Constitution of Kenya was passed through a peaceful referendum, marking an important milestone for the political history of Kenya. The Constitution established a progressive Bill of Rights which contains provisions relating to the protection of CRSV survivors and advancement of their rights. For instance, it safeguards *"any person from any form of violence from either public or private sources."*²⁶⁸ Also, the Constitution establishes that everyone has the right *"to the highest attainable standard of health, which includes the right to health care services, including reproductive health care."*²⁶⁹ After the promulgation of the Constitution, independent and oversight institutions were established such as the National Gender and Equality Commission (NGEC), the

Independent Electoral and Boundaries Commission (IEBC), the Kenya National Commission on Human Rights (KNCHR), the Independent Police and Oversight Authority (IPOA), among others.

The new Constitution introduced reforms in the judiciary and opened avenues for any person to approach the national courts when their rights or fundamental freedoms have been denied, violated, infringed upon, or threatened.²⁷⁰ These provisions allowed for the sexual violence survivors of the 2007-8 PEV and civil society organisations to seek reparation through a judicial process known as Petition 122 of 2013 (see Section 7.2.2.1).

6.2.3. The Truth, Justice and Reconciliation Commission (TJRC)

Once the TJRC was established, it operated from 2009 to 2013 with a mandate to inquire into the gross human rights and historical injustices that occurred from independence (1963) until the KNDR was signed (2008).²⁷¹ The TJRC had various phases which included *"statement-taking, research and investigations, hearings and report writing."*²⁷² At the end of the process, the TJRC had conducted reconciliation workshops and produced detailed reports with recommendations for a reparation framework, and for an implementation mechanism for the report's findings. The TJRC Report includes a specific section on CRSV, making express reference to sexual violence throughout Kenya's history of ethnic, political, and electoral-related violence. However, the published TJRC Report excluded Volumes IIA and IIC which provide lists and details of sexual violence incidents and gross human rights violations (these have been published elsewhere online).²⁷³

263 Ibid 240.

264 Ibid 269.

265 Ibid ix.

266 International Crimes Act 16 of 2008, <https://www.legal-tools.org/doc/816990/pdf/> accessed 26 April 2023.

267 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) 479 <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-ci-pev-final-report> accessed 31 January 2021.

268 Constitution of Kenya (2010), art 29(c).

269 Ibid art 43(1)(a).

270 Ibid art 258.

271 Truth, Justice and Reconciliation Commission Act 6 of 2008, art 5.

272 Truth, Justice, and Reconciliation Commission (TJRC), 'Final Report- TJRC Report Volume 1' (Seattle University Law School of Digital Commons, 2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/7/> accessed 31 January 2021.

273 OHCHR, PHR and UN WOMEN, 'Breaking the Cycles of Violence: Gaps in Prevention of Response to Electoral Related Sexual Violence' (31 December 2019) <https://www.ohchr.org/en/documents/reports/breaking-cycles-violence-gaps-prevention-and-response-electoral-related-sexual> accessed 31 March 2021.

The TJRC Report recommendations include, but are not limited to:²⁷⁴

1. acknowledgement and apology by the Kenyan government;
2. establishment of one-stop gender recovery centres for comprehensive medical, counselling and legal services to the victims and survivors;
3. implementing a mechanism for providing Reparation;
4. raising awareness on harmful gender-related cultural practices; and
5. enacting legislation to prohibit torture, etc.

A decade later, these recommendations correspond to many of the views and priorities outlined by the survivors in this Study. In accordance with Section 48 of the TJRC Act, the TJRC Commission submitted its Report, including findings, recommendations, and proposals for implementation to H.E. President Uhuru Kenyatta on 21 May 2013. In December 2013, the National Assembly amended Section 48 of the TJRC Act, requiring the TJRC Report to be debated in Parliament, with the Attorney General operationalising the implementation process. A decade later, the National Assembly has yet to debate the report in Parliament.

On 24 March 2019, the National Victims and Survivors Network (NVSN) tabled a Petition in the Senate, seeking, among other demands, that the Senate consider and adopt the TJRC Report, which the National Assembly failed to debate.²⁷⁵ On 16 May 2019, the Petition was committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights for consideration. The Committee recommended that a motion be introduced in the Senate to debate the matter. At the time of writing,

no debate, scrutiny or adoption of the TJRC Report has taken place in the Senate (these initiatives are discussed below in Section 8.2).

6.2.4. Legal and Policy Frameworks

The 2010 Constitution provides the primary basis for the state's obligations to prevent and respond to CRSV.²⁷⁶ Kenya has a variety of relevant legal and policy frameworks, including:

- Sexual Offences Act (2006);²⁷⁷
- International Crimes Act (2008);
- Victims Protection Act (2014);²⁷⁸
- National Policy on Prevention and Response to Gender-Based Violence (2014);
- National Policy on Gender and Development (2019), among others.

The **International Crimes Act** integrated provisions of the Rome Statute into Kenyan law, providing an avenue to pursue accountability for CRSV. Importantly, it adopts modes of liability that are recognised under the Rome Statute.²⁷⁹ As the International Crimes Act came into force in 2009, a year after the post-election violence, there remains the issue of whether this law can be applied retroactively.²⁸⁰ The establishment of an International Crimes Division was stalled, and the police failed to conduct further investigations into CRSV cases.²⁸¹ The multi-agency taskforce that was established by the Director of Public Prosecutions (DPP) in 2012 found that the bulk of sexual violence cases apparently cannot be prosecuted because survivors are not able to identify their assailants.²⁸² Furthermore, there is lack of physical and medical evidence to substantiate allegations. Statements were also weakened by the failure of the police to record corroborating evidence from victims.²⁸³

274 TJRC, 'Final Report- TJRC Report (Newspaper Supplement)' (2013) <https://digitalcommons.law.seattleu.edu/tjrc-core/1> accessed 31 January 2021.

275 NVSN, 'Public Petition by the National Victims and Survivors Network Appealing to the Senate of Kenya to Establish Measures Towards Rehabilitation Services to Victims of Past Gross Human Rights Violations as Identified through the Truth Justice and Reconciliation Process' (2019) <https://www.khrc.or.ke/images/docs/SenatePetition.pdf> accessed 9 May 2023.

