

‘These Wounds and Scars Have Not Healed:’<sup>1</sup> A Critical Gender Analysis of the  
Kenyan Truth, Justice and Reconciliation Commission’s Recommendations for  
Reparations

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**COMPULSORY DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signed by candidate

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<sup>1</sup> Kenya’s Truth, Justice and Reconciliation Commission’s Final Report uses this phrase when describing the harms and suffering endured by many women in the Mt. Elgon region after violence during security raids and breakouts of generalized violence. See the Final Report of the Kenyan Truth, Justice and Reconciliation Commission, Volume IIC, p. 94

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### **List of Abbreviations**

FGM/C:	Female Genital Mutilation and Cutting
FIDA:	Kenyan Federation of Women Lawyers
GBV:	Gender Based Violence
GHRV:	Gross Human Rights Violation
GOK:	Government of Kenya
ICC:	International Criminal Court
ICJ Kenya:	Kenyan Section of the International Commission of Jurists
ICTJ:	International Center for Transitional Justice
IDP:	Internally Displaced Person
KES:	Kenyan Shillings
KDHS:	Kenya Demographic and Health Survey
KHRC:	Kenya Human Rights Commission
NGO:	Non-Governmental Organization
ORN:	Operation Rudi Nyumbani
PEV:	Post-Election Violence
SV:	Sexual Violence
TJR Act:	Truth, Justice and Reconciliation Act of 2008
TJRC:	Truth, Justice and Reconciliation Commission
VAW:	Violence Against Women

## Abstract

This dissertation provides a critical gender analysis of the Kenyan Truth, Justice and Reconciliation Commission's (TJRC) recommendations for reparations. While 'gender' describes the form of analysis undertaken, this dissertation is focused on how gender has interacted with other factors to influence *women* and *girls'* experiences of violence and harm during the TJRC's post-independence mandate period (1963 to early 2008) and whether or not the TJRC's proposed reparations program offers gender-sensitive remedies. Therefore, the main question this dissertation seeks to determine is: to what extent does the TJRC's Reparations Framework a) address the types of violence and harm commonly experienced by women, b) encourage their participation in developing the framework, c) promote a change to female victims and survivors' lived realities and d) address the root causes of this violence? This question is explored through an examination of primary and secondary sources such as empirical research on violence against women in Kenya, academic theory on gender-sensitive reparations programs, reports and literature produced by civil society institutions and the TJRC's Final Report. The dissertation's analysis draws on normative theory regarding reparations from scholars such as de Greiff (2006) and Hamber (2009) among others. The civil society document, The Nairobi Declaration (2007) and the literature on gender sensitive reparations, specifically that of Rubio-Marin (2009), Manjoo (2010), Duggan and Jacobson (2009), Durbach and Chappell (2014) act as guideposts for this analysis. This literature establishes the basic elements of any gender-sensitive reparations framework, namely: participation, rehabilitation and transformation.

Overall, the TJRC was dedicated to understanding women's experiences of human rights violations and recommending remedy to women acutely impacted by violence. However, due to limited funds, controversies over the suitability of its Chairman, Bethuel Kiplagat, a poor relationship with civil society and oversights of its own, the Commission faced difficulty in securing meaningful participation of women in the development of its recommendations for reparations. However, notwithstanding a few oversights, it is argued that the content of the TJRC's recommendations for reparations are gender sensitive. Given the gravity of violence and the massive numbers of victims in need of redress, the recommendations for reparations separate victims in terms of violations endured and their level of vulnerability. Overall, this eligibility criterion is responsive to the types of violence and harm commonly endured by women. The TJRC's proposed reparations include elements of acknowledgement, rehabilitation, prevention and transformation. With the Commission's recommendations to provide medical and psycho-social vouchers, pensions as well as collective reparations in the form of official acknowledgment, institutional reforms and gender violence recovery centers, the reparations program has the potential to impact both the lived experiences of victims and survivors as well as in a small way, subvert Kenya's deeply entrenched gender hierarchy. With a combination of individual and collective reparations, the TJRC's recommendations for reparations, if implemented, could play a role in combating the micro and macro impact of gendered violence in Kenyan society.

Following Kenyan President Uhuru Kenyatta's March 2015 announcement of a 10 billion Kenyan Shilling (approximately 98,288,800 US Dollars) Restorative Justice Fund, this dissertation is submitted at an appropriate time. This critical gender analysis is intended to

contribute to the discussion of designing and implementing gender sensitive reparations in Kenya as well as the wider literature on gender sensitive reparations.

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## 1. Introduction

During his televised State of the Nation address on 26 March 2015, Kenyan President Uhuru Kenyatta apologized on behalf of the Kenyan Government “for all past wrongs”,<sup>2</sup> urged Parliament to process the Final Report of the Kenyan Truth, Justice and Reconciliation Commission (TJRC) and announced a 10 billion Kenyan Shilling (approximately 98,288,800 US Dollars) Restorative Justice Fund.<sup>3</sup> Kenyatta’s announcements came nearly two years after the TJRC published its Final Report in May 2013, which documented the gross human rights violations (GHRV) that persisted in the country during its post-independence mandate period of 1963 to 2008. Included in the TJRC’s 2,210 page Final Report are recommendations for reparations for individuals and communities particularly impacted by state-sponsored and state-condoned violence, discrimination and exclusion. Among the TJRC’s recommendations are reparations specifically tailored to benefit women and redress the types of harms they commonly experienced during the mandate period.

Considering that the State and Kenyan civil society are in the process of developing or advocating for a reparations policy to be included within the Restorative Justice Fund, it is an appropriate time to provide this critical gender analysis of the TJRC’s recommendations for reparations. In order to frame the subject of the dissertation, the introduction will offer a description of the TJRC and its process in order to provide necessary context. Subsequently, it will discuss the concept of reparations and gender-sensitive reparations in particular by providing a brief literature review. Lastly, the introduction will conclude with the dissertation’s research design, motivation and outline.

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<sup>2</sup> “President Uhuru Kenyatta’s State of the Nation full speech speech”[sic], YouTube video, 1:11:04, posted by “KTN News Kenya,” March 26, 2015, <https://www.youtube.com/watch?v=AGnYyik6NJ8> Accessed 24 November 2015

<sup>3</sup> Ibid.

### *1.1 Precursors, Process, Gender Considerations and Controversies of the TJRC*

This section provides a general description of the origins and the work of the TJRC.<sup>4</sup> In contrast to other recent transitional justice contexts, Kenya's post-independence history has been characterized by periods of 'generalized violence,'<sup>5</sup> rather than large-scale intra-state conflict. The Post Election Violence (PEV) of 2007/2008 was not the first breakout of political, ethnic or large-scale violence that has spread throughout Kenya; the TJRC found that Kenyans were routinely tortured, killed, sexually violated and denied their socio-economic and cultural rights throughout the mandate period.<sup>6</sup> However, the PEV was the most intensified period of violence seen in Kenya's post-independence history.

Following the disputed December 2007 presidential election between incumbent President Mwai Kibaki and his opponent Raila Odinga, Kenya experienced intense levels of political and ethnic violence that resulted in widespread killing, sexual violence and displacement throughout the country. As a result of the PEV, which lasted roughly two months, 1,113 persons were killed, an estimated 900 women were raped,<sup>7</sup> 3,561 persons experienced serious injuries, and 663,921 people were displaced.<sup>8</sup> Though Kenyan civil society activists engaged in a sustained struggle for a truth commission in the country from 2003 (after the end of President Moi's tenure and the introduction of multi-party democracy),<sup>9</sup> it was the PEV that provided an impetus to finally establish a commission. As a response to the violence, the African Union established a Panel of Eminent African Personalities led by Kofi Annan to bring representatives of the rival political parties together and negotiate an end to the PEV. In February of 2008, representatives endorsed a power sharing agreement, which ruled that President Kibaki would stay in his position and

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<sup>4</sup> Detail regarding statement taking and civic outreach is included in Chapter Three.

<sup>5</sup> The term 'generalized violence' was used by the Commission, likely to connote the reality that while violence remained widespread throughout Kenya, violence was often politically and ethnically motivated. The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC," (2013) Volume I, p. xiii

<sup>6</sup> Kenya Transitional Justice Network, *Summary: Truth, Justice and Reconciliation Commission Report* (Nairobi: Kenya Transitional Justice Network, 2013) <http://www.acordinternational.org/silo/files/kenya-tjrc-summary-report-aug-2013.pdf> p. 6

<sup>7</sup> This is likely an understatement of the real number of women who were raped or experienced sexual violence during the PEV. Security concerns, fear of police and stigma regarding being identified as a sexual assault survivor contributed to the underreporting of this crime.

<sup>8</sup> The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC," (2013) Volume IIC, p. 114

<sup>9</sup> Lydiah Kemunto Bosire and Gabrielle Lynch. "Kenya's Search for Truth and Justice: The Role of Civil Society." *International Journal of Transitional Justice* 8, no. 2 (2014) p 259.

Odinga would be made Prime Minister as part of the Kenya National Dialogue and Reconciliation Accord. Additionally, as part of this process, commitments to establishing a TJRC were made.

Kenya's National Assembly adopted the Truth, Justice and Reconciliation Act of 2008 (TJR Act) and the President subsequently signed it on 28 November 2008. The TJRC later began its operations in March of 2009. The Act established the "powers and functions" of the TJRC itself and its mandate to "promote peace, justice, national unity, healing, and reconciliation among the people of Kenya".<sup>10</sup> According to the Act, this would be done in part by "restoring the human and civil dignity of ...victims by granting them an opportunity to relate their own accounts of the violations of which they are victims" in a truth commission "and by recommending reparations measures in respect of them".<sup>11</sup> Moreover, the TJRC Bill fittingly suggested that the Commission should consider "mechanisms and procedures" to address the experiences of women and the pervasiveness of GBV during the mandate period.<sup>12</sup>

The TJRC's legislative origins intended for its process to be gender-sensitive and victim-centered. Kenya's legal duty to provide reparations to victims of GHRV was established in the TJR Act. The Act defined GHRV, which were deserving of reparations *inter alia* as: torture, abduction, rape and sexual violence, severe ill treatment, imprisonment, severe deprivation of physical property, enforced disappearance and persecution.<sup>13</sup> Notably, the TJR Act included sexual violence and rape as well as "persecution against" a group due to their gender, two classifications of GHRV commonly experienced by women.<sup>14</sup> The TJR Act directed the Commission to make concrete recommendations for reparations for GHRV to be reviewed and implemented by the National Assembly. While the original Bill declared that the recommendations of the TJRC were binding and would be implemented by a neutral Implementation Committee, the National Assembly maneuvered to amend the TJR Act in order

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<sup>10</sup> The Truth, Justice and Reconciliation Commission Bill (2008), Section Five

<sup>11</sup> TJRC Bill (2008), Section Five

<sup>12</sup> TJRC Bill (2008), Section 27

<sup>13</sup> TJRC Final Report, Volume I, p. 66

<sup>14</sup> TJRC Bill (2008), Section One

to give itself powers to “consider” the Report and oversee the implementation of any recommendations.<sup>15</sup>

The TJRC Act also included specific provisions for the selection and appointment of Commissioners to the TJRC. The Act required that there be nine total Commissioners, with six Kenyan Commissioners appointed by a Selection Panel made up of representatives of professional, religious, legal and other civil society organizations and three non-Kenyan Commissioners selected by the Panel of Eminent African Personalities. In the process of selecting Commissioners, the Kenyan Federation of Women Lawyers (FIDA), a widely respected and reputable women’s rights organization was chosen to nominate one person to the Commission’s Selection Panel, which was tasked with the responsibility of choosing Commissioners.<sup>16</sup> The Act required that Commissioners have a gender balance and come from areas all throughout Kenya.<sup>17</sup> Moreover, the Act required that Commissioners be free from any conflict of interest with the mandate of the Commission and must not have been “involved, implicated, linked or associated with human rights violations of any kind” investigated by the TJRC.<sup>18</sup> Through advertisements in Kenyan newspapers, the Selection Panel invited qualified members of the public to apply for Commissioner positions and once applications were reviewed, a shortlist was created and the Selection Panel interviewed the shortlisted applicants.<sup>19</sup> 15 applications were forwarded to the National Assembly for final review and nine were formally nominated.<sup>20</sup> Of the nine Commissioners, President Kibaki selected Bethuel Kiplagat to be the Chairman of the Commission, which created tremendous controversy, as will be discussed later in this introduction.

In the interpretation of its mandate, the Commissioners and staff actively decided to have a commitment to mainstream<sup>21</sup> gender throughout its operations. In recognition of the reality that

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<sup>15</sup> Christopher Gitari Ndungú, *Lessons to be Learned: an Analysis of the Final Report of Kenya’s Truth, Justice and Reconciliation Commission* (New York: International Center for Transitional Justice, 2014), p. 1

<sup>16</sup> TJRC Final Report, Volume I, p 22

<sup>17</sup> TJRC Final Report, Volume I, p. 22

<sup>18</sup> TJRC Final Report, Volume I, p 23

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Essentially, gender mainstreaming is a method and strategy of making visible women’s and gendered experiences and the potential gendered impact of policy or program with the end goal of gender equality. See Porter, Fenella, and Caroline Sweetman. 2005. 'Editorial'. *Gender & Development* 13 (2): 2-10. P.2

GHRV impacted men and women differently and resultantly influenced men and women's gendered views in regards to truth, justice, reconciliation and peace, the TJRC adopted a "Gender Policy".<sup>22</sup> The Commission's "Gender Policy" was a program of gender mainstreaming that guided its operations and functions. Gender was a core and guiding principle of the Commission in its staff representation and content focus.

Though the Commission did not acquire equal representation, women were consistently represented above 40% and at the directorate level within the Commission, representation stood at 50%.<sup>23</sup> In total, 44% of the TJRC's Commissioners were women.<sup>24</sup> In addition to striving for a gender representative staff, the TJRC established a Special Support Services Unit to allow for the lived experiences of 'vulnerable groups' to be addressed throughout the Commission process. Women, children and persons with disabilities were selected as the 'vulnerable groups' requiring special attention throughout the TJRC process.