276 Constitution of Kenya (2010), art 25–31, 53.

277 Sexual Offences Act 3 of 2006.

278 Victims Protection Act No. 17 of 2014 <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No%2017%20of%202014> accessed 27 April 2023.

279 HRW, 'I Just Sit and Wait to Die: Reparations for Survivors of Kenya's 2007–2008 Post-Election Sexual Violence' (2016) 74 <https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait-die/reparations-survivors-kenyas-2007-2008-post-election> accessed 2 May 2023.

280 Ibid 75.

281 Ibid 75.

282 Ibid 77.

283 Ibid.

Moreover, there is a general unwillingness of the government to ensure accountability for CRSV.²⁸⁴

In 2014, the **Victim Protection Act** was passed by the National Assembly, with the goal of providing assistance and protective measures to victims of crime, including ensuring access to reparation.²⁸⁵ As per the act, a Victim Protection Board was to be established,²⁸⁶ and it would be required to provide advice²⁸⁷ and submit annual reports to the Cabinet Secretary on the *"policies, programmes and activities related to the implementation of this Act."*²⁸⁸ The appointment of the members started to be announced, and the publication of annual reports commenced in 2019.²⁸⁹

In its 2021 report, the Victim Protection Board noted the need for raising awareness about its existence amongst stakeholders.²⁹⁰ The operational structure of the board is still under formation.²⁹¹ Despite these advances, there are flagrant gaps in relation to prevention, protection, accountability, and reparation measures for CRSV. In 2019 the OHCHR, UN Women and Physicians for Human Rights (PHR) published a study assessing the **gaps and challenges in the prevention and response to ERSV** during

the 2017 election.²⁹² The study considered the international, regional, and national legal and policy frameworks on ERSV and highlighted their concerns. The concerns included:²⁹³

- a lack of contingency planning and security to mitigate future risks of ERSV, despite knowledge of the cycle of electoral-related violence;
- delays in the implementation of laws and policies resulting in inadequate resource allocation and provision of protective measures;
- inconsistencies in Kenya's legal framework, such as a lesser penalty for sexual violence under the Election Offences Act, compared to the Sexual Offences Act;²⁹⁴
- a lack of government acknowledgement of the violations suffered by survivors;
- the failure to adopt and debate the TJRC Report in Parliament;
- the pending adoption of the Restorative Justice Fund.

These issues have now been raised repeatedly by various UN bodies (see Sections 6.1.3 & 6.1.4) and will be elaborated below, in the section on the Status of Implementation of Reparation.

284 Ibid 78.

285 Victims Protection Act No. 17 of 2014, art 3; OHCHR, PHR and UN WOMEN, 'Breaking the Cycles of Violence: Gaps in Prevention and Response to Electoral Related Sexual Violence' (31 December 2019) accessed 31 March 2021 <https://www.ohchr.org/en/documents/reports/breaking-cycles-violence-gaps-prevention-and-response-electoral-related-sexual> accessed 31 March 2021.

286 Victims Protection Act No. 17 of 2014, art 31.

287 Ibid art 32.

288 Ibid art 33.

289 Republic of Kenya, 'The Kenya Gazette' (2 Feb 2018).

290 Victim Protection Board, 'Annual Report 2021' (30 Sep 2021), chapter 4 <https://statelaw.go.ke/wp-content/uploads/2022/12/VPB-Annual-Report-2021.pdf> accessed 27 April 2023.

291 Ibid, chapter 2.6.

292 OHCHR, PHR and UN WOMEN, 'Breaking the Cycles of Violence: Gaps in Prevention of Response to Electoral Related Sexual Violence' (31 December 2019) <https://www.ohchr.org/en/documents/reports/breaking-cycles-violence-gaps-prevention-and-response-electoral-related-sexual> accessed 31 March 2021.

293 Ibid.

294 Elections Offences Act 37 of 2016.



Judiciary building, Nairobi, Kenya
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VII. STATUS OF IMPLEMENTATION OF REPARATION

Although there has been no reparation for CRSV, there are some benchmarks that must be stressed, including: the government's apology for 'all past wrongs', the announcement of a Restorative Justice Fund, access to limited assistance for internally displaced persons, and an attempt at ensuring accountability through a Constitutional Petition made possible by the 2010 Constitution.

7.1. Government acknowledgement

In response to the TJRC Report (discussed in Section 6.2.3) recommending an acknowledgement and public apology for gross human rights violations between 1963 and 2008, President Uhuru Kenyatta has **apologised in parliament for historical injustices** during the State of the Nation Address (SONA) on 26 March 2015.

President Uhuru Kenyatta stated:

*"To move forward as one nation, I stand before you today on my own behalf, that of my government and all past governments, to offer the sincere apology of the Government of the Republic of Kenya to all our compatriots for all past wrongs."*²⁹⁵

In his general apology, he stated that the TJRC Report was before the House, and stated that:

*"I urge Honourable members to process it without undue delay."*²⁹⁶

The SONA was made to fulfil the constitutional obligation requiring the President to annually report in an address, measures and progress towards the realisation of national values.²⁹⁷ The Chief Justice Willy Mutunga has also made an official apology, which he stated was in line with the recommendation of the TJRC.²⁹⁸

President Uhuru Kenyatta referenced the 2007-8 PEV as a past wrong, acknowledging the 1,300 dead and more than 650,000 individuals displaced.²⁹⁹ However, there was no acknowledgment of sexual violence, despite a reference to SGBV in the context of counterterrorism.

The President also announced in his speech that he had instructed the Treasury to establish a Fund of KES 10 billion (approx. USD 90 million), to be used for restorative justice,³⁰⁰ later referred to as the **Restorative Justice Fund** (RJF).

On 3 December 2015, Hon. Abdullahi Diriyee, Wajir South MP and Chair of the Kenya Parliamentary Human Rights Association (KEPHRA) on behalf of the National Victims and Survivors Network (NVSN) tabled a Petition in the National Assembly to debate the TJRC Report. The Majority Leader of the National Assembly Hon. Aden Duale pledged to prioritise debate of the report on 9 February 2016.³⁰¹ A second petition by NVSN was tabled on 24 March 2019, this time before the Senate, demanding it to consider and adopt the TJRC Report, as the National Assembly had failed to do so (See Section 6.2.3). By the time of drafting this Study, the debate and adoption of the TJRC report is yet to take place in the National Assembly.