The Commission's individual hearings were focused on the personalized experiences of GHRV during the TJRC's mandate period. The TJRC held 220 hearings including general hearings, thematic hearings and women's hearings.<sup>25</sup> The general hearings were organized around the TJRC's selected individual cases from the Statement Taking Forms, referred to as "window cases." These window cases<sup>26</sup> were chosen to depict "the broader patterns and trends of gross violations of human rights in a particular region or area"<sup>27</sup> and convey "issues and injustices specific to vulnerable and minority groups resident in the region".<sup>28</sup> Out of 680 individual testimonies, only 161 women testified during the public hearings.<sup>29</sup>

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<sup>22</sup> TJRC Final Report, Volume IIC, p.6

<sup>23</sup> TJRC Final Report, Volume I, p 33.

<sup>24</sup> TJRC Final Report, Volume IIC, p.5

<sup>25</sup> TJRC Final Report, Volume I, p. 37

<sup>26</sup> In order to select the relevant window cases the Legal, Investigations and Research departments were tasked with the responsibility of selecting cases. According to the TJRC, the Research Department prepared a background report on the trends of GHRV in each respective region. Subsequently, the Investigations Department of the TJRC scrutinized statements and memoranda in each region to select potential individuals to testify before the Commission. Potential witnesses were identified and interviewed in order to construct a shortlist to submit to the Commission's Legal Department, which determined the window cases' suitability. See The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC," (2013) Volume I, p. 99

<sup>27</sup> TJRC Final Report, Volume I, p. 97

<sup>28</sup> TJRC Final Report, Volume I, p. 98

<sup>29</sup> TJRC Final Report, Volume IIC, p. 13

To more fully address key themes that emerged throughout the TJRC, the Commission elected to hold 14 thematic hearings.<sup>30</sup> Among the thematic hearings was the women’s hearing, which focused on women’s experiences of GHRV and systematic discrimination. This thematic hearing was an expert forum for women’s rights experts, academics, women’s organizations and relevant government representatives to engage the Commission on issues that impact women.<sup>31</sup> The hearing was held on 8 February 2012 in Nairobi.

The TJRC elected to hold separate women’s only hearings for victims and survivors of GHRV given previous and comparative experience,<sup>32</sup> social and cultural mores which restrict women’s full participation in public affairs, the stigma surrounding sexual violence survivors and the resultant difficulty in encouraging women’s participation in the Commission’s processes. The TJRC’s “conversations with women,” as the women’s only hearings were strategically named, were chaired by female Commissioners and other TJRC staff members and were designed to provide women with “safe spaces” where they could speak as openly as possible about their experiences with GHRV.<sup>33</sup> According to the TJRC, over 1000 women attended the 39 hearings across the country; no number was provided for the number of women who testified before the women’s hearings.<sup>34</sup>

While the TJRC’s commitment to gender mainstreaming and the representation of women should be considered progressive, two particular obstacles within the Commission hampered its ability to reach women and other Kenyan survivors and also marred the reputation of the Commission. Firstly, the TJRC faced a sustained funding crisis. Despite the promises made by the GOK after the PEV to delivering sufficient funds to the Commission, the TJRC lacked funds to “efficiently and effectively conduct its operations”.<sup>35</sup> Secondly and arguably the most damaging controversy within the TJRC was the appointment of its Chairman, Bethuel Kiplagat. While Kiplagat had

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<sup>30</sup> The hearings focused on the following matters: access to justice; economic marginalisation and minorities; land; armed militia groups; prisons and detention centres; torture; ethnic tensions and violence; the 1982 attempted coup; security agencies, extra-judicial killings and massacres; persons with disabilities; women; children; internally displaced persons; and political assassinations

<sup>31</sup> TJRC Final Report, Volume IIC, p. 13

<sup>32</sup> Lessons from Kenya’s Makau Mutua Task force, suggested that women felt more comfortable discussing their own experiences when few or no men at all were in attendance. (TJRC Volume IIC, p. 9-10)

<sup>33</sup> TJRC Final Report, Volume IIC, p. 9

<sup>34</sup> TJRC Final Report, Volume I, p. 105

<sup>35</sup> Ibid., 144.

been a diplomat, he was also a permanent secretary in the Ministry of Foreign Affairs when a prominent minister was assassinated, had been named as a beneficiary of illegal land grabbing and was allegedly involved in planning the 1984 Wagalla Massacre, which resulted in the death of roughly 1000 people.<sup>36</sup> As more information about Kiplagat's role in previous human rights abuses became clear, civil society became increasingly skeptical of the TJRC process.<sup>37</sup> Given his controversial past and alleged role in organizing GHRV, civil society actors vigorously protested his appointment as Chairman to the TJRC and demanded his resignation.<sup>38</sup> Kiplagat's refusal to resign prompted many civil society organizations and donors to withdraw their support for the Commission. Additionally, TJRC Vice-Chair Betty Murungi, the only Kenyan Commissioner who was a well-known human rights activist, stepped down from her position. The withdrawal of support from groups including FIDA Kenya dramatically impacted the Commission's ability to carry out its mandate and engage with victims and survivors of GHRV, including women.<sup>39</sup> The controversies within the TJRC significantly hurt its credibility, and contributed to the limited coverage of the Commission in the media.<sup>40</sup>

In addition to the challenges within the TJRC, the controversial International Criminal Court (ICC) cases against prominent Kenyans forced the TJRC process to operate within its shadow. In May of 2008, the Waki Commission was established to narrowly investigate the PEV and make recommendations in light of its findings. Among the Waki Commission's recommendations was that a special tribunal should be established in order to prosecute those most responsible for organizing and orchestrating the violence. After several months of political obstructionism, a list of names of alleged perpetrators was submitted to the ICC for investigation and prosecution. Six prominent Kenyans were indicted including Uhuru Kenyatta and William Ruto, who won the 2013 presidential elections and respectively became President and Deputy President. Given the political stature of the accused and their Head of State status, the Kenyan government has been

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<sup>36</sup> Lydia Kemunto Bosire and Gabrielle Lynch. "Kenya's Search for Truth and Justice: The Role of Civil Society." *International Journal of Transitional Justice* 8, no. 2 (2014) p. 270; TJRC Volume IV, p. 18

<sup>37</sup> Bosire and Lynch. "Kenya's Search for Truth and Justice: The Role of Civil Society." p 272.

<sup>38</sup> TJRC Final Report, Volume I, p. 125

<sup>39</sup> Thomas Obel Hansen, "Kenya's Power-sharing Arrangement and Its Implications for Transitional Justice." *The International Journal of Human Rights* 17, no. 2 (2013) p. 315

<sup>40</sup> Bosire and Lynch, "Kenya's Search for Truth and Justice: The Role of Civil Society," p. 269

actively attempting to get the cases withdrawn ever since the introduction of the ICC cases.<sup>41</sup> Controversy over the ICC cases created a media spectacle and overshadowed the operations of the TJRC and eventually the publishing of its Final Report, which included two sections devoted to women and sexual violence as well as recommendations for reparations.

### *1.2 Introducing Reparations:*

Reparations are one of the many tools of ‘transitional justice’, a term that is used to describe both a “range of judicial and quasi-judicial institutions and practices that states (and other relevant actors) may adopt in their quest of dealing with systematic human rights violations” and the field of scholarly inquiry that analyzes these processes.<sup>42</sup> Additional tools of transitional justice include criminal prosecutions, institutional reforms and truth commissions. In recent years, international organizations, civil society groups, post-conflict states and scholars have called for more victim-centered forms of transitional justice in the aftermath of conflict and large-scale human rights violations.<sup>43</sup> Reparations for past violence and suffering are at the forefront of this struggle for victim-centered justice.

The International Center for Transitional Justice (ICTJ) defines reparations simply as the types of initiatives that “seek to address the harms caused by these [GHRV] violations”.<sup>44</sup> Reparations may be offered through either judicial or administrative avenues in the aftermath of GHRV, a term developed by the United Nations Commission on Human Rights to describe the most serious and flagrant violations of human rights.<sup>45</sup> Judicial reparations can be dispersed under international or domestic law, in which measures will be taken to redress a crime committed to a victim or a group of victims. In contrast, an administrative reparations program can be defined as:

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<sup>41</sup> *Crying For Justice: Victims' Perspectives On Justice For The Post-Election Violence In Kenya*. (London: Amnesty International, 2014).p. 47

<sup>42</sup> Thomas Obel Hansen, “Facing the Challenges of Transitional Justice: Reflections from Post-Genocide Rwanda and Beyond” (PhD Thesis in Law, Aarhus University, 2010), p. 4

<sup>43</sup> de Greiff, P, (2006). Introduction. In P. de Greiff, ed., *The Handbook of Reparations*, 1<sup>st</sup> ed. New York: Oxford University Press

<sup>44</sup> *Reparations & Transitional Justice*. International Center for Transitional Justice. Accessed January 16, 2016. <https://www.ictj.org/our-work/transitional-justice-issues/reparations>.

<sup>45</sup> What Amounts to ‘A Serious Violation of International Human Rights Law’? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty. Geneva Academy of International Humanitarian Law and Human Rights, 2014

An out-of-court process used by States to provide reparation to massive numbers of victims of gross violations of international human rights law and/or serious violations of international humanitarian law. In such programs, States identify the violations and the victims to be redressed and provide them with reparation through an established procedure.<sup>46</sup>

While reparations can take a variety of forms, the United Nations General Assembly specifically categorized the various types of reparations in the 2005 “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”. The categories of reparations highlighted in the Basic Principles include restitution, (the restoration of the victim to their position prior to human rights violation)<sup>47</sup> compensation (recompense for economically quantifiable damage resulting from violation and proportional to the gravity of violation), rehabilitation (psychosocial and medical care), satisfaction (measures to end ongoing violence, the right to truth, acknowledgement and restoration of dignity, sanctions, tributes and memorials), and guarantees of non-repetition (measures aimed at preventing further violence such as institutional reform).<sup>48</sup>

As this dissertation examines the TJRC’s proposed reparation program, this literature review will focus on administrative reparations. These type of reparations may take a variety of forms; reparations may either be individual or collective and either material or symbolic. Individual reparations respond to the needs of victims and survivors of human rights violations by granting benefits to each person that successfully applies for benefits and fits the criteria established by a reparations framework. While a large breakout of violence infringes on the individual rights of scores of people, it also has an impact on groups. Because violence is often committed due to a particular individual’s group membership or affiliation, many scholars advocate for the use of collective reparations following breakouts in violence. Collective reparations are the variety of

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<sup>46</sup> Guidance Note Of The Secretary General: Reparations For Conflict Related Sexual Violence. 2014. New York: United Nations, p. 6

<sup>47</sup> This is a controversial aspect of reparations in many post-conflict and low-income countries. The position of many individuals and groups prior to conflict is often at best marginalized. Many people in transitional justice settings are poor prior to conflict and the roots of poverty –and structures of discrimination such as patriarchy exist long before the start of conflict.

<sup>48</sup> United Nations, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, March 21, 2006

measures, either material or symbolic, that “redress the harm to identity and status resulting from group based violence”.<sup>49</sup>

Symbolic reparations refer to the set of ‘things done or given’<sup>50</sup> to acknowledge victims and survivors of conflict such as official apologies, creation of commemorative holidays, changing of the names in public spaces, museums, memorials, among others.<sup>51</sup> Symbolic reparations may provide a space for official recognition of harm and suffering victims and survivors feel in the aftermath of conflict. With collective symbolic reparations in particular, the state and transitional justice mechanisms can promote a collective memory and social solidarity following conflict.<sup>52</sup> For marginalized victims, and women in particular, official acts of apology may facilitate the psychological rehabilitation of victims who suffer from crimes, such as sexual and reproductive violence, that carry a great stigma by directly addressing the prejudices held by many about the ‘private’ nature of the violations.<sup>53</sup> Typically, in comparison to other forms of reparations, symbolic reparations are easier to implement due to their lower cost.<sup>54</sup> However, when governments only enact symbolic measures they can create the impression that symbolic reparations alone are sufficient reparations for victims and survivors.<sup>55</sup>

Material reparations may take the form of individual or collective grants, pensions or payments, service packages or social services. According to the ICTJ, the material dimensions of a reparations program must not be lost.<sup>56</sup> Without elements of material reparations in a reparations program, it is unlikely that the lived realities of victims will be positively altered in the aftermath of violence.

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<sup>49</sup> Ruth Rubio Marin, “Gender and Collective Reparations in the Aftermath,” in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, ed. R. Rubio-Marin, (New York: Cambridge University Press, 2009), 394

<sup>50</sup> Brandon Hamber, “Gender, Memorialization, and Symbolic Reparations,” in: R. Rubio-Marin, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, p. 324

<sup>51</sup> Hamber, “Gender, Memorialization, and Symbolic Reparations,” p. 324

<sup>52</sup> Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 468

<sup>53</sup> Colleen Duggan and Ruth Jacobson, “Reparation of Sexual and Reproductive Violence,” in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, p. 115

<sup>54</sup> Hamber, “Gender, Memorialization, and Symbolic Reparations,” p. 325

<sup>55</sup> Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, p. 468

<sup>56</sup> International Center for Transitional Justice, *Reparations In Theory And Practice: The Nature And Objectives Of Reparations*. (New York, 2007), p. 4

Whilst the Basic Principles represent a new focus and commitment on behalf of international organizations and some states on reparations for victims, this has typically not translated into reparative gains for women. In fact, women have often been excluded from receiving reparative benefits either because the types of violence they oftentimes experience (such as sexual violence) are de-politicized or because administrative and/or institutional obstacles (*inter alia* lack of transport, stigma associated with violence experienced by women and feminized poverty) prevent many women from accessing reparations. In light of this problem, a diverse group of women's organizations and survivors of sexual violence gathered in Nairobi in 2007 to discuss how to incorporate gender into reparations programs<sup>57</sup> and released the Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation (Nairobi Declaration), which unequivocally declares the right to gender sensitive reparations for women in post-conflict settings. The Nairobi Declaration has since been influential in guiding academic literature, policy and truth commission recommendations for gender-sensitive reparations in the aftermath of conflict and generalized violence.<sup>58</sup>

Inevitably, due to the gravity of the human rights abuses that warrant reparations and the magnitude of the harms that are left in their aftermath, reparations are contentious tools of transitional justice. Doxtader has noted "reparations are never enough. The past cannot be undone, lost potential can never be fully recovered and the reparative gesture is inevitably partial".<sup>59</sup> As Roht-Arriaza wrote about reparations in situations of mass violence, "what could replace lost health and serenity, the loss of a loved one or of a whole extended family, a generation of friends, the destruction of culture or an entire community?".<sup>60</sup> Whilst victims should not be categorically viewed as 'damaged', reparations are unlikely to fully restore, rehabilitate and compensate victims of human rights abuses to their situation before the abuse. Therefore, reparations should not simply be viewed through their compensatory and restorative

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<sup>57</sup> Helen Scanlon and Kelli Muddell, "Gender and Transitional Justice in Africa: Progress and Prospects," *African Journal on Conflict Resolution*, 9 (2009): p. 19

<sup>58</sup> More recently, in 2014, the United Nations Secretary General adopted the "Guidance Note on Reparations for Conflict Related Sexual Violence," which further entrenches some of the normative advancements of gender-sensitive reparations.

<sup>59</sup> Erik Doxtader, "Reparations," in *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, ed. Charles Villa-Vicencio and Erik Doxtader, (African Minds, 2004), 25

<sup>60</sup> Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence." *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (New York, 2004), 122

aims. Rather, as suggested by Hamber, reparations can be simply viewed as “good enough”.<sup>61</sup> Despite their inevitable shortcomings, reparations have been described as the “most victim centered of the various transitional justice mechanisms” in the aftermath of human rights violations because they can begin to directly address victims needs<sup>62</sup> and may aid victims in mentally resolving their experience of past and current trauma by exhibiting that actions have been taken to make amends for their suffering.<sup>63</sup>

### *1.3 Goals and Ideal Outcomes of Administrative Reparations*

In the discussion of administrative reparations, the question, ‘what, ideally, should a reparations program accomplish?’ remains a central discussion point within the literature. As a response to this question, the reparative justice literature differs in light of the individual and societal aims of reparations programs. De Greiff articulates that the three primary goals of reparations efforts as a matter of justice ought to be the short-term goal of victim recognition and the longer-term goals of civic trust and solidarity, which are often destroyed or deeply damaged as a result of conflict and GHRV.<sup>64</sup> <sup>65</sup> While de Greiff focuses on some of the macro and long term goals of reparations, other scholars such as Rubio-Marin, van der Merwe, Duggan and Jacobson provide both micro and macro level aims, with a special emphasis on victims and survivors.

Van der Merwe suggests that most immediate goal of reparations is to fulfill the critical human needs of victims.<sup>66</sup> While victims’ needs following conflict are complex and multi-dimensional,

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<sup>61</sup> Brandon Hamber, "Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition," in *The Handbook of Reparations*, p. 569

<sup>62</sup> Simon Robins, “To Live as Other Kenyans Do”: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations. (Kenya: International Center for Transitional Justice, 2011), 6

<sup>63</sup> Hamber, "Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition," in *The Handbook of Reparations*, p. 569

<sup>64</sup> de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, p. 461

<sup>65</sup> Firstly, reparations offer victims and survivors recognition because they acknowledge responsibility for wrongdoing and harm perpetrated against individual victims or groups of victims. Ideally through reparations, governments recognize victims of human rights abuses living within the state as equal rights holders. Secondly, through reparations, civic trust is built or strengthened. Granting reparations in the aftermath of mass violence exemplifies the seriousness of the state and political community to establish more egalitarian relationships. By distributing reparations, de Greiff argues that the state can build a more inclusive community in which victims and survivors can participate. Thirdly, according to de Greiff reparations can build a sense of social solidarity amongst members within a society. For de Greiff, reparations build social solidarity because they are symbols of the most advantaged communities in deeply divided societies interests in vulnerable and victim communities. The three goals of reparations: recognition, promoting civic trust and social solidarity, while addressing abuses of the past are meant to be forward looking and elements of building new communities.

<sup>66</sup> Hugo van der Merwe, “Reparations through Different Lenses: The Culture, Rights and Politics of Healing and Empowerment after Mass Atrocities.” in J. M. Wemmers, ed., *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparation*, (New York: Routledge, 2014), 200

and impacted by the material conditions of victims prior to their victimization, victims of human rights violations have indicated that safety and basic survival are primary concerns.<sup>67</sup> Specifically for impoverished victims and survivors of human rights abuses in several settings, empirical studies have shown that reparations are prioritized above all transitional justice options –as reparations not only reflect acknowledgement–but also can result in substantive gains and an improved quality of life.<sup>68</sup> As previously mentioned, victims and survivors of violence have different needs in the aftermath of violence and thus reparations ought to be tailored to their multi-dimensional and ranging needs.<sup>69</sup>

Specifically in terms of reparations for sexual violence (SV), Duggan and Jacobson suggest another goal of reparations is to stop the ‘domino effect,’ whereby the initial act of violence (SV in particular) sets off a prolonged series of harms stemming from the SRV that has an impact on future safety, psycho-social well-being, economic survival, suitability for marriage and general social status.<sup>70</sup> While this goal of reparations is valid, in order to stop the ‘domino effect’ following SV, urgent and interim reparations must be considered, given the usual long time frame of the implementation of reparations.

#### *1.4 Assessing Reparations Programs*

As this dissertation provides a critical gender analysis of the TJRC’s recommendations for reparations, it is necessary to highlight the literature that theorizes how to assess reparations. In this regard, de Greiff has developed a useful ‘taxonomy of reparations efforts’.<sup>71</sup> De Greiff’s categories include: scope, completeness, comprehensiveness, complexity, integrity or coherence, finality and munificence.<sup>72</sup> While each of these elements is useful in analyzing a reparations program, when assessing the gender contents of reparations, the critical categories in de Greiff’s taxonomy are completeness and comprehensiveness.

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<sup>67</sup> Ibid., 201.

<sup>68</sup> Ibid., 200.

<sup>69</sup> Robins, “To Live as Other Kenyans Do”: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations, 23

<sup>70</sup> Colleen Duggan and Ruth Jacobson, “Reparation of Sexual and Reproductive Violence,” in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, p. 124

<sup>71</sup> de Greiff, P. “Introduction,” in *The Handbook of Reparations*, p.5

<sup>72</sup> Ibid.

De Greiff's 'completeness' refers to the degree to which a reparations program can cover all members within a potential beneficiary category.<sup>73</sup> De Greiff suggests that the evidentiary standards set for obtaining reparations as well as outreach efforts to advertise reparations will impact the completeness of a reparations framework.<sup>74</sup> For de Greiff, completeness is an important and desired feature of reparations. Comprehensiveness refers to the types of violations and harms that are redressed through the reparations program.<sup>75</sup> This category has been controversial in recent transitional justice reparations frameworks, as it has prioritized certain violations, namely violations to civil and political rights, over other violations such as social, economic and cultural rights. Moreover, reparations frameworks of the past have not been comprehensive, as they have generally ignored many of the violations women suffer during conflict. Rubio Marin suggests that adding a gender perspective to reparations may help provide better completeness and comprehensiveness.<sup>76</sup> Women and girls often struggle to access reparations and thus, this greatly weighs on a reparations framework's completeness and comprehensiveness.<sup>77</sup> For example, victims of sexual and reproductive violence in particular find it difficult to publicly identify as a victim due to the significant stigma and cultural meanings attached to identifying as a 'rape victim'.

While de Greiff's taxonomy and goals for reparations are largely helpful in providing a blueprint for the design and assessment of reparations programs, he loses sight of preexisting structural obstacles and systems that often directly or indirectly cause violence in the first place. The goals and taxonomy he includes in *The Handbook* are narrow and largely gender-blind when considering the monumental impact of systemic violence.

### *1.5 Assessing Gender Sensitive Reparations*

In response to de Greiff's taxonomy of reparations, Ruth Rubio-Marín suggests two additional categories to provide for a more gender conscious taxonomy. Building on the principles of the Nairobi Declaration, Rubio-Marín argues that one can assess the gender sensitivity of a

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<sup>73</sup> Ibid., 7.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid., 9.

<sup>76</sup> Rubio-Marín, "Introduction: A Gender and Reparations Taxonomy." in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, p. 12

<sup>77</sup> Ibid.

reparations program through its degree of ‘openness’ and ‘transformative potential’.<sup>78</sup> For Rubio Marin, the level of ‘openness’ of a reparations effort can be determined by the level of participation of victims and survivors, victims groups, and relevant civil society organizations in the formulation of the reparations program.<sup>79</sup> The concept of ‘openness’ has become a foundational principle in feminist literature surrounding reparations. Rubio-Marín’s openness essentially reflects the Nairobi Declaration’s emphasis on the full and meaningful participation of victims and survivors. Rubio Marin indicates that it is crucial to consider input from victims in the design of reparations so that they can suitably address victims’ needs.<sup>80</sup> Rashida Manjoo, the former UN Special Rapporteur on Violence against Women adds that women must not only be involved in the formulation of reparations, but also their implementation, monitoring and evaluation.<sup>81</sup> Involving women in the process of establishing a reparations framework, in itself, has a reparative impact “by affirming the victims’ status as active citizens”<sup>82</sup> or as political actors.<sup>83</sup> In particular for women who have been subject to GBV and have been long subject to systematic oppression and marginalization, the reparative and empowering aspects of participating in the design of a reparations framework is key.

In contrast to de Greiff’s relatively modest theoretical goals of reparations, the Nairobi Declaration and feminist scholars suggest that the primary goal of reparations efforts ought to be transformation, both in the individual lives of victims and survivors as well as societal transformation. While rehabilitation for individual victims is critical in improving their lived realities, the Declaration boldly declares that rehabilitation is not sufficient in itself for a transformative reparations program, since the “origins of violations of women’s and girls’ human rights predate the conflict situation” and thus “reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid., 16.

<sup>80</sup> Ibid.

<sup>81</sup> Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences A/HRC/14/22*, (Geneva: Human Rights Council, 2010), 1-22

<sup>82</sup> Rubio-Marín, “Introduction: A Gender and Reparations Taxonomy.” in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, p 16

<sup>83</sup> Jemima García-Godos “Victims’ Rights and Distributive Justice: In Search of Actors.” *Human Rights Review* 14, no. 3 (2013): 24

political and structural inequalities that negatively shape women's and girls' lives".<sup>84</sup> According to Durbach and Chappell, guarantees of non-repetition are essential to transformative and gender-sensitive reparations due to their emphasis on prevention.<sup>85</sup>

With an overview of the aforementioned literature, the theoretical and normative framework for conceptualizing gender sensitive and transformative reparations programs as a means to provide justice to female victims following conflict becomes clear. Ultimately, gender-sensitive reparations ought to a) include women in the process of establishing and implementing reparations, b) reflect the types of violations women commonly experience and provide remedy that works to rehabilitate them and improve their lives, c) seek to prevent future violations and d) transform, to the degree possible, patriarchal and unjust systems. Therefore, in accordance with the literature, gender sensitive reparations are meant to be participatory, rehabilitative and transformative.

#### *1.6 Problem Statement, Research Question, Methodology and Challenges:*

While the transitional justice experience in Kenya contains several lessons for scholars and practitioners, there is insufficient literature to date examining the Report of the Truth, Justice and Reconciliation Commission (the Final Report or the Report), the ultimate product of the TJRC. The majority of literature surrounding Kenyan transitional justice generally addresses issues of impunity and debate around the ICC. Recently however, there is a small but slowly growing number of scholars who have begun to analyze aspects of the TJRC process.<sup>86</sup> However, most of this content remains transfixed by the political controversies surrounding the Commission and its fractured relationship with civil society organizations. While it must be noted that the Commission's reputation has been unalterably marred by the alleged human rights abuses of Kiplagat, the resignation of the TJRC's former Vice-Chair person, Betty Murungi, and its injured

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<sup>84</sup> *The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation. See [http://www.womensrightscoalition.org/site/reparation/signature\\_en.php](http://www.womensrightscoalition.org/site/reparation/signature_en.php) Accessed 14 November 2015*

<sup>85</sup> Andrea Durbach and Louise Chappell. "Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations." *International Feminist Journal of Politics* 16, no. 4 (2014) 546

<sup>86</sup> See for example Bosire and Lynch, "Kenya's Search for Truth and Justice: The Role of Civil Society,"; Kimberly Langegran, "The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process," *Transitional Justice Review* (2015); ; Gabrielle Lynch. "The International Criminal Court and the making of a Kenyan President," *Current History* 114 (2015): 183-188

relationship with civil society, there has been a significant oversight of the Final Report. Prioritizing the process over the Report has blinded many scholars to the contributions and the limitations of the Report and its recommendations, which include the Reparations Framework. Currently, the only available literature on the TJRC's recommended Reparations Framework comes from Kenyan civil society and international NGOs. At the time of writing, there is no rigorous academic work that analyzes the finalized Reparations Framework that is suggested in the TJRC Final Report.

Reparations are arguably the most victim-centered tool of transitional justice, and if implemented, directly impact victims' lives. As the Kenyan Government is considering the Reparative Justice Fund and the recommendations of the Final Report, an analysis of the TJRC's proposed reparations program is overdue. Moreover, administrative reparations programs have historically prioritized certain types of human rights violations such as physical torture and disappearances not as commonly experienced by women. As previously mentioned, these sorts of reparations programs, like many other post-conflict transitional justice mechanisms, have generally ignored many of the types of harm suffered by women, and thus, women have generally been left without a reparative recourse.<sup>87</sup> While this has been the case in most transitional justice settings, the Kenyan TJRC reparations framework mainstreams gender both in terms of the prioritization of specific crimes for individual reparations as well as the acknowledgment of gender inequality as a major structural issue to redress through collective reparations.

The writing of this dissertation is motivated by the historic exclusion of women in benefiting from reparations programs, the Kenyan Government's decision to consider reparations this year and the lack of research on the specific topic. With a thorough analysis of the TJRC's recommendations for reparations that may benefit women, this dissertation is intended to contribute to the discussion of designing and implementing gender sensitive reparations in Kenya and the wider literature on gender sensitive reparations.