²⁹⁵ Office of the President of the Republic of Kenya, 'Speech by His Excellency Hon. Uhuru Kenyatta, CGH., President and Commander in Chief of the Forces of the Republic of Kenya during the State of the Nation Address at Parliament' (26 March 2015) para 85 <https://www.kara.or.ke/Speech%20by%20H.E.%20Hon%20Uhuru%20Kenyatta%20During%20the%20State%20of%20the%20Nation%20Address%20at%20Parliament%20Buildings.pdf> accessed 1 June 2021.

²⁹⁶ Ibid para 78.

²⁹⁷ Constitution of Kenya 2010, art.132 (1).

²⁹⁸ Tom Maliti, 'Kenyan President and Chief Justice Apologise for Past Injustices' (International Justice Monitor, 9 April 2015) <https://www.ijmonitor.org/2015/04/kenyan-president-and-chief-justice-apologize-for-past-injustices/> accessed 1 June 2021.

²⁹⁹ Ibid para 76.

³⁰⁰ Ibid para 83.

³⁰¹ Journalists For Justice, 'Parliament to debate the TJRC report after petition from victims is tabled' (4 December 2015) <https://jifjustice.net/parliament-to-debate-the-tjrc-report-after-petition-from-victims-is-tabled/> accessed 16 May 2021.

In 2017, the Kenya National Commission on Human Rights (KNCHR) developed a framework to facilitate reparation through the Restorative Justice Fund. This was undertaken during a multi-sectoral consultation with the Office of the Attorney General and the Department of Justice, together with the Kenya Transitional Justice Network, NVSN, the Kenya Law Reform Commission (KLRC) and the Office of the UN High Commissioner for Human Rights.³⁰² Two documents were developed:

- the Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017 which is anchored to the Public Finance Management Act;³⁰³
- the Reparations for Historical Injustices Fund Policy.

The Regulations and the Policy provide the framework and guidelines needed to operationalise the Fund. However, the two documents have not progressed since they were submitted to the Office of the Attorney General and the Department of Justice in 2017.³⁰⁴ It would seem that there are political blockages, even though President Uhuru Kenyatta reaffirmed his commitment to design a KES 10 billion Fund *“to heal the wounds of historical grievances which have long been poisoned by our politics and strained communal relations”* in his State of the Nation address on 4th April 2019.³⁰⁵

There have been no developments from the government on this matter since the address,³⁰⁶ despite recommendations made by the UN Human Rights Council, the Human Rights Committee, CAT and CEDAW Committees, in which they urge Kenya to acknowledge sexual violence survivors, implement reparation measures and programmes including the adoption of the TJRC report and the RJF framework (see Section 6.1).

Outside the government, there have been parallel initiatives to push for reparation. For example, the Kenya Reparations Bill 2019 was proposed by Hon. Gladys Boss Shollei, currently the Deputy Speaker of the National Assembly, whilst waiting for the parliament's consideration of the TJRC report.³⁰⁷

7.2. Access to reparation

7.2.1. Internally Displaced Persons (IDPs)

After the 2007-8 PEV, there have been various government initiatives aimed at addressing the plight of Internally Displaced Persons (IDPs). There have been efforts to return and integrate IDPs including the Operation Rudi Nyumbani (Return Home), Operation Ujirani Mwema (Good Neighbourliness) and Operation Tujenge Pamoja (Build Together) which were designed to build a safe environment for the return of displaced persons.³⁰⁸

These initiatives have been criticised for failing to meet the expectations of IDPs and for ineffective implementation. With the enactment of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act in 2012,³⁰⁹ it was expected that the government would create a comprehensive IDP database, and that the database would inform transparent and accountable disbursement of funds, among other issues. However, there was a haphazard government disbursement of funds to IDPs in a flawed process, which resulted in IDPs receiving different amounts or nothing at all.³¹⁰ For example, in Operation Rudi Nyumbani, the government offered *“transportation by lorry, and in*

302 Perpetua Akoth Adar, 'Domestic accountability through strategic litigation: Towards redress and reparations for Kenya's 2007-2008 post-election sexual and gender-based violence' (2022) 22 African Human Rights Law Journal 219-220 <https://www.ahrj.up.ac.za/adar-pa> accessed 6 August 2022.

303 Public Finance Management Act 18 of 2012.

304 KNCHR, 'KNCHR Third Cycle UPR Report' (17 July 2019) <https://www.knchr.org/Portals/0/InternationalObligationsReports/KNCHR%203RD%20CYCLE%20UPR%20REPORT.pdf?ver=2019-07-22-084058-850> accessed 9 July 2021.

305 Parliament of Kenya, 'Joint Sitting Of The National Assembly And The Senate' (4 April 2019) <http://www.parliament.go.ke/sites/default/files/2019-04/Hansard%20Report%20-%20Joint%20Sitting%20-%20Thursday%2C%204th%20April%202019%28P%29.pdf> accessed 9 May 2023.

306 Ibid.

307 Walter Menya, 'Gladys Shollei seeks justice for victims of rights abuses (Nation, 30 June 2019) <https://nation.africa/kenya/news/gladys-shollei-seeks-justice-for-victims-of-rights-abuses-181990> accessed 9 May 2023.

308 Megan Anne Shutzer, 'The Politics of Home: Displacement and Resettlement in Postcolonial Kenya' (2012) 71(3) African Studies 346.

309 Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 56 of 2012.

310 Robert Waweru, 'Challenges Faced in the Resettlement of Internally Displaced Person in Kenya' (5 June 2018) <https://halshs.archives-ouvertes.fr/halshs-01807710/document> accessed 2 July 2021.

some cases, fiscal compensation amounting to either 10,000 KES (around US\$120) or 25,000 KES (around US\$300) for landowners who had lost one's home."³¹¹ However, accounts from beneficiaries have indicated that people who were from the same household were at times given different amounts, and that there was alleged inequality in the resettlement process. The perception emerged that IDPs from the ruling party strongholds received more compensation and attention than IDPs from opposition regions.³¹²

Currently, there remain IDPs who still are demanding recognition, assistance, and compensation from the government.³¹³ Furthermore, no other category of victims was compensated by the government through these processes. This approach has fostered inequalities between victims and affirmed the perception that the Kenyan government does not care for CRSV survivors.

7.2.2. Judicial remedies

7.2.2.1. CONSTITUTIONAL PETITION 122 OF 2013

In February 2013, six women and two men survivors of the 2007-8 ERSV filed a petition at the Constitutional and Human Rights Division of the High Court of Kenya.³¹⁴ The eight survivor-petitioners represented different types of sexual violence that occurred during 2007-8. Other petitioners included NGOs such as the Coalition on Violence Against Women (COVAW), the Independent Medico-Legal Unit (IMLU), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya Section) and Physicians for Human Rights (PHR). The forms of sexual and gender-based violence identified in the petition were "*rape, attempted*

rape, defilement, attempted defilement, gang rape, forced pregnancy, the deliberate transmission of HIV or any other life threatening sexually transmitted disease, sexual assault, other indecent acts and other gender-based physical violence."³¹⁵ The petition notes that men also experienced other forms of sexual violence, such as "*sodomy, forced circumcision, and mutilation or forced amputation of their penises.*"³¹⁶ Perpetrators referred to in the petition included police officers and private citizens.³¹⁷

The petitioners' main contention was the State's failure to fulfil its human rights obligations as per the Constitution of Kenya and other regional and international human rights instruments, including comprehensive psychosocial healthcare to the victims of ERSV, the investigation and prosecution of perpetrators, and the implementation of reparation programmes, among others.³¹⁸

The petition provided significant detail about the State's responsibility to provide effective remedies and reparation but also detailed its specific shortcomings in providing the measures to the survivors of PEV-related sexual violence.

In a landmark judgement, on 10 December 2020, the High Court of Kenya at Nairobi ruled in favour of four of the eight survivor-petitioners.³¹⁹ Of the four successful petitioners, three were attacked by police officers (5th, 6th and 9th petitioners) and one was attacked by private citizens (8th petitioner). The other petitioners (7th, 10th, 11th and 12th) who were unsuccessful, were attacked by private individuals.

There were three key declarations made by the High Court in its decision:

311 Megan Anne Shutzer, 'The Politics of Home: Displacement and Resettlement in Postcolonial Kenya' (2012) 71(3) African Studies 346, 358).

312 Robert Waweru, 'Challenges Faced in the Resettlement of Internally Displaced Person in Kenya' (5 June 2018) <https://halshs.archives-ouvertes.fr/halshs-01807710/document> accessed 2 July 2021.

313 Kibisu Kabatesi, 'Festering wound of IDPs needs definite closure, not cover-up' (*The Star*, 2 January 2021) <https://www.the-star.co.ke/siasa/2021-01-02-festering-wound-of-idps-needs-definite-closure-not-cover-up/> 25 July 2021.

314 Constitutional Petition No. 122 of 2013, filed by Coalition on Violence Against Women (COVAW) & 11 others v Attorney General of the Republic of Kenya & 5 others (20 February 2013) <https://phr.org/wp-content/uploads/2019/09/petition-122of2013.pdf> accessed 28 April 2023.

315 Ibid para 25.

316 Ibid para 26.

317 Ibid para 35.

318 Ibid paras 36-56.

319 High Court of Kenya At Nairobi: Constitutional And Human Rights Division, 'Coalition on Violence Against Women (COVAW) & 11 others v Attorney General of the Republic of Kenya & 5 others - Petition No. 122 Of 2013' (10 December 2020) <https://phr.org/wp-content/uploads/2020/12/NAIROBI-HC-CHR-PETITION-NO-122-OF-2013-COVAW-11-OTHERS-V-A.G.-10-OTHERS-4.pdf> accessed 28 April 2023.

- The court affirmed that the state owed a duty to refrain from causing harm and to pursue those whose acts caused harm to the three survivor-petitioners attacked by police officers;³²⁰
- The court established that Kenya had a positive obligation to investigate and prosecute SGBV-related crimes in relation to the 2007-8 PEV;³²¹
- The court established, through its declaratory orders, an important recognition that sexual violence, including rape and forced circumcision, constitute forms of torture.³²²

Though the court acknowledged that survivors of the 2007-8 PEV did not receive medical or psychosocial support, and that some of them were denied treatment in public hospitals, it also ruled that the petitioners failed to prove that they were personally denied or precluded from accessing these services.³²³ The ruling does not engage with victims' ongoing right to "*adequate, effective and prompt reparation*" which should be "*proportional to the gravity of the violations and the harm suffered*" (See Section 6.1.7.2).³²⁴ The issue is not whether they were personally denied treatment or not, but instead that their rights have and continue to be denied with respect to accessing reparation.

On a separate note, the services that most survivors received were from non-governmental providers, exemplifying the inadequacy in legislation and state action. Nevertheless, the petitioners hail the decision as it was the first official recognition of victims of PEV-related sexual violence, affirming the state's obligations to prevent and respond to ERSV/CRSV. They have filed a partial appeal at the Court of Appeal, on the grounds of existing gaps in the High Court's decision regarding the victims' right to reparation.³²⁵

7.3. Key challenges and obstacles faced in accessing remedies

In addition to the severe social stigma experienced when speaking out or going public, the lack of psychosocial support, legal assistance and protection are all significant issues for survivors in Kenya. The ICC cases, which could have resulted in reparation, was partly frustrated by witness tampering and threats (see section 6.1.1). Reprisals against victim petitioners were also a key challenge in the Constitutional Petition 122 of 2013.

Another challenge has been the lack of awareness, or neglect of international best practice standards with respect to victims' right to a remedy and reparation. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation,³²⁶ provide a framework for holistic reparation that address the multi-faceted impacts of the harm, (namely restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition).³²⁷ However, the Kenyan judiciary in the Constitutional Petition 122 of 2013, focused merely on compensation. It set a problematic precedent whereby survivors' entitlement to rehabilitation, medical or psychosocial care should be based on evidence that these services were denied to them at the time, rather than as an inherent right based on their reparative needs. Whether they accessed any services previously, and who provided them, is immaterial. If survivors continue to suffer the impacts of the harms inflicted on them, they must be repaired by duty bearers.

The court ordered the Kenyan government to pay each of the four successful survivor-petitioners KES four million (approx. USD 36,781) as general damages for the violation of their constitutional rights.³²⁸ While

320 Ibid para 27.

321 Ibid 172.

322 Ibid.

323 Ibid.

324 UN Basic Principles and Guidelines on Victims' Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, GA Resolution 60/147.