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<sup>87</sup> Ruth Rubio-Marin, "The Gender of Reparations: Setting the Agenda." in: Rubio-Marin, Ruth. *What Happened to the Women?: Gender and Reparations for Human Rights Violations*. Social Science Research Council, 2006, 20

The main question this dissertation seeks to address is the following: to what extent does the TJRC's Reparations Framework a) address the types of violence and harm commonly experienced by women, b) encourage their participation in developing the framework, c) promote a change to female victims and survivors' lived realities and d) address the root causes of this violence? This research question is influenced by the normative literature on gender-sensitive reparations and essentially questions whether the TJRC's recommendations for reparations offer a suitable and gender sensitive framework for remedy based on their experiences of violence and the need to transform patriarchal institutions. In answering this question, this dissertation utilizes empirical research on VAW in Kenya, academic theory on gender sensitive reparations programs, reports and literature produced by civil society institutions and the TJRC's Final Report. This is done to assess the major strengths and limitations of the TJRC's Reparations Framework in relation to reparations for gendered violence.

The biggest challenge to this analysis of the TJRC's Reparations Framework is the lack of relevant research and literature that address issues of key concern to this dissertation. Firstly, empirical research on violence against women (VAW) in Kenya remains limited. Notably, credible national level statistics regarding GBV in Kenya were not available until the 2008 Kenyan Demographic and Health Survey was published.<sup>88</sup> Moreover, there is insufficient academic literature regarding VAW and gendered GHRV in the Kenyan context. Secondly, as previously mentioned, the Kenyan TJRC process and Final Report has not yet been analyzed in enough detail. More specifically, there has not yet been a thorough analysis (let alone gendered analysis) of the TJRC's Reparations Framework. Whilst these challenges have undoubtedly complicated the research process, they have also allowed for this dissertation to be an original contribution to the literature.

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<sup>88</sup> The 2008 Kenyan Demographic Health Survey included national level data on GBV and sexual violence for the first time.

### 1.7 Scope:

This dissertation will narrowly focus on the TJRC's recommendations for administrative reparations. However, it is important to note that the GOK can provide reparations through either judicial and/or administrative means. Currently, several victims and survivors are engaged in lawsuits against the Kenyan Government due to its violation of human rights in the hopes of receiving reparations.<sup>89</sup> While these cases are undoubtedly significant, this dissertation focuses on the TJRC's proposed administrative reparations program.<sup>90</sup>

As previously mentioned, there has yet to be a thorough analysis of the TJRC's recommendations. This dissertation does not attempt to provide a general analysis of the Reparations Framework and other recommendations for reparations. Within the scope of this dissertation, it is impossible to provide an analysis of the recommendations based in the experiences of all victims and survivors of GHRV. Given the confines of this dissertation and the fact that victims (or even groups of victims) of GHRV are not monolithic, it is best to limit the analysis to a specific group of victims and engage in critique through a certain lens.

Although this dissertation uses the term 'gender' to describe its form of analysis, it is focused on how gender plays a role in structuring women and girls' experiences of violence, harm and the necessity to include gender as a feature of a reparations program. This dissertation is focused on Kenyan women and girls because they are more likely than men and boys to experience violence, discrimination and marginalization based on their gender identity<sup>91</sup> and women and girls have historically been left out of receiving reparations benefits in many contexts. That said, men

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<sup>89</sup> Notably, in one such case, eight survivors of sexual and reproductive violence during the PEV along with the Coalition on Violence Against Women, Independent Medico-Legal Unit, The Kenyan Section of the International Commission of Jurists and Physicians For Human Rights have petitioned the High Court in Petition No. 122 of 2013. The petitioners demand that government should offer a public apology, compensation, psycho-social services and prosecution of responsible parties as reparations. See *Crying For Justice: Victims' Perspectives On Justice For The Post-Election Violence In Kenya*. p. 44

<sup>90</sup> This is a conscious decision due to the fact that judicial reparations typically fall short of redressing the harms experienced by large groups of victims –including women. When compared to judicial reparations, administrative reparations programs generally have a lower standard of evidence, less intrusive forms of engagement with victims, and increased trust by victims of the process. Additionally, administrative reparations are more accessible to victims who often do not have the money to pay for legal fees. Each of these aforementioned factors allow for administrative reparations to redress a larger group of victims and may enable more women to benefit from reparations. See Rubio-Marin, "The Gender of Reparations: Setting the Agenda," p. 5

<sup>91</sup> TJRC Final Report, Volume IIC , p. 3

undoubtedly experience violence on the basis of their gender and issues of masculinity have played a large role in Kenya's history of violence. Moreover, certain forms of violence such as sexual and reproductive violence have been feminized and resultantly male survivors face acute forms of stigma. Therefore, reparations should to be sensitive to the types of violence men experience and the groups of male victims that are often excluded from benefits. However, due to the scope and confines of this mini-dissertation, there is no room for an analysis of how the TJRC's recommendations for reparations consider men's experiences of violence, harm and exclusion. Nevertheless, this is a worthy topic for future research and consideration.

### *1.8 Outline of Dissertation*

Following this introduction, Chapter Two identifies the determinants, nature and impact of the violence typically experienced by women during the TJRC's mandate period. Chapter Two performs the important task of providing context to the analysis of the TJRC's recommendations for reparations by using empirical research on the extent of VAW in Kenya and the harms it has caused. Subsequently, Chapter Three begins to evaluate the Reparation Framework recommended by the TJRC by evaluating the process in which the Framework was developed. This chapter is included in the dissertation in order to determine whether, and to what extent female victims and survivors were included in the process of establishing the recommendations for reparations. Chapter Four assesses the content of the TJRC's recommendations for individual reparations and whether and to what degree they respond to the types of violations and harms women experienced and encourage a change to victims and survivors' lived realities. Finally, Chapter Five analyzes some of the collective reparations recommended by the TJRC and their potential impact on women and transforming patriarchal institutions. Chapter Five will also discuss and analyze some of the steps taken by the Government of Kenya (GOK) to implement reparative remedies. The appendices of this dissertation include a full description of the TJRC's recommendations for reparations.

## 2. The Nature and Impact of Gendered Violence

In order to provide a critical gender analysis of the Reparations Framework proposed by the TJRC, it is necessary to firstly understand the determinants, nature and impact of GHRV experienced by Kenyan women during the TJRC's mandate period. Given the large scope of the TJRC's mandate and the magnitude of GHRV experienced by women, it is impossible to provide a comprehensive evaluation of violence and its resulting harms. Accordingly, this chapter will provide an analysis of gendered violence, discrimination and marginalization commonly experienced by women and therefore, the eligible categories of violence that may garner redress in accordance with the eligibility criteria included in the TJRC's Reparations Framework. To the extent available through the TJRC Report, existing literature and research this chapter will also analyze the multi-dimensional nature of gendered harms experienced by women in Kenya. The chapter is divided into two main sections, with the first highlighting what is called the 'violence continuum' and the second discussing violence that was commonly experienced by women during large breakouts of violence.

While this chapter focuses on the violations experienced and the resulting harms women endured during the TJRC's mandate period, firstly, it is important to acknowledge the activism, agency and resilience of Kenyan women. Throughout the country's history, Kenyan women have not simply been victims of their circumstances, but rather have often been active agents fighting for the space to be effective participants in public life. Despite the oppressive and sexist laws discussed later in this chapter and social norms, many Kenyan women have been activists in the fight for liberation, peace, human rights and gender equality within and beyond Kenya's borders.

<sup>92</sup> While it is impossible to provide a complete picture of the contributions of women to Kenya

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<sup>92</sup>. Kenyan women played a critical role in Kenya's struggle against colonialism and fight for human rights. Women were involved in organizing and executing protests that condemned oppressive British rule and were involved in anti-colonial resistance. Though they are not generally given their due recognition, women during the Mau Mau war performed important duties in their roles as cooks, porters and spies and some as fighters. Following independence, Kenyan women have continued to demand truth, justice and human rights. Kenyan women have mobilized for peace at the local and national levels. Women have formed successful groups such as Wajir Women Association for Peace, Kibera Women for Peace and Fairness and Rural Women Peace Link to creatively organize at a grassroots level and convince belligerents, youth and clan leaders to stop violence, initiate community dialogues for reconciliation and to ensure that GBV is an issue addressed by communities and institutions alike. Moreover, following the PEV, many women demanded to be physically represented in the KNDR mediation team as well as have their concerns reflected in the content of the mediation process. Additionally, Kenyan women have been at the forefront of the

during the mandate period,<sup>93</sup> women's experiences of activism and agency must be acknowledged in order to move away from the problematic assumption that women have only been passive victims of their circumstances. However, it is also important to acknowledge that violence and institutional marginalization in Kenyan society has constrained women's agency; women have been subjected to oppressive systems and extreme forms of violence, which has significantly impacted their lives.

In the analysis of VAW during the post-independence era, this chapter advances three claims: first, violence, marginalization and discrimination against women in Kenya were constant and systematic; second, much of the violence endured by women has set off a 'domino effect' whereby an initial act of violence results in a prolonged series of harms and thus the impact of violence has been cumulative; third, violence has impacted multitudes of women in Kenya, irrelevant of ethnicity, both individually and collectively.

### *2.1 The Continuum of Violence in Kenyan Society*

While analyzing and redressing 'public' violence (torture, killings, conflict-related sexual violence) in periods of generalized violence is vital, it is also important to recognize that this violence stems from the 'everyday' forms of discrimination and violence in society. Women have endured structural<sup>94</sup> and physical violence throughout Kenya's history and into

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struggle for gender equality and have secured important victories. Since the 1990s, feminist activists have spearheaded the "Second Liberation Struggle" campaign, a movement for institutional change and social justice, which also included gender equality. From the Second Liberation Struggle and the women's movement arose the demand to represent women at 30% of all Members of Parliament, a measure that has since reached success as per the passing of 2010 Constitution of Kenya which requires that no more than 2/3 of Parliament may be comprised of representatives from the same gender. Facing massive opposition in Parliament, feminists and women's activists have pushed for gender responsive budgeting, comprehensive affirmative action, and have consistently lobbied government, despite their lack of representation.

See TJRC Volume IIC; Juma, Monica Kathina. 2000. Unveiling Women As Pillars Of Peace Peace Building In Communities Fractured By Conflict In Kenya. United Nations Development Programme.

[http://lnweb90.worldbank.org/Caw/CawDocLib.nsf/0/2662DA99837757A085256CC50070864A/\\$file/unveiling+women.pdf](http://lnweb90.worldbank.org/Caw/CawDocLib.nsf/0/2662DA99837757A085256CC50070864A/$file/unveiling+women.pdf) ; Nzomo, Maria. 2015. Impacts Of Women In Political Leadership In Kenya: Struggle For Participation In Governance Through Affirmative Action. Institute of Diplomacy & International Studies. Accessed July 13.

[http://ke.boell.org/sites/default/files/uploads/2014/01/affirmative\\_action-impacts\\_of\\_women\\_in\\_political\\_leadership\\_in\\_kenya\\_by\\_prof\\_maria\\_nzomo.pdf](http://ke.boell.org/sites/default/files/uploads/2014/01/affirmative_action-impacts_of_women_in_political_leadership_in_kenya_by_prof_maria_nzomo.pdf).

for more information.

<sup>93</sup> It is also important to move beyond the assumption that all women are inherently committed to peacebuilding and human rights. While women in Kenya have notably and actively fought for peace, human rights and gender equality, women have also been organizers, complicit actors and perpetrators of violence. The TJRC found that "some women" were involved in perpetrating gross human rights violations. See TJRC Volume IV, p. 38.

<sup>94</sup> In the discussion of violence and injustice in Kenya, it is helpful to consider Galtung's conception of structural violence, which moves beyond the limited view that violence is exclusively physical, intentional and committed by individual

contemporary Kenyan society. GBV and marginalization of women do not randomly arise in periods of generalized violence, but are rather omnipresent features of life that intensify during periods of generalized violence. In this analysis the feminist ‘continuum of violence’<sup>95</sup> theory is helpful. The continuum of violence suggests that harms committed before, during and after periods of conflict (or in the Kenyan case, generalized violence) are closely connected. Indeed, the experience of women in Kenya comports with the continuum of violence theory. As will be highlighted below, marginalization, inequality and ‘normalized’ or ‘ordinary’ forms of violence such as intimate partner and sexual violence occurred prior to, during and after generalized violence.

Though literature and research on GBV in Kenya remains limited, it is known that Kenyan women are at a high risk of experiencing GBV throughout their life cycles. According to the Kenya Violence Against Children Survey, approximately 76% of females experience at least one incident of physical, emotional or sexual assault prior to the age of 18.<sup>96</sup> The nationally representative Kenya Demographic and Health Survey (KDHS) of 2008-2009 identifies that 39% of 6,318 women surveyed throughout the country have experienced either physical or sexual violence in their lifetimes, with roughly one in four women experiencing violence in the 12 months preceding the survey.<sup>97</sup>

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actors. Galtung’s understanding of violence is that which reduces human agency, prevents people from accessing their basic needs, denies well-being and disproportionately harms certain groups. Galtung further classifies various types of violence which include ‘structural violence’ which he defines as “the violence [that is] built into the structure and shows up as unequal power and consequently as unequal life chances”. Therefore, violence is present in institutions or structures when these structures cause adverse and unequal outcomes for certain groups of people such as death, injury, illness, disease, likelihood of experiencing violence, marginalization, discrimination, poverty, etc. See Galtung, Johan. 1969. 'Violence, Peace And Peace Research'. *Journal Of Peace Research* 6 (3).p. 168

<sup>95</sup> Cynthia Cockburn, “The Continuum of Violence: A Gender Perspective on War and Peace,” in W. Giles and J. Hyndman eds *Sites of Violence: Gender and Conflict Zones*, (University of California Press, 2004)

<sup>96</sup> 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 Behavioral Consequences of Violence Experienced in Childhood. Nairobi, Kenya: United Nations Children’s Fund Kenya Country Office, Division of Violence Prevention, National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, and the Kenya National Bureau of Statistics, 2012. p. 3

<sup>97</sup> Kenya National Bureau of Statistics (KNBS) and ICF Macro. 2010. Kenya Demographic and Health Survey 2008-09. Calverton, Maryland: KNBS and ICF Macro.p. 247

The impact of GBV undermines the health and well being of women. Survivors of physical and sexual violence are more likely to have an increased risk of health problems that are dependent on the type of abuse and its related consequences; typical injuries include damage to joints, partial loss of hearing or vision, scars, wounds, as well as infertility, miscarriage, and unintended pregnancy and mortality.<sup>98</sup> The impact of GBV on a woman's physical health is often coupled with negative psychological and behavioral outcomes; post-traumatic stress disorder, depression, anxiety, fear and sleeping disturbances are commonly associated with having survived physical and sexual gender-based violence.<sup>99</sup> Moreover, given that VAW occurs throughout the life cycle, the impact of violence should be considered cumulative. In addition to its harmful mental and physical impact, GBV often damages women's social, economic and cultural well-being. Though women of all economic classes are impacted by violence, GBV is a contributing cause of poverty, due to its destruction of women's confidence and their social ties.<sup>100</sup> Additionally, sexual violence survivors in Kenya face extraordinary stigma that can result in social exclusion and rejection by family and communities.<sup>101</sup>

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<sup>98</sup> Lawoko, Stephen, Koustuv Dalal, Luo Jiayou, and Bjarne Jansson. "Social Inequalities in Intimate Partner Violence: a Study of Women in Kenya." *Violence and Victims* 22, no. 6 (2007): 773

<sup>99</sup> Heise, Lori L., Jacqueline Pitanguy, and Adrienne Germain. "Violence against Women. The Hidden Health Burden." (World Bank, 1994).

<sup>100</sup> Hazel M. McFerson, "Poverty among women in Sub-Saharan Africa: A review of selected issues." *Journal of International Women's Studies* 11, no. 4 (2013): 50-72.

<sup>101</sup> In addition to sexual and physical forms of violence, many Kenyan girls, are subject to FGM/C. FGM/C in practice ranges from the cutting and removal of the clitoris and labia minora, (which remains the most commonly practiced form of FGM/C in Kenya) to infibulation, a procedure that stitches together the edges of the vulva. In certain cultures FGM/C improves a girl's marriageability, and thus her access to social, economic and cultural resources. Despite its celebrated position within some ethnic groups in Kenya, the TJRC considers FGM/C a practice that results in physical harm and violates girls' human rights. FGM/C can cause serious psychological trauma and short and long-lasting health and social complications such as sterility, obstetric fistulae, arterial hemorrhage, tetanus, heavy bleeding and HIV/Aids and can also limit a girl/woman's access to education, since girls often do not return to school following circumcision. FGM/C is a contributing factor to complications during pregnancy and childbirth, which remains the leading cause of death among girls 15-19 years of age in Kenya.

See UNFPA-UNICEF., 2013. Joint Evaluation Of UNFPA-UNICEF Joint Programme On Female Genital Mutilation/Cutting: Accelerating Change 2008-2012. New York. [http://www.unfpa.org/sites/default/files/admin-resource/fgmcc\\_kenya\\_final\\_ac.pdf](http://www.unfpa.org/sites/default/files/admin-resource/fgmcc_kenya_final_ac.pdf).; UNFPA - United Nations Population Fund., 2010. 'Taking Female Genital Mutilation/Cutting Out Of The Cultural Mosaic Of Kenya'. <http://www.unfpa.org/news/taking-female-genital-mutilationcutting-out-cultural-mosaic-kenya>.; Female Genital Mutilation/Cutting: A Statistical Exploration. 2005. UNICEF.; Kenya National Bureau of Statistics (KNBS) and ICF Macro. 2010. Kenya Demographic and Health Survey 2008-09. Calverton, Maryland: KNBS and ICF Macro; TJRC Report, Volume IIC, Chapter 1: Gender and Gross Violation of Human Rights: Focus on Women

## 2.2 Gendered Inequality, Discrimination and Marginalization in Kenya

Feminist scholars have suggested that VAW is “inextricably linked to broader gender power dynamics”<sup>102</sup> and thus the levels of inequality between men and women provide a strong foundation for violence. Inequality is prominent in many aspects of society; however, it is highly visible in regards to education,<sup>103</sup> access to socio-economic assets and most vividly in discriminatory laws and marginalization in the public sphere. Partially due to these markers of inequality, women, much more so than men, are disproportionately vulnerable to violence, state sanctioned discrimination and marginalization on the basis of their gender identity.<sup>104</sup>

According to the World Bank, roughly half of the total Kenyan population lives in poverty, and nearly one out of every five Kenyans lives in “severe poverty,” meaning that they could not afford basic food bundles even if they spent their whole budget on food.<sup>105</sup> Though poverty remains widespread in Kenya, poverty is indeed feminized. In Kenya, like most countries around the world, women account for the majority of the poor.<sup>106</sup> In female-headed households, which account for one in four households in Kenya,<sup>107</sup> poverty is typically more acutely felt with the poverty incidence at 48% in female-headed households compared to 31% for male-headed households.<sup>108</sup> The high poverty rates among women are related to their limited access and remuneration in the labor market (women’s average earnings are less than half of their male counterparts’ earnings), lower levels of education, lack of participation in decision-making roles and institutions and child-rearing responsibilities.<sup>109</sup>

Feminized poverty has consequences for Kenyan women and their families. For example, poverty and violence are intimately connected, with both contributing to and reproducing

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<sup>102</sup> Catherine O’Rourke, Feminist Scholarship in Transitional Justice: a De-politicizing Impulse? ,” *Women’s Studies International Forum* (2014), <http://dx.doi.org/10.1016/j.wsif.2014.11.003>

<sup>103</sup> See See Central Bureau of Statistics (CBS) [Kenya], Ministry of Health (MOH) [Kenya], and ORC Macro. 2004. Kenya Demographic and Health Survey 2003. Calverton, Maryland: CBS, MOH, and ORC Macro.

<sup>104</sup> TJRC Final Report, Volume IIC , p. 3

<sup>105</sup> Kenya Poverty And Inequality Assessment Volume I: Synthesis Report. 2008. Ebook. 1st ed. The World Bank. P. 17 <http://siteresources.worldbank.org/INTAFRREGTOPGENDER/Resources/PAKENYA.pdf>

<sup>106</sup> TJRC Final Report, Volume IIC , p. 40

<sup>107</sup> Kenya Poverty And Inequality Assessment Volume I: Synthesis Report. 2008. Ebook. 1st ed. The World Bank. p. 48 <http://siteresources.worldbank.org/INTAFRREGTOPGENDER/Resources/PAKENYA.pdf>

<sup>108</sup> Ibid., 20, 48.

<sup>109</sup> Ibid., 20.

unequal gender relations.<sup>110</sup> It is reported that violence and income has an inverse relationship in Kenya, with women in the lowest income brackets experiencing the most violence.<sup>111</sup> Moreover, poverty among women and conditions in poor urban areas, namely unsanitary conditions, overcrowding, insecurity and high levels of sexual violence increase risks for HIV transmission.<sup>112</sup> In addition to poverty's resulting social isolation and exclusion from many aspects of public life, HIV/AIDS can doubly stigmatize Kenyan women. As a result, the TJRC reports that many HIV positive women were evicted from their homes.<sup>113</sup>

VAW during periods of 'peace' and generalized violence should be viewed within a context of explicit and implicit discrimination on behalf of the State. Many Kenyan laws during the mandate period discriminated against women by limiting their rights, reinforcing their dependence on men, and excluding them from decision-making in matters intimately impacting their lives. Moreover, state discrimination against women provided an enabling environment for GBV and marginalization of women from the public sphere.

The 1963 Kenyan Constitution provided the legal foundation for discrimination against women during the entirety of the mandate period. While the post-independence Constitution of Kenya (1963-2010)<sup>114</sup> technically outlawed discrimination on the basis of 'sex' in civil and political matters, Section 82 (4) did not extend constitutional protection in matters of discrimination against women in the private sphere in marriage, divorce, adoption, burial, dissolution of property on death, burial and matters of 'personal law'.<sup>115</sup> In issues effecting these institutions, the customary laws of a woman's given culture determined her power in relation to her family and community. While customary law throughout the mandate period was fluid and could benefit women, women were (and continue to be) considered subordinate to men under customary law,

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<sup>110</sup> Fiske, L., & Shackel, R., *Gender, Poverty and Violence: Transitional Justice Responses to Converging Processes of Domination of Women in Eastern DRC, Northern Uganda and Kenya*, Women's Studies International Forum, 2014, <http://dx.doi.org/10.1016/j.wsif.2014.11.008>, p.2

<sup>111</sup> *Reducing Vulnerability To Sexual And Gender Based Violence In Kenya*, Collaborative Centre for Gender and Development, International Development Research Centre, 2014, p. VII.

<sup>112</sup> M. Amuyunzu-Nyamongo, L. Okeng'O, A. Wagura & E. Mwenza (2007) Putting on a brave face: The experiences of women living with HIV and AIDS in informal settlements of Nairobi, Kenya, *AIDS Care: Psychological and Sociomedical Aspects of AIDS/HIV*, 19:S1, 25-34, DOI: [10.1080/09540120601114618](https://doi.org/10.1080/09540120601114618) p. 29

<sup>113</sup> TJRC Final Report, Volume IV, p. 38

<sup>114</sup> It was only in 2010 that the government established the new Constitution of Kenya, which is discussed in Chapter 3.

<sup>115</sup> Government of Kenya., 1963. 1963 Kenya Constitution.

particularly in issues regarding property.<sup>116</sup> Therefore given the fact that the Independence Constitution remained in effect during the entirety of the TJRC's mandate period, women were denied agency and were resultantly placed in a subjugated position in matters concerning their families and communities.

Customary law determined women's access and ownership to land in many areas throughout Kenya. In respect to most customary law in Kenya, men had greater rights than women "to own, inherit, acquire, manage, and dispose of property".<sup>117</sup> Women who remained in abusive relationships, recently widowed women and divorced women acutely felt the impact of the laws' sanction of discriminatory land practices.<sup>118</sup>

Upon divorce or the death of their husbands, women were often evicted from their land and stripped of the assets that maintained their livelihood. Human Rights Watch reports that in some of Kenya's ethnic groups, particularly the Luo and Luhya, widows "are expected to undergo wife inheritance or cleansing rituals. Most of those who did the rituals said they could keep their property. Those who refused not only lost their property but were also ostracized".<sup>119</sup> Proponents of the practice, which include women, argue that widow inheritance and cleansing, which may require sexual intercourse with a 'cleanser'<sup>120</sup> serves as social security mechanisms for women and their dependent children in the aftermath of a man's death.<sup>121</sup> Once a woman is 'inherited,' she will have access to land and her late husband's relative can provide for her and her children. Moreover, women may be motivated to undergo widow inheritance in order to have children.<sup>122</sup> Thus it is argued that the 'inheritance' of women can confer legitimacy to herself and her children by maintaining her residence in a male-headed household.<sup>123</sup> Despite its cultural,

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<sup>116</sup> Winifred Kamau. Customary Law And Women's Rights In Kenya. The Equality Effect. <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>. Accessed 15 July 2015 .

<sup>117</sup> Human Rights Watch,. 2003. Double Standards: Women's Property Rights Violations In Kenya. Vol. 15, No. 5. New York: Human Rights Watch. p. 33

<sup>118</sup> Ibid., 25.

<sup>119</sup> Ibid., 16.

<sup>120</sup> See Perry, Brian, Lennah Oluoch, Kawango Agot, Jamilah Taylor, Jacob Onyango, Lilian Ouma, Caroline Otieno, Christina Wong, and Amy Corneli. 2014. 'Widow Cleansing And Inheritance Among The Luo In Kenya: The Need For Additional Women-Centred HIV Prevention Options'. Journal Of The International AIDS Society 17 (1). doi:10.7448/ias.17.1.19010.

<sup>121</sup> Gwako, Edwins Laban Moogi. "Widow Inheritance among the Maragoli of Western Kenya." Journal of Anthropological Research (1998): 173-198.

<sup>122</sup> Ibid.,181.

<sup>123</sup> Human Rights Watch, Double Standards: Women's Property Rights Violations In Kenya.

economic and social benefits to some women, the TJRC reports that during the Women's Hearings, "women who testified on this practice strongly condemned it, almost without exception".<sup>124</sup>

Women who were evicted from their matrimonial homes often faced serious hardship. Regardless of their economic status during marriage, eviction from matrimonial homes destroys women's livelihoods and exposes women to poverty and vulnerability to violence given their lack of shelter.<sup>125</sup> Thus, the law's sanction of discrimination in regards to land reinforced women's subordinate position in society and strengthened their dependence on men.

Given the aforementioned violence, exclusion, and discrimination experienced by women, it should not be surprising that women have not been gainfully represented in respect to political leadership and public offices. According to a 2009 Ministry of Gender survey, only 30.9% of posts within Kenya's public service were filled by women, and of those posts, 72% were in the lower cadres.<sup>126</sup> Additionally, women have not been remuneratively elected and nominated into the Kenyan Parliament, as displayed by the table below.

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<sup>124</sup> TJRC Final Report, Volume IIC, p. 32

<sup>125</sup> Human Rights Watch, 2003. *Double Standards: Women's Property Rights Violations In Kenya*, p. 30

<sup>126</sup> Nyokabi Kamau. *Women And Political Leadership In Kenya: Ten Case Studies*. (Nairobi: The Heinrich Böll Stiftung, 2010). p. iii

**Table 1: Female Members of Parliament Elected and Nominated During TJRC Mandate Period**<sup>127</sup>

Parliament	Period	Number of Constituencies	Number of Women Elected	Available Slots for Nomination	Number of Women Nominated
<b>1</b>	1963-1969	158	0	12	0
<b>2</b>	1969-1974	158	1	12	1
<b>3</b>	1974-1979	158	4	12	2
<b>4</b>	1979-1983	168	5	12	1
<b>5</b>	1983-1988	158	2	12	1
<b>6</b>	1988-1992	188	2	12	0
<b>7</b>	1992-1997	188	6	12	1
<b>8</b>	1997-2002	210	4	12	5
<b>9</b>	2002-2007	210	10	12	8
<b>10</b>	2008-2013	210	16	12	6

Women in Kenya's 11<sup>th</sup> Parliament (2013-2018) represent 19% of members of Parliament. Though 19% representation in the 11<sup>th</sup> Parliament compared to roughly 10% representation in the 10<sup>th</sup> Parliament is a noteworthy step towards more equitable representation of women, it is not nearly enough to guarantee that women's voices and interests will be adequately represented.