325 PHR, 'Survivors of Post-Election Sexual Violence in Kenya Appeal Elements of Recent Ruling, Seek Justice and Redress for All Survivor-Petitioners' Press Release (11 November 2021) <https://phr.org/news/survivors-of-post-election-sexual-violence-in-kenya-appeal-elements-of-recent-ruling-seek-justice-and-redress-for-all-survivor-petitioners/> accessed 28 April 2023.

326 UN Basic Principles and Guidelines on Victims' Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, GA Resolution 60/147.

327 Ibid.

328 High Court of Kenya At Nairobi: Constitutional And Human Rights Division, 'Coalition on Violence Against Women (COVAW) & 11 others v Attorney General of the Republic of Kenya & 5 others - Petition No. 122 Of 2013' (10 December 2020) <https://phr.org/wp-content/uploads/2020/12/NAIROBI-HC-CHR-PETITION-NO-122-OF-2013-COVAW-11-OTHERS-V-A.G.-10-OTHERS-4.pdf>

there was no declaration granting similarly affected CRSV survivors the same relief, the court's reasoning makes it possible for other CRSV survivors to file their own cases to obtain general damages. However, litigation is not an accessible avenue for all survivors, given the time and resources required. This case lasted seven years, had numerous delays, and was heard by six different judges due to changes in the judiciary,

including death and recusal, among other factors. While it is a landmark judgment in many respects, the damages remain unpaid. The case is still ongoing in the Court of Appeal as of January 2023, while more than 10 years have passed. As outlined by one of the legal representatives, *"there is considerable strain that this case put on the survivor-petitioners [...] that must be considered ahead of any future litigation."*³²⁹



329 Interview with Lydia Muthiani, Expert Consultant and Legal Representative of Victims in the Constitutional Petition 122 of 2013.



VIII. ANALYSIS OF OPPORTUNITIES AND THREATS FOR REPARATION

| 8.1. Mapping of key stakeholders

8.1.1. National CSO stakeholders

Kenya has a robust, well informed, and capable civil society, that has worked with international partners and the government on reparation and CRSV for many years. Although most civil society organisations operate from Nairobi, many have networks in or carry out projects in at least three other counties. Other organisations, like the CSO Network in Kisumu, operate regionally. There are also networks and coalitions that collaborate informally and are made up of various national civil society stakeholders. At times, the informal structure of these networks has prevented any single organisation from being singled out or attacked by government.

There are three main networks:

- the Kenya Transitional Justice Network (KTJN), led by the International Center for Transitional Justice (ICTJ), is an inclusive grouping of all the NGOs working on transitional justice;
- the National Victims and Survivors Network (NVSN) is a member-based network of individuals and groups of survivors of gross human rights violations and historical injustices from the colonial era to date. It acts and advocates as a collective;
- Kenyans for Peace with Truth and Justice (KPTJ), housed at the Africa Centre for Open Governance (AfriCOG), is a coalition of over 30 Kenyan and East African legal, human rights, and governance organisations, together with ordinary Kenyans and friends of Kenya, convened in the immediate aftermath of the 2007-8 PEV.

KTJN together with NVSN have led the work on pushing for the implementation of the TJRC report and for the Restorative Justice Fund (see Section 7.1). Under the auspices of the KPTJ, civil society actors

have advocated for accountability in relation to the ICC's Kenya cases³³⁰ and are currently monitoring the implementation and enforcement of the KNDR mediation agreement. Formally, the organisations involved in the strategic litigation of cases as petitioners (see VII on Status of Implementation of Reparation) are Coalition on Violence against Women (COVAW), Physicians for Human Rights (PHR), the International Commission of Jurists-Kenya (ICJ- Kenya Section), and the Independent Medico-Legal Unit (IMLU).

Some of the key national stakeholders include Grace Agenda, CSO Network (Kisumu), ICJ-Kenya, Kituo Cha Sheria, Kenya Human Rights Commission (KHRC), Katiba Institute, AfriCOG, COVAW, Constitution and Reform Education Consortium (CRECO), Federation of Women Lawyers (FIDA-Kenya), IMLU, KPTJ, KTJN and NVSN.

8.1.2. Government offices and Commissions

The Kenya National Commission on Human Rights (KNCHR) is a national human rights institution (NHRI) established in line with the Principles relating to the Status on NHRIs (Paris Principles), and investigates, monitors, and promotes the implementation of Kenya's national and international human rights obligations. Although KNCHR is government funded, it is a constitutionally independent body both legally and in practice. KNCHR has served as the bridge between the Kenya government and human rights CSOs and provides reports to various UN human rights bodies.

The Office of the Attorney General and the Department of Justice are the government offices tasked with issues relating to reparation, including the operationalisation of the Historical Injustices Fund, and the implementation of the TJRC recommendations and draft Reparations for Historical Injustices Fund legal framework (see Section 6.2).

330 See Kenyan Civil Society Statements and Letters to the ICC and at the Assembly of States Parties to the Rome Statute https://kptj.or.ke/category/kptj-statements_letters/ accessed 5 July 2021.

8.1.3. Key international stakeholders

International actors who have played active roles in the journey towards reparation in Kenya include: the OHCHR, the UN Special Adviser on CRSV, Physicians for Human Rights (PHR), Human Rights Watch (HRW), ICTJ, Amnesty International (Regional Office), REDRESS Trust, Coalition for the International Criminal Court (CICC) and the ICC TFV.

documents were submitted to the Department of Justice and Attorney General's Office, which have not yet been adopted or progressed:

- the Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017, which are attached to the Public Finance Management Act; and
- the Reparations for Historical Injustices Fund Policy.

| 8.2. Reparation advocacy initiatives

Advocacy and other initiatives towards the realisation of reparation in Kenya have been taking place for several years. Some highlights include:

8.2.1. Parliamentary petitions

In 2015, civil society actors including survivors campaigned and petitioned for the discussion of the TJRC Report issued in 2013 in the National Assembly. The Report was only partially published (sections on Sexual Violence and other Human Rights Violations were omitted) and was never debated by the National Assembly in 2015 (See Section 7.1).

8.2.2. Development of a framework for a "Reparations for Historical Injustices Fund"

In 2015, the Kenya National Commission on Human Rights (KNCHR) led a multisectoral consultation to operationalise the "Reparation for Historical Injustices Fund" announced by President Kenyatta in 2015. Civil society partners included members of the Kenya Transitional Justice Network, National Victims and Survivors Network (NVSN), the Kenya Law Reform Commission (KLRC) as well as the Office of the UN High Commissioner for Human Rights. In 2017, two

8.2.3. Petition to the senate

In 2019, NVSN tabled petitions to the Attorney General and in the Senate, seeking among other demands, that the Senate consider and adopt the TJRC Report that the National Assembly failed to consider.³³¹ Thereafter, Jaqueline Mutere, from Grace Agenda and Wachira Waheire, Coordinator of NVSN, both survivor-advocates, were invited to make presentations to the Standing Committee on Justice, Legal Affairs and Human Rights.

On 15th September 2020, the Committee submitted a report to the Senate, recommending that the issues be tabled for debate in the Senate.³³² The Committee observed that while the public apology issued by the President and his initiative to establish a Restorative Justice Fund were important in "*laying ground for healing and reconciliation processes to commence among the Kenyan people*",³³³ the failure of the state to operationalise the reparation framework unduly lengthens the suffering of survivors and their families. The Committee recommended that a motion be introduced in the Senate to formally consider the TJRC report and implement its recommendations. Such a deliberation could also invite the county governments to find ways of supporting reparation initiatives in their own capacity, such as budget allocations for local memorials, remembering and honouring the victims and survivors, and symbolising the "*non-recurrence of violations*".³³⁴ The recommendations were never debated.

331 NVSN, 'Public Petition by the National Victims and Survivors Network Appealing to the Senate of Kenya to Establish Measures Towards Rehabilitation Services to Victims of Past Gross Human Rights Violations as Identified through the Truth Justice and Reconciliation Process' (2019) <https://www.khrc.or.ke/images/docs/SenatePetition.pdf> accessed 9 May 2023.

332 Republic of Kenya Standing Committee on Justice, Legal Affairs and Human Rights, 'Report on Consideration of a Petition by Bernard Waheire and Jaqueline Mutere on Implementation of the Report of the Truth, Justice and Reconciliation Commission (TJRC)', (15th September 2020). <http://www.parliament.go.ke/sites/default/files/2022-08/Report%20on%20Consideration%20of%20a%20Petition%20by%20Bernad%20Waheire%20%26%20Jacqueline%20Mutere%20on%20Implementation%20of%20the%20report%20of%20TJRC.pdf> accessed 9 May 2023.

333 Ibid 18.

334 Ibid 19.

8.2.4. Survivors Speak event

On 22 June 2021, for the International Day for the Elimination of Sexual Violence in Conflict (19 June), civil society actors Jaqueline Mutere, Founder of Grace Agenda and Betty Abade-Okeru, Director of CSO Network (Kisumu), alongside the Kenya Transitional Justice Network and NVSN, with support from the Global Survivors Fund, organised a high-level event “Survivors Speak” to engage government leaders. The event was live-streamed and triggered online participation in a campaign that reached over 2.8 million people through the hashtags #SurvivorsSpeakKE and #ActForReparations.

| 8.3. Opportunities for reparation

Whilst there is hopelessness amongst survivors and fatigue amongst activists, there are significant opportunities to progress. The Restorative Justice Fund for Historical Injustices was announced in 2015, and there is a possibility to operationalise it if there is political will. The 2020 landmark High Court ruling, while on appeal, acknowledges the harm caused to survivors and affirms victims’ right to reparation and government failings. It provides opportunities for further advocacy, as do the Kenyan government’s commitments made at the 2020 UN Human Rights Council (see Section 6.1.3 above).

In response to the Survivors Speak event in June 2021, there have been positive commitments from at least three new government allies, including Member of Parliament Hon. Esther M Passaris; Leah Nyambeki, Vice-Chairperson of the Victim’s Protection Board; and Hon. Dr. Linah Jebii Kilimo, Chief Administrative Secretary, Ministry of Public Service and Gender.

There is a sense of urgency with respect to ensuring reparation for the victims and survivors of CRSV, owing to the work of activists, and the changes in the government’s agendas over time, especially around election periods:

“It is difficult to rope in the representatives on matters of GBV when we are in the context of elections, because by then they are busy with issues of economy and post-election agendas.”³³⁵

Election periods do not seem to present new opportunities, the focus on reparation temporarily shifts towards preventing renewed violence, involving, sensitisation meetings with state officials, seeking to obtain commitments, and preparing for the worst.³³⁶