Women have been underrepresented (or not at all represented) in important and influential parliamentary committees. For example, during Kenya's 10<sup>th</sup> Parliament (2008-2013), women comprised just 7% of the Budget Committees, 9% of the Committee on Implementation and 17% of the Procedure and House Rule Committees.<sup>128</sup> Respectively, these are the Committees that monitor and make recommendations on the budget; monitor the proper implementation of legislation; and design rules for conducting the business of committees. As the Final Report discusses, the lack of representation of women in Parliament has resulted in the refusal of politicians to mainstream gender in their work and to make decisions with the interests of women in mind.<sup>129</sup>

<sup>127</sup> Data and table adapted from TJRC Final Report, Volume IIC p. 76

<sup>128</sup> TJRC Final Report, Volume IIC, p. 76

<sup>129</sup> That said, it is important to acknowledge that just by electing and nominating more women to office does not automatically result in gender-sensitive or informed public policy decision making.

### 2.3 Women's Experiences During Generalized Violence in Kenya

Throughout the TJRC's mandate period, many women experienced some of the same forms of violence as men including death, arbitrary arrest, torture and ethnic violence.<sup>130</sup> Though the literature and the TJRC's Final Report do not provide concrete numbers, during Kenyatta and Moi's consecutive regimes (between 1963 and 1978 and 1978 and 2002 respectively), "multitudes of women," with female politicians and elected representatives, human rights activists and academics in particular were detained and tortured.<sup>131</sup> Despite the fact that many men experienced some of the same violations endured by women, women's pre-existing socioeconomic and political statuses indicate that the harms experienced by women are more pronounced,<sup>132</sup> thus suggesting these types of violations are gender-multiplied.

#### 2.3.1 Sexual Violence

Sexual violence<sup>133</sup> has been a prevalent form of gender normative or gender-based violence throughout Kenya's history. Men and women have experienced GHRV not just inflicted upon them solely on the basis of their gender, but also due to their intersecting ethnic and political identities, as was the case in the 1992, 1997 and 2007 elections.<sup>134</sup> However, the mode of violence selected by perpetrators was often sexual violence. As mentioned in the introduction, the TJRC received 1,104 statements from adults in total in respect to sexual violence and identified a victim count of 2,646 women and 346 men who were victims of sexual violence.<sup>135</sup> The number provided by the TJRC is likely a massive underestimate of individuals who endured sexual violence during periods of generalized violence, let alone those who experienced 'peacetime' sexual violence.<sup>136</sup>

<sup>130</sup> TJRC Final Report, Volume IIC

<sup>131</sup> TJRC Report, Volume I, p. xvii

<sup>132</sup> RubioMarín, R. (2006). *The Gender of Reparations: Setting the Agenda*. In: R. Rubio-Marin, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations*, 1st ed. New York: Social Science Research Council, p. 21

<sup>133</sup> The TJRC adopted their definition of sexual violence from the International Conference on the Great Lakes Region Protocol on the Prevention and of Sexual Violence against Women and Children. This was a relatively expansive definition which can be viewed in full in the TJRC Report. While the TJRC should be lauded for taking sexual violence seriously and adopting an expansive definition of sexual violence committed against women, the TJRC's consideration of men's experiences of sexual violence is minimal. While the definition states that sexual violence is "any act which violates the sexual autonomy and bodily integrity of a person," the acts defined as sexual violence specifically refer to women (acts defined in d, i, j, k, l, and n) and leave out the types of sexual violence experienced by men. Act d defined as "assault or mutilation of female reproductive organs" is particularly troubling as men also experienced assault and mutilation of their reproductive organs.

<sup>134</sup> TJRC Final Report, Volume IIC, p. 2

<sup>135</sup> TJRC Final Report, Volume I, p. xiii

<sup>136</sup> Though this thesis is particularly focused on women, it must be noted that men were also subject to horrific forms of gender-based violence. While women were the primary victims of violence on the basis of their gender during the mandate

The TJRC found sexual violence to be a major violation of bodily integrity rights that was common. The TJRC reports that colonial and post-colonial sexual violence has been pervasive in Kenya during periods of violence, recovery and relative peace.<sup>137</sup> As indicated in the previous section, sexual violence has in fact been a ubiquitous feature of life for all too many people living in Kenya. While the exact causes of sexual violence are debated within the literature, it is argued that extreme expressions of sexual violence are directly tied to the structural and more ‘everyday’ forms of violence and sexual violence women experience during periods of relative peace.<sup>138</sup>

Sexual violence has escalated in scale<sup>139</sup> and brutality during periods of generalized violence in Kenya.<sup>140</sup> The TJRC attributes this to the “breakdown of the social order –perpetrators taking advantage of the disorder to commit sexual violence with impunity –and the use of sexual violence as an instrument of terror”.<sup>141</sup> As mentioned above, sexual violence has accompanied most violations of human rights and other injustices.<sup>142</sup> Thus, it is important to keep in mind that the harms that directly relate to sexual violence are compounded and multiplied by the harms and injuries resulting from other violations.

The motive behind sexual violence during periods of violence highlighted by the Commission differed case by case, but the Final Report identified sexual violence has historically been used as a tool to humiliate, discipline and collectively punish men and women on the basis of their political identity or voting record as well as a tool to invoke terror on communities or ethnic

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period, men were also exposed to various forms of sexual violence. Men were subjected to forcible circumcision, a form of violence targeted against men due to both their gender and ethnicity. In just one night during the height of the PEV, 38 Luo men were forcibly circumcised, While it was reported that some men were left to bleed to death as a result of their injuries, forced circumcision often resulted in genital amputation. See Ahlberg, Beth Maina, and Kezia Muthoni Njoroge. 2015. ‘Not Men Enough To Rule!’: Politicization Of Ethnicities And Forcible Circumcision Of Luo Men During The Postelection Violence In Kenya’. *Ethnicity And Health* 18 (5)

<sup>137</sup> TJRC Final Report, Volume IIA , p 721

<sup>138</sup> Elisabeth Rehn and Ellen Johnson-Sirleaf. *Women, War Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-building*. New York: UNIFEM, 2002. p. 10

<sup>139</sup> Anastario, Michael P., Monica Adhiambo Onyango, Joan Nyanyuki, Karen Naimer, Rachel Muthoga, Susannah Sirkin, Kelle Barrick et al. "Time Series Analysis of Sexual Assault Case Characteristics and the 2007–2008 Period of Post-Election Violence in Kenya." (2014): e106443.

<sup>140</sup> TJRC Final Report, Volume IIA , p721

<sup>141</sup> TJRC Final Report, Volume IIA , p. 721

<sup>142</sup> TJRC Final Report, Volume I, p. 33

groups. Specifically, nearly a quarter of the statements submitted to the TJRC in relation to sexual violence were in the context of ethnic and political violence.<sup>143</sup>

State security agencies, namely the General Service Unit, the Kenyan Police, the Administration Police, the Anti Stock Theft Unit and the Kenyan military, were found to be the main perpetrators of bodily integrity violations –including sexual violence.<sup>144</sup> During periods of electoral and ethnic violence, gangs of men were largely responsible for sexual violence and typically identified their victims on the basis of their ethnicity.<sup>145</sup> Additionally, British soldiers were identified by the TJRC as responsible for raping and sexually violating women in Samburu and Laikipia between 1980 and the early 2000s.<sup>146</sup>

While it is important to acknowledge the traumatic experience of sexual violence standing alone as a heinous act, once the onslaught of sexual violence ends, survivors typically must live with long-lasting negative impacts. As elaborated in the Final Report, sexual violence has impacted “virtually every area” of survivors’ lives.<sup>147</sup> One survivor of sexual violence during the PEV of 2007/2008 provided her account:

When you walk around here everybody knows that you were raped, so you don’t have a good reputation and you don’t have a normal life. I still have pains in my stomach up to now and I was never used to just idling, I used to depend on myself and I had my own salon and I also sold earrings and panties yet all of this was burnt. I used to take very good care of myself, but right now I don’t even look like a human being, and I used to live well with my children and husband. I had a husband and four children.<sup>148</sup>

As this survivor details, the impact of sexual violence has had communal, social, economic, physical and mental repercussions. Given the scale of sexual violence as a ‘violation of bodily integrity’ during the mandate period, the impact on survivors in Kenya has been far reaching.<sup>149</sup> Many of the physical injuries sustained as well as infections and diseases transmitted as a result of sexual and reproductive violence require both short and long-term medical attention.

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<sup>143</sup> TJRC Final Report, Volume IIA p. 735

<sup>144</sup> TJRC Final Report, Volume I, p. vii

<sup>145</sup> Robins, “To Live As Other Kenyans Do,” p. 18

<sup>146</sup> TJRC Final Report, Volume I, p. 32

<sup>147</sup> TJRC Final Report, Volume IIA , p. 753

<sup>148</sup> Robins, “To Live As Other Kenyans Do,”p. 22

<sup>149</sup> As previously indicated, the major physical wounds of sexual violence as defined by the TJRC include internal and external physical injuries, damaged reproductive health, unwanted pregnancies, poor overall health and increased exposure to HIV/AIDS and other sexually transmitted infections. See TJRC Final Report, Volume IIA , p. 758

In addition to the health impact of the initial violence, sexual and reproductive violence has a devastating impact on a woman's relationship to her family and community and thus her social capital, which can be defined as "the quality or quantity of resources that an actor...can access or use through its location in a social network".<sup>150</sup> As social capital is accrued through trust in social and community relationships, patriarchal community responses to sexual and reproductive violence survivors has been devastating. When a woman is identified as a sexual violence survivor in Kenya (as is the case in many other contexts), it is likely that she will face tremendous stigma, social exclusion and ultimately outright rejection by her family and even her community at large.<sup>151</sup> The TJRC reports that partner abandonment and the breakup of families was commonplace.<sup>152</sup> For example, if it was known in a community that a woman was a victim of rape, it was normal practice for her to be evicted from her home –whether it was shared with her husband or that of her parents.<sup>153</sup> Moreover, if a woman were known to be a survivor of sexual violence, her marriageability, and thus her access to financial security and stability, would be deeply compromised. The rejection and ostracism faced by sexual violence survivors multiplies their trauma and mental health injuries that exist due to the sexual violence itself; it has been shown that negative social reactions from 'informal support providers' such as families and communities predicts consequences such as increased levels of anxiety, post-traumatic stress and depression.<sup>154</sup>

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<sup>150</sup> See Lin, Nan. "Inequality in social capital." *Contemporary sociology* (2000): 785-795.

<sup>151</sup> TJRC Final Report, Volume IIA

<sup>152</sup> *Ibid.*, p. 758.

<sup>153</sup> *Ibid.*, 764.

<sup>154</sup> Campbell, Rebecca, Emily Dworkin, and Giannina Cabral. "An Ecological Model of the Impact of Sexual Assault on Women's Mental Health." *Trauma, Violence, & Abuse* (2009).

### 2.3.2 Forced Displacement

As relayed by the TJRC Final Report, forced displacement has been a “permanent feature of Kenya’s history” from the colonial era to post-independence.<sup>155</sup> In the post-colonial period, political and economic elites have forcibly removed ‘squatters and poor people’ as well as certain ethnic groups from their land, a practice that was also foundational to British rule.<sup>156</sup> Additionally, Kenyan state representatives and powerful individuals have utilized the services of ‘youths,’ criminal gangs and state security agents to evict people from their land, usually without warning or compensation.<sup>157</sup> According to the Commission, in most cases, sexual violence was utilized by a variety of actors in order to precipitate the evictions of communities or to indicate the start of cattle raids.<sup>158</sup>

Breakouts of political and ethnic violence, particularly those between 1991 and 2008, have accounted for the most forced displacement in Kenya’s history, which has resulted in enormous numbers of internally displaced persons (IDPs) within Kenya and Kenyan refugees in neighboring countries such as Uganda.<sup>159</sup> In the PEV alone, 663,921 people were displaced, with 350,000 people seeking shelter in 118 different camps and 313,921 finding refuge in communities throughout Kenya and beyond its borders.<sup>160</sup> In the episodes highlighted by the TJRC’s Final Report, displacement was not simply a byproduct of violence, but rather, a carefully considered calculation by perpetrators.

During the TJRC’s mandate period, forced displacement can be categorized as what Margaret Urban Walker calls ‘gender-skewed’<sup>161</sup> violence because women have been disproportionately impacted and bear the brunt of harm as a result of displacement. Women and their dependent children make up the vast majority of all refugees and displaced people impacted by violence in Kenya;<sup>162</sup> during the PEV of 2007/2008, the United Nation’s Livelihood Recovery Program

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<sup>155</sup> TJRC Final Report, Volume IIC, p. 113

<sup>156</sup> TJRC Final Report, Volume IIA p. 745

<sup>157</sup> Ibid., 746.

<sup>158</sup> Ibid.

<sup>159</sup> TJRC Final Report, Volume IIC , p. 113

<sup>160</sup> Ibid., 114.