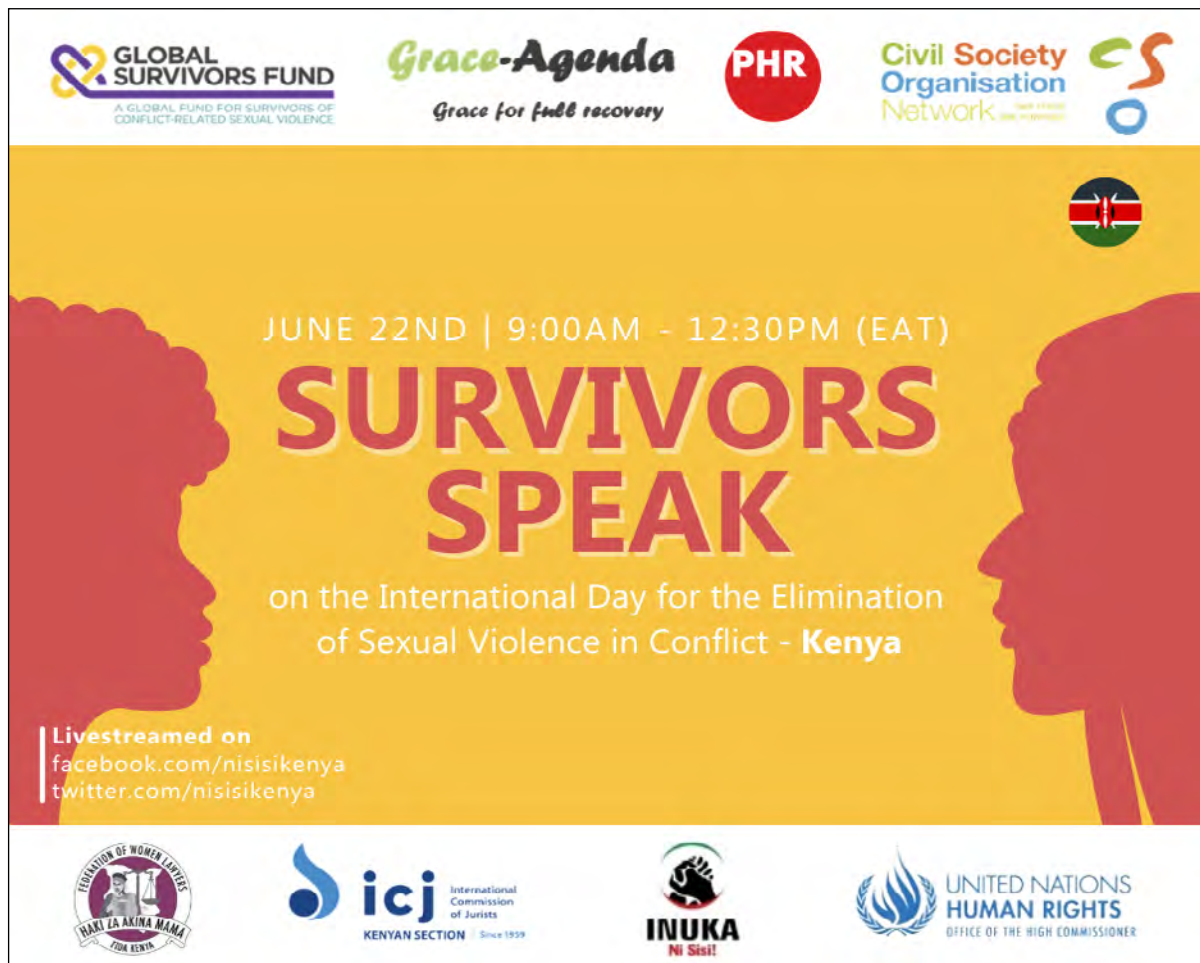
Following the August 2022 elections, the key to a successful reparation agenda for CRSV survivors includes a strong survivor movement, complemented by commitments from civil society organisations and other allies, including international partners. These networks and collaborations are already in place and together have a large enough capacity to instil change. Grace Agenda organised a campaign named 16 Days of Activism in December 2022, to continue highlighting the struggles of the survivors of the 2007-08 PEV. In an open letter to the new President William Ruto, Jaqueline Mutere appealed:

“Your Excellency, we take this opportunity to share once again that we are still crying out for justice through reparations. [...] Survivors have children, fistula, disabilities, medical conditions, HIV infection, pelvic diseases, mental health conditions, and children born of the violations. We have endured stigma, ridicule, disbelief, rejection, and ostracized from our families and communities. The children are called accursed, tagged, used and abused. If it wasn't for the resilience of their mothers, many would have been lost. Your Excellency, as mothers and children, this has been our life for 14 years, presenting petitions and pleas to parliament, the senate and the attorney general.”³³⁷

335 Interview with Jaqueline Mutere, Director, Grace Agenda (7 July 2022).

336 Ibid.

337 Jaqueline Mutere, ‘Letter to the President: Reparation for sexual violence survivors and request for interim reparative measures’ (*The Star*, 25 November 2022) <https://www.the-star.co.ke/opinion/star-blogs/2022-11-25-mutere-reparation-for-sexual-violence-survivors-and-request-for-interim-reparative-measures/> accessed 9 May 2023.



Poster of the "Survivors Speak" event, organised to commemorate the International Day for the Elimination of Sexual Violence in Conflict (19 June). 22 June 2021, Nairobi, Kenya
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One of the main challenges ahead is that initiatives, campaigns and targeted advocacy campaigns will need to be sustained over time. Many survivors and activists have lost hope and have moved on to other work. Opportunities to keep addressing the issues and making progress requires:

- Sustaining the momentum and sense of empowerment gained by survivors through this Study, and other initiatives, enabling survivors to engage the general public, build a community of support and speak out to their leaders;
- Following up commitments made by officials and political leaders during the Survivors Speak Event on 22 June 2021;
- Taking forward the messages delivered during the 16 Days of Activism campaign that ended on 16 December 2022;
- Following up on the continued operation of the Victims Protection Board in ensuring proper implementation of the Victim Protection Act No. 17 of 2014;
- Sustaining momentum around the Constitutional Petition 122 of 2013 currently on appeal as the Civil Appeal Case Number E 645 of 2021 (the second anniversary of the judgement was on 10 December 2022), and pursuing further strategic litigation;
- Supporting and giving visibility to the Memorialisation Project being put forward by the National Victims and Survivors Network, ensuring that it reflects the scale and impact of CRSV; and
- Creating momentum and empowerment of survivors to appeal to their area leaders, particularly with County level leaders, for instance in Kisumu, where connections between civil society advocates and leaders are already established.

8.4. Threats to effective reparation for CRSV

There are several threats and impediments to CRSV in Kenya. These include:

- **Lack of political will:** After 15 years of shifting goal posts, CRSV survivors are still waiting for reparation. Successive governments have consistently only acknowledged victims as those individuals killed and displaced by the violence, not recognising CRSV survivors or other victims. Attempts to stop CRSV survivors claiming compensation through shaming, threats and intimidation have also been reported.
- **Survivor fatigue and hopelessness:** Based on survivor testimonies, their experiences with sexual violence have been devastating, and in spite of 15 years of efforts, reparation is still elusive. Maintaining momentum and ensuring progress is fundamental in this climate of fatigue and hopelessness.
- **Lack of provision for children born of rape, now 15 years old:** the untold devastating psychological, social and economic impacts on

hundreds of children born of rape continues to be neglected, while the children from 2007-8 are now adolescents with lost opportunities and deep psychological, emotional and socio-economic scars.

- **Lack of comprehensive figures:** The numbers generally quoted are a small fraction of those estimated by experts on the ground. When experts have made assessments in some regions, figures have been far greater than reported, especially for male survivors. *"If we had a study focused on the numbers, we would all be shocked by the outcome"*, says Betty Abade-Okero, Director, CSO Network operating in Western Areas.
- **The current culture of impunity, political intransigence and 'state capture':** The personalisation of the Presidency and deliberate weakening of public institutions, which has grown under each President since independence is a real challenge. It underlies a *"widespread belief that the presidency brings advantages for the President's ethnic group"*³³⁸, which, in part, explains communities' motivations to commit violence to obtain or keep power with no regard for the consequences of their actions or for the impacts on their fellow citizens.

338 CIPEV, 'The Commission of Inquiry into Post Election Violence Report' (2008) viii <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> accessed 9 May 2023.



A male survivor at the "Survivors' Hearing on Reparations" event, that lead to the creation of the Kinshasa Declaration. Kinshasa, 2021.

© Jaqueline Mutere



IX. RECOMMENDATIONS

9.1. Recommendations to the Government of Kenya

Accountability

- The Office of the Attorney General and Department of Justice should address impunity by investigating and prosecuting CRSV crimes committed in 2007-8 and 2017;
- The President should officially and specifically recognise the status of survivors of CRSV and the specific harms they have suffered;
- The Government should take immediate action to publish the full TJRC report, including Volumes IIA and IIC, followed by a parliamentary debate that includes discussion of sexual and other violence; and implement its recommendations for reparation to victims of CRSV;
- Government agencies should engage with the International Criminal Court Trust Fund for Victims assistance programme and use lessons learned from this project to adopt a State-led national reparation programme;
- Implement symbolic measures such as memorialisation, educational and cultural interventions, and legal and institutional reforms to guarantee non-recurrence in a process led by survivors;
- The Ministry of Public Service, Gender and Affirmative Action should create a Task Force, comprised of key actors in this space, including survivors to onboard delivery partners within the Government of Kenya to make the right to reparation a reality.

Restorative Justice Fund

- The Office of the Attorney General and Department of Justice should adopt the draft Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017 and Policy, to operationalise the Restorative Justice Fund.

This includes:

- Award survivor-centred and holistic reparation specifically for survivors of CRSV, including financial compensation, or other measures as suggested by survivors, such as rehabilitation measures, education, livelihood empowerment, medical and psychosocial support;
- Put in place special measures to provide children born of rape with psychosocial support, access to education, and other measures to adequately address the consequences of the violations and the stigma and rejection they have faced;
- A secure and independent process, staffed with adequately trained personnel, to safely register different categories of victims, including CRSV survivors, identifying the impact of the violence and their reparation needs. The process should ensure psychosocial assistance to survivors for them to be able to come forward. This should be through a trusted organisation to transparently disburse reparation to survivors;
- Funding be made available through national budgets and factored into planning for future years;
- The reparation programme should prioritise survivors with disabilities, and also recognise the transgenerational impacts of violence, to include provisions for the survivor's family after they pass;

- To ensure satisfaction and non-repetition, the Government should adequately resource and operationalise the 2014 National Policy on Prevention and Response to GBV, providing security, psychosocial support, socio-economic assistance, legal aid and referral services for victims and survivors of sexual violence.

9.2 Recommendations to State Institutions

- The Judiciary should fast track the hearing and determination of Civil Appeal Case No. E 645 of 2021 (appealing the High Court judgment in Constitutional Petition No. 122 of 2013), to affirm the state's obligation to effectively prevent and respond to CRSV, including by providing effective remedies and reparation to affected victims;
- The Independent Oversight Policing Authority should address the impunity of police and security forces and the Government should ensure systemic reform of all relevant enforcement agencies.

9.3 Recommendations to Civil Society

- Support survivor-led or centred initiatives for empowerment, including through trauma healing activities, and support for economic independence. Women-led initiatives are proven to create safe spaces for men, allowing them to speak out;
- Bolster survivor-led or centred initiatives to sustain, coordinate and amplify advocacy campaigns targeting duty bearers at county and national levels;
- Support to county and national survivor organisations, as well as survivor networks to engage in knowledge sharing, solidarity, and assistance between counties;
- Engage with national allies and champions who can act as ambassadors to gather a critical mass of spokespersons advocating for implementation of reparative measures;
- Work with international actors and donors such as the African Union, United Nations, friendly States and the Global Survivors Fund on inquiring about the lack of progress and the technical or other support needed in facilitating the implementation of a State-led reparation programme.



Before the Kenya Study was finalised, survivors reviewed the draft version to validate its content during a series of workshops. Some of them are here gathered in Kisumu, April 2023.

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X. CONCLUSION

“It is not easy bringing up children under such circumstances.”³³⁹

As has been evidenced, the impacts of CRSV on survivors in Kenya have been devastating. Survivors have lost their health, psychological well-being, livelihoods, their social standing and their familial and social bonds within the community.

The scale of CRSV victimisation and the urgent needs which have resulted from this, mean that advocacy towards urgent reparation is crucial. Survivors are growing increasingly impatient and cannot afford to wait any longer to repair their harms, as expressed by one survivor:

“We’ve been given many promises which have not borne any fruit.”³⁴⁰

The Government of Kenya is the primary duty-bearer for the implementation of all reparation measures and programmes to survivors of CRSV of the 2007/2008 and 2017 elections. The government should implement, as a priority, measures that respond to the most urgent needs of CRSV survivors. The action required from the government of Kenya is within

reach. Reports, regulations, and policy papers have been drafted, and following years of endeavours, a significant cohort of well-informed professionals are available to implement the required mechanisms that have already been outlined. The core issue has been the lack of political will, and in its absence, Kenyan civil society and the international community, must sustain and re-invigorate action to keep the reparation agenda for CRSV survivors highly visible.

Following the relatively peaceful elections in 2022, which have been followed by sporadic protests, the government of Kenya has an opportunity to demonstrate its commitment to human rights and to its obligations towards CRSV survivors of the election violence in 2007/2008 and 2017. Acknowledging that the majority of survivors are women and children born of rape, this government has an opportunity to provide transformative reparation that empowers survivors to break the bonds of gender inequality that enabled the violations to occur in the first place.

Reparation can give survivors opportunities to heal, to achieve economic empowerment, to access education and to repair broken social relationships. It is crucial that the design and implementation of any reparation measures is survivor-led, ensuring that survivors’ own agency continues to grow.

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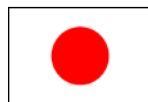
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