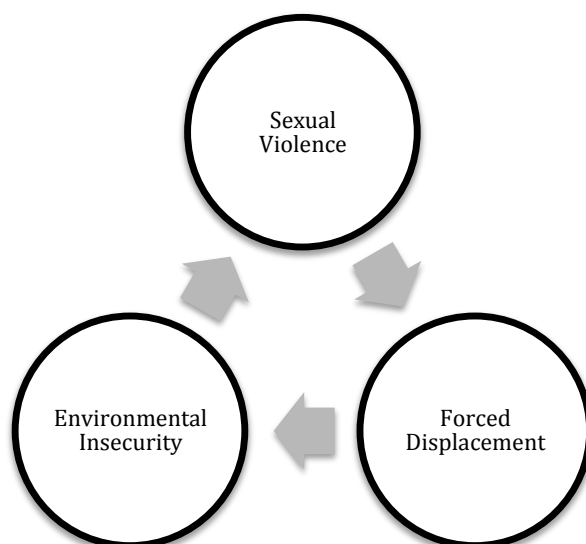
<sup>161</sup> Walker, “Gender And Violence In Focus: A Background For Gender Justice In Reparations,” p. 51

<sup>162</sup> TJRC Final Report, Volume IIC, p. 113.

estimated that over 60% of IDPs were women.<sup>163</sup> For the women who testified before the TJRC, displacement and forced evictions from their homes was a common occurrence. The majority of women revealed that they had been forcefully displaced multiple times after their properties were looted or destroyed.<sup>164</sup>

It must be noted that though women flee from violence or imminent danger in their places of residence, they are not safe or free from violence throughout their search for refuge. The TJRC found that Kenyan women were subjected to tremendous violence during the process of fleeing from their residences to shelter.<sup>165</sup> The process of forced displacement, environmental insecurity and poor conditions in IDP and refugee camps rendered women more vulnerable to further violence.<sup>166</sup> Thus, it can be said that the initial act of forced displacement as a result of generalized violence (which was most often preceded by sexual violence) is likely to initiate a ‘domino effect’ of further violence and harms.

### The Gender Multiplied Domino Effect



<sup>163</sup> Preston McGhie, Meredith, and E. Njoki Wamai. *Beyond The Numbers: Women's Participation In The Kenya National Dialogue And Reconciliation*. (Geneva: The Centre for Humanitarian Dialogue, 2011).p. 13

<sup>164</sup> TJRC Final Report, Volume IIC, p. 121

<sup>165</sup> Ibid., 122.

<sup>166</sup> Rehn, Elisabeth, and Ellen Johnson-Sirleaf. *Women, War Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building*, p. 23; TJRC Final Report, Volume IIC, p. 126, 135

The conditions and lack of resources in displacement camps greatly impacted women's well-being.<sup>167</sup> Access to food was limited for IDPs and refugees. Camps supervised by the United Nations did not provide enough food to feed families, leaving women and their dependent children to go hungry or scramble for food.<sup>168</sup> A memorandum submitted to the TJRC from women displaced by the PEV and residing in IDP camps revealed that they were suffering from asthma and other breathing problems, hypertension, ulcers and HIV/AIDS due to the conditions or violations committed against them in the camps.<sup>169</sup> Camps were overcrowded, unsanitary, and lacking in basic medicines and health supplies such as anti-retroviral drugs and sanitary towels.<sup>170</sup>

### 2.3.3 *Impact of Secondary Victimization and Communities of Harm*

When assessing harm, it is important to utilize the feminist theory that suggests that harm is experienced both individually and socially.<sup>171</sup> The impact of violence or injustice on an individual victim often causes a chain reaction that impacts multiple people or certain identity groups. This chain reaction and the connectivity of injuries and losses create what Fionnuala Ni Aoláin describes as a “community of harm”.<sup>172</sup> Communities of harm can be constituted of people, oftentimes family members, who are emotionally tied or codependent upon the primary victim; death, injury and prolonged absence of the ‘primary victim’ acutely impact the community of harm. In the Kenyan case, communities of harm can be comprised of the persons who witnessed first-hand atrocities such as torture, killing and sexual violence committed against another person.<sup>173</sup> For some women, the loss of a loved one can often be so traumatic and thus the line between primary and secondary victim becomes blurred. As explained by Ni Aoláin, “many women know and feel instinctively when harm comes to those connected to them: that the harm is not disembodied and unrelated to them but they feel and experienced it as a direct harm to the self”.<sup>174</sup>

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<sup>167</sup> TJRC Final Report, Volume IIC , p 151.

<sup>168</sup> Ibid., 135.

<sup>169</sup> Ibid., 125.

<sup>170</sup> TJRC Final Report, Volume IIC

<sup>171</sup> Fionnuala Ni. Aoláin, "Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies." *Queen's LJ* 35 (2009): 219.

<sup>172</sup> Fionnuala Ni. Aoláin, "Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War." *Theoretical Inquiries in Law* 1, no. 2 (2000).

<sup>173</sup> See TJRC Volume IV, 40).

<sup>174</sup> Ni Aolain, “Exploring A Feminist Theory Of Harm In The Context Of Conflicted And Post- Conflict Societies”

Due to women's preexisting subordinate socio-economic status, the impact of violence and forced displacement on their livelihoods and economic security has been destabilizing and devastating. Women in Kenya are often dependent on the men in their lives to be 'breadwinners' and social and cultural mores require women to be to some degree dependent on the men in their lives.<sup>175</sup> Because men have largely been killed in recurrent election violence and massacres in the northeast of Kenya, women often suddenly experience cycles of economic hardship, grief and trauma following the death and injuries of their male partners and relatives.<sup>176</sup> In his analysis of focus groups and interviews with victims of violence in Kenya, Robins has suggested that violence has had the greatest impacts on victims' lives through their secondary effects.<sup>177</sup> Being impacted by another's death or injury has introduced a host of difficulties and new responsibilities for women, such as solely providing for children and other dependents, but they have also has exacerbated violations women may have experienced.

#### *2.4 Vulnerabilities and Intersectionality*

As it has been shown in the above sections, gender in Kenya is a strong and pervasive dimension of inequality that often precipitates loss and violence. However, it must also be recognized that women's experiences, losses and harms were not uniform and thus it is important to avoid essentializing women as one category. Thus, it is important to view women's experiences in an intersectional manner and acknowledge that some women endured more intensified harm or were able to better cope with the impact of exclusion given their class, citizen status, sexual orientation, ethnicity, geographical location. An intersectional approach can help to identify the categories of highly vulnerable women. The TJRC identifies women with disabilities, women with HIV/AIDS, women in rural and economically marginalized areas, women from minority and indigenous communities and the poorest of women as the most vulnerable groups among women.<sup>178</sup>

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<sup>175</sup> Stephen Lawoko, Koustuv Dalal, Luo Jiayou, and Bjarne Jansson. "Social inequalities in intimate partner violence: a study of women in Kenya." *Violence and victims* 22, no. 6 (2007): 773-784., p.782

<sup>176</sup> TJRC Final Report, Volume IV, p. 38

<sup>177</sup> Robins, "To Live As Other Kenyans Do," p 30

<sup>178</sup> TJRC Final Report, Volume IIC , p. 2

*Conclusion*

Given the extent and prolonged history of violence and injustices in Kenya, victims, their families and communities continue to suffer scores of harms that directly stem from violence or state discrimination. Marginalization, discrimination and violence has introduced “destructive synergies of loss and suffering” or ‘domino effects’ that continue to exacerbate women’s injuries and socio-economic positions.<sup>179</sup> As it was mentioned in this chapter, the violence and harms suffered by women during the mandate period are interconnected and thus the impact has been cumulative.

The individual harms and violence endured by women must be viewed within a greater system of female subordination. Thus, it is critical that a well-designed gender-sensitive reparations program be implemented in order to provide relief for psycho-social and physical injuries and address victims’ needs, acknowledgement for the depth of harm widespread among women, and rehabilitation to female victims and survivors.

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<sup>179</sup> Rubio-Marin, “Introduction: A Gender and Reparations Taxonomy”, p.20

### 3. Participation of Women in Developing Recommendations for Reparations

In the aftermath of the disempowerment and violence discussed in the previous chapter, the meaningful participation of victims in the procedural aspect of developing a reparations framework may facilitate greater agency and autonomy. Thus, for female victims and survivors, being included in the process of establishing reparations affirms their agency and role in transforming gender inequalities in patriarchal societies. The very inclusion and participation of women in developing a reparations program can in a way be considered a form of reparation. Considering the importance of procedure to female victims and survivors of GHRV, it is useful to imagine reparations “both as a process and an outcome”.<sup>180</sup> Thus, to provide a gender sensitive analysis, it is important to begin with the Reparations Framework’s process –or in other words, its methodology.

In a context where structural and physical VAW is omnipresent and social and cultural norms inhibit women’s active and meaningful contribution in the public sphere, the TJRC should be lauded for its adoption of special measures to maximize women’s participation within the everyday functions of the truth commission, as discussed in the introduction. However, as it will be explored in this chapter, the TJRC struggled to fully include victims, with female victims and survivors of GHRV in particular, in the process of developing its Reparations Framework.

#### 3.1 Reparations Methodology

The procedure or methodology of establishing reparations is important –particularly in regards to its inclusion of victims and survivors of GHRV. According to the literature on gender-sensitive reparations discussed in the introduction, in order to provide an ‘open’ reparations policy that is adapted to female victims’ needs and interests, it is important to ensure that victims are “full participants” in the development of a reparations framework. To develop reparations characterized by ‘openness’, it is necessary for a commission to acknowledge and remove, to the extent possible, structural barriers to women’s participation. However, as this chapter will discuss, the TJRC was unable to remove these barriers for a variety of reasons.

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<sup>180</sup> Moffett, L, Transitional Justice and Reparations: Remediating the Past?. In: Dov Jacobs (ed.) *Research Handbook on Transitional Justice*, Forthcoming, p. 34

Despite the widely acknowledged assertion that the process of establishing reparations is significant to victims and survivors, the TJRC's 2,210 page Final Report devotes just 65 words to how it developed its Reparation Framework and does not describe the work of the Reparations and Rehabilitation Committee. As disclosed through the TJRC's statement on its reparations methodology, it "considered the full extent of data" collected through interactions with the public during civic education and other forums, official statements and memoranda and testimony before the TJRC.<sup>181</sup> Thus, in turn, these processes must be scrutinized to assess to what degree they allowed for the meaningful participation of female victims.

### *3.2 Civic Education and Outreach*

Civic education and sensitizing the public in regards to a commission's activities is a crucial process for any truth commission. In order to fully contribute to the development of any reparations framework, victims and survivors of GHRV must first be aware of a truth commission process in order to influence the body and fully participate in its proceedings. Given that women are often marginalized or excluded from public forums in highly patriarchal societies, in order to be gender-sensitive, civic education and outreach activities must be inclusive and strategic in reaching women.

According to the TJRC, the pre-hearing civic education and outreach initiatives' goals were to inform the general public on the Commission's mandate, work and processes, manage the public's expectations of the Commission and to establish a "receptive environment" for the TJRC's hearings.<sup>182</sup> In order to execute these goals, the TJRC organized meetings primarily in town halls but also held sessions in open-air gatherings.<sup>183</sup> The civic education meetings organized by the TJRC involved both open and closed sessions with the general public, groups of victims, community leaders and business people.<sup>184</sup> In order to foster full and meaningful participation of vulnerable groups, the TJRC held special sessions with "women, youth, children, persons with disabilities, internally displaced persons, slum dwellers, squatters, evictees and

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<sup>181</sup> TJRC Final Report, Volume IV, p. 100

<sup>182</sup> Ibid.,82.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

survivors of particular episodes of human rights violations”.<sup>185</sup> Though the TJRC’s efforts to reach vulnerable groups who are often excluded from public forums should be mentioned, the Final Report and available literature do not indicate how many sessions were held with these groups and whether or not they occurred throughout the country.

In order to increase women’s participation in the TJRC process, the Commission developed targeted communication messages for women and encouraged them to get involved in the TJRC process through radio announcements and campaigning in local markets throughout the country.<sup>186</sup> In its efforts to encourage more women to attend its civic education meetings and increase outreach in other forums, the Commission partnered with both local and community based women’s organizations.<sup>187</sup> Though the Final Report discloses that it worked with some women’s organizations in its “mobilization initiatives,” the Report and existing literature do not indicate how involved these organizations were and whether and to what degree they influenced the TJRC’s outreach strategy.

As mentioned in the introduction, the TJRC’s funds were limited and the internal controversies within the commission tarnished its relationship with civil society, which resultantly impacted the Commission’s outreach work and image throughout the country.<sup>188</sup> The strained partnership between civil society and the TJRC was readily apparent in the Commission’s relationship with some women’s rights organizations, including FIDA Kenya, which decided to disengage with the TJRC for the majority of the Commission’s life span.<sup>189</sup> Thus, it can be seen that the Commission, due to its internal controversies, was partially restricted in its ability to access a more ideal number of Kenyans and women in particular.

### *3.3 Statement Taking Process:*

Arguably, statement taking is one of the most important processes in any truth commission. In the span of a truth commission’s lifetime, most victims interact with the Commission only through the statement taking process. It is through taking the statements of victims, survivors and

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<sup>185</sup> Ibid.

<sup>186</sup> TJRC Final Report, Volume IIC. p.8

<sup>187</sup> TJRC Final Report, Volume IIC. p.8

<sup>188</sup> TJRC Final Report, Volume I. p.81

<sup>189</sup> TJRC Final Report, Volume IIC. p.14

witnesses that truth commissions are able to collect personalized and vital data and can subsequently identify patterns of GHRV.

The TJRC's Statement Taking Form included a section for victims to provide their recommendations for reparations, which was considered by those who developed the Reparations Framework. Thus, it was necessary for the TJRC to obtain a substantial number of statements from women, as they experienced the brunt of gender-based human rights violations and were hugely impacted by the secondary impacts of GHRV. Additionally, in order to be truly effective, the Statement Taking Forms and the data derived from it needed to fully represent victims' ideas regarding the forms of redress they need in order to rehabilitate. According to the literature discussed in the introduction, it is only through victims' own articulation of their needs, interests and priorities that a truly victim centered and gender sensitive reparations framework can be developed. However, as will be discussed, the TJRC was unable to obtain an equitable representation of statements from women and the substance of the data it acquired from victims disclosed in the Report had limited utility.

The Commission took measures to maximize the quality and number of statements from women. Following the lessons from prior truth commissions that female victims were unlikely to provide statements to male statement takers, the TJRC attempted to ensure that as far as possible, women's statements were taken from female statement takers.<sup>190</sup> Additionally, the Commission learned from the experiences of former truth commissions that women often prioritize sharing how GHRV impacted their loved ones over the violence they experienced themselves; thus statement takers and the form itself encouraged women to discuss the violations they personally experienced.<sup>191</sup> Moreover, the Commission decided to provide 'gender sensitivity training' to statement taking staff.<sup>192</sup> However, monitoring research of the Commission reveals that the 'gender sensitivity training' provided to TJRC staff was only one day long.<sup>193</sup> Given the gendered complexities in the country, it was impossible to provide a rigorous training that would

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<sup>190</sup> TJRC Final Report, Volume IIC. p.8

<sup>191</sup> Ibid.

<sup>192</sup> Ibid., 7.

<sup>193</sup> Mayesha Alam, "Gender Mainstreaming In Transitional Justice: Progress And Persistent Challenges In Retributive And Restorative Processes" (Master of Arts in Conflict Resolution Dissertation, Georgetown University., 2012) p. 71

equip TJRC staff with the knowledge and skills necessary to engage women in a daylong training.

Despite the Commission's attempts to ensure that women express their experiences of violations in the Statement Taking Forms, the TJRC only recorded 16,377 statements from women out of the 42,465 total statements collected by the Commission; thus, in total, just 38% of the Commission's statements were collected from women.<sup>194</sup> While the TJRC collected the highest number of statements by any truth commission to date,<sup>195</sup> recognizing that only 38% of the statements came from women (who were both primary and secondary victims of GHRV) places the gender representative nature of the statements into question.

Although the Commission received a minority number of statements from women, the Final Report includes no analysis as to the reason why they believe they obtained just 38% of statements from women. While there may be a number of reasons why the TJRC did not receive a gender representative sample of statements, the Commission, which described itself as gender-sensitive, did not elaborate upon its failure to obtain a more representative sample of statements from women.<sup>196</sup>

While the general lack of statements from women is notable, portions of the actual form itself diluted victims' input into their reparative wishes. The TJRC's Statement Taking Form included a section (Section Seven) with the purpose of recording victims' recommendations for reparations.<sup>197</sup> According to Robins' study of victims' reparative needs, which was undertaken in 2010 while statements were being taken by the TJRC, very few Kenyan victims of GHRV were familiar with the concept of reparations.<sup>198</sup> Thus, as it will be shown, it is plausible that the TJRC prompted victims to respond in an uninformed way. Section Seven of the Statement Taking

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<sup>194</sup> TJRC Final Report Volume IIC. p.8

<sup>195</sup> Global Partnership for the Prevention of Armed Conflict and NPI Africa., 2014. *Transitional Justice In Kenya: A Historical Perspective And A Synopsis Of A Troubled Truth, Justice And Reconciliation Commission*. p. 15

<sup>196</sup> Kenya's Constitution and Reform Education Consortium's monitoring report on the TJRC process argues that one of the reasons why women's participation in the statement process was lacking was because "it was assumed that if a husband or father is involved" and provided a statement to the TJRC "he will obviously represent issues affecting the entire family". See *Constitution & Reform Education Consortium (CRECO)*, 2012. *The Quest For An Elusive Justice: A Report On Observation Of The Truth, Justice And Reconciliation Commission Of Kenya*. Nairobi.

<sup>197</sup> TJRC Final Report ,Volume IV. p.100

<sup>198</sup> Robins, "To Live as Other Kenyans Do"

Form provided a perfunctory list of commonly used examples of reparations. The form did not provide a definition of reparations or a description of the concept to victims; rather, the description of reparations included the following text:

An important part of the TJRC's proposals to the government will be about reparations including symbolic acts (targeting individuals and communities) which will help us remember the past, honor the dead, acknowledge the victims and their families and further the cause of reconciliation.<sup>199</sup>

The statement form asked for victims' opinions on "what should be done" in regards to reparations for individuals, communities and the nation. The examples provided by the TJRC's Statement Taking Form is included below. Each section included a space for victims' responses after the following prompts:

For individuals: (for example compensation; prosecution, identification of perpetrators; exhumation and burial; apology; medals; certificates; street names; memorials; grave stones; counseling etc.)

For the Community: (for example, a peace park; build a school; exhumation and proper burial of the dead; special ceremony; annual religious service; recovery of stolen funds; affirmative action etc.)

For the Nation: (for example, monuments; recovery of stolen funds; prosecution; apology; legal and institutional reforms; national day of remembrance, etc.)<sup>200</sup>

The TJRC, through the Statement Taking Form missed an opportunity to educate Kenyan victims, who largely knew very little regarding the concept of reparations, of the principles and right to reparations in the aftermath of GHRV. Given that much of Section Seven was vague, the responsibility to explain the concept of reparations, if asked by the victim, was left to the statement taker. However, monitoring evidence from NGOs and researchers<sup>201</sup> suggests that the statement takers' knowledge of transitional justice concepts and the TJRC itself was limited. In part, this was due to the TJRC's employment practices. As an attempt to empower marginalized victims, the TJRC elected to hire victims as employees of the Commission with the responsibility of taking victim statements across the country.<sup>202</sup> The Commission stressed that the involvement of victims "facilitates access to victim communities, and promotes ownership and

<sup>199</sup> TJRC Final Report Volume I, appendix. p.189

<sup>200</sup> Ibid., p. 190.

<sup>201</sup> Including the ICTJ and CRECO

<sup>202</sup> TJRC Final Report, Volume I, p.32

legitimacy of the process”.<sup>203</sup> While the TJRC’s affirmative action policies and empowerment of victims through employment is admirable, the TJRC failed to ensure that its employees were well-trained and knowledgeable regarding important subjects that were essential to carrying out the Commission’s mandate.

According to an ICTJ’s interview with Nancy Kanyago, the TJRC’s former Head of the Special Support Services Unit, the training of statement takers was not uniformly provided across Kenya; moreover, some trainers themselves were not equipped with necessary skills for educating statement takers.<sup>204</sup> Additionally, Kenya’s Constitution & Reform Education Consortium’s monitoring work of the TJRC’s statement taking process suggests that some statement takers were entirely untrained and those who were exhibited a “lack of awareness and understanding of the TJRC mandate”.<sup>205</sup>

Thus, the Statement Form’s lack of description of reparations coupled with the lack of uniformity in training and knowledge of statement takers plausibly resulted in confusion over the concept of reparations for many victims. This is evidenced by the large proportion of victims who did not respond with recommendations for reparations.<sup>206</sup> The ranking of reparations proposed by individuals and the nation as conveyed in the TJRC Report reveals that the category “not given” ranked second and first respectively.<sup>207</sup> This indicates that the Statement Forms did not provide enough information regarding reparations to victims.

### 3.4 The TJRC’s Hearings

In addition to the TJRC’s outreach and statement taking activities, the Commission’s public and private hearings informed the development of the TJRC’s Reparations Framework. Between April 2011 and April of 2012 the TJRC conducted three types of hearings: individual hearings, thematic hearings and women’s hearings as detailed in the introduction.

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<sup>203</sup> Ibid.

<sup>204</sup> *The Accountability Gap On Sexual Violence In Kenya: Reforms And Initiatives Since The Post-Election Crisis.* (New York: The International Center for Transitional Justice, 2014) p. 7

<sup>205</sup> *The Quest For An Elusive Justice: A Report On Observation Of The Truth, Justice And Reconciliation Commission Of Kenya.* (Nairobi.: Constitution & Reform Education Consortium, 2012) p. 32

<sup>206</sup> TJRC Final Report, Volume IV, p. 101

<sup>207</sup> Ibid

The TJRC employed certain measures to include female victims and witnesses as participants in the general hearings. In addition to ensuring that victims could testify before the Commission *in camera*, men and women who testified were able to access trauma counseling services before, during and after the hearings.<sup>208</sup> Among the organizations available for counseling was the well-established Gender Violence Recovery Centre,<sup>209</sup> a charitable wing of the Nairobi Women's Hospital which provides free psychosocial support and medical services to survivors of GBV and engages in advocacy for violence prevention.<sup>210</sup> Moreover, the TJRC encouraged women with infant children to participate in the general hearings and covered expenses for someone to travel with the women and infants and provided childcare while the women were busy testifying before the Commission.<sup>211</sup>

Within the general hearings, the TJRC encouraged selected women to “speak about the whole gamut of issues and violations that affect them” in order to reveal to the general population the “gendered perspectives”<sup>212</sup> of human rights violations.<sup>213</sup> Though the TJRC employed certain measures to encourage women to participate in the general hearings, as mentioned in the introduction, only 161 testified during the public hearings.<sup>214</sup> While the TJRC failed to provide a critical reflection of the lack of female participation in the public hearings, it can be reasoned that social mores regarding women's participation in public forums and the burden of stigma in regards to gendered experiences of violence prevented some women from testifying. While structural and patriarchal issues undoubtedly limited women's participation in the general hearings, the statement forms largely informed the selection of window cases and as previously mentioned, just 38% of the statements were collected from women.<sup>215</sup> Therefore, it is clear that female victims and survivors of GHRV were unable to gainfully participate in the Commission's general hearings.

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<sup>208</sup> TJRC Final Report Volume I, p. 99

<sup>209</sup> See Chapter Five for a discussion on one-stop gender violence recovery centers.

<sup>210</sup> Gender Violence Recovery Centre, Gvrc.or.ke., 2016. "About Us". Accessed January 16. <http://gvrc.or.ke/about-us>.

<sup>211</sup> TJRC Final Report ,Volume I, p. 99

<sup>212</sup> While it was important to encourage women to speak about the holistic experience of harm they endured beyond sexual and reproductive violence, the TJRC's notion that women alone have “gendered perspectives” is problematic, given that men's experiences during the mandate period were also deeply gendered and they too experienced gender based violence.

<sup>213</sup> TJRC Final Report, Volume IIC, p. 13

<sup>214</sup> Ibid.

<sup>215</sup> Ibid., 8.

*Conclusion*

According to the Final Report, the Reparations Framework was developed in part, from its consideration of “the full extent of data” collected through statements and memoranda, hearings and other interactions with the public. However, as this chapter has shown, the Commission had difficulty in representing female victims in this process of establishing the Reparations Framework. Understandably, resource constraints, limited time, social mores regarding women’s participation in the public sphere and the controversies regarding the TJRC limited the TJRC’s capacity in its outreach to women and their resultant representation in forums which contributed to the Reparations Framework’s development. In addition to these factors, the TJRC failed to develop a sound Statement Taking Form and process to adequately document victims’ reparative needs and recommendations. Ultimately due both to factors within and beyond the Commission’s control, the ‘openness’ of the TJRC’s Reparations Framework is partial.

#### 4. Gender Analysis of Proposed Individual Reparations

Following the description and analysis of the process leading up to the development of the Reparations Framework, it is necessary to begin the evaluation of its content. This chapter evaluates the extent to which the Reparations Framework responds to the worst types of violence experienced by Kenyan women and encourages a change to their lived realities through its proposed remedies. In order to do so, this chapter will provide an analysis of the substantive content of individual reparations proposed by the TJRC's Reparations Framework grounded in the normative literature on gender-sensitive reparations as well as women's experiences of violence during the mandate period. In the analysis of its reparative content, it is argued that the TJRC's Reparations Framework appropriately recognizes the worst types of violations women experienced and, for the most part, proposes remedy for compensation and rehabilitation that, if implemented, is likely to make a positive impact on victims' lived realities. However, the Framework contains some significant oversights and lack of detail in its eligibility criteria, which may threaten to exclude deserving female victims of benefits.

##### *4.1 Gender Sensitive Individual Reparations*

Administrative reparations programs, like the one proposed by the TJRC, have both individual and societal aims. Collective reparations, the subject of the next chapter, mostly contain transformative goals that seek to address the root causes of violence, modestly transform society and prevent future violence from occurring. At an individual level, reparations are corrective and meant to acknowledge and remedy the harms experienced by victims as a result of a violation.

Feminist scholars argue that the most important and immediate goal of individual reparations is to assist survivors with coping with the negative impacts of violence on their lives.<sup>216</sup> While the impacts of violence on victims' lives are complex, multi-dimensional and are influenced by victims' unique material conditions prior to victimization, there are certain trends in the impact of GHRV in women's lives. As it was discussed in Chapter Two, violence has had an attendant negative economic, psycho-social and physical impact on women. Therefore, any individual

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<sup>216</sup> Duggan and Jacobson, "Reparation of Sexual and Reproductive Violence"

gender-sensitive reparations program in Kenya must enable women to cope with the impact of violence on their lives. By better enabling victims to cope with the effects of violence and harm, reparations may assist victims in restoring dignity and may act as a tool of modest empowerment.

#### 4. 2 Description of the TJRC's Individual Reparations Framework

The following sections describe the relevant beneficiaries, benefits and evidentiary standards pertinent to this analysis. See the table below and appendix for a detailed description of the TJRC's recommendations for individual reparations.

#### The TJRC's Individual Reparations Framework

Priority	Beneficiaries	Benefits	Evidentiary Standards
A: Expedited individual Reparations	Individual victims of gross human rights violations in <u>Category 1 or 2</u> defined as 'most vulnerable.'  Exemptions: Individuals who have already received monetary compensation should not receive the monetary measures included in Priority A.	1. <u>Compensation:</u> Monetary compensation in the form of a ten year pension paid to the victim or deceased victim's family.  2. <u>Rehabilitation:</u> Medical care and psychosocial vouchers will be provided to victims who demonstrate need.	More likely than not standard of evidence.
C Non-expedited individual Reparations:	Individuals who have experienced violations from category 1 or category 2 who did not qualify and receive reparations from Priority A or monetary reparations from Priority B	1. <u>Compensation:</u> Standardized 5 year pension to victim	More likely than not standard of evidence.

### *4.3 Selection of Violations and Beneficiaries*

Selecting the categories of victims that should receive reparations is difficult for any truth commission. As discussed in Chapter Two, many Kenyans faced GHRV and systematic discrimination. However, given political obstacles and the restricted funds possessed by the GOK, the TJRC limited individual reparations to victims who endured some of the worst abuses during the mandate period. These include individuals who are victims and survivors of Category One,<sup>217</sup> violations of the right to life violations and Category Two,<sup>218</sup> violations of the right to personal integrity violations. Moreover, the TJRC further restricted beneficiaries of the full Priority A reparations (reparations with the maximum benefits of a ten-year pension and psychosocial as well as medical vouchers) to the most vulnerable of all victims. While ostensibly, the Framework's recommendations for individual reparations beneficiaries are gender neutral, they are for the most part inclusive of the worst types of GHRV typically experienced by women. The categories of violations in the Framework that qualify victims for reparations include types of violence that are gender skewed and gender normative; these types of violence and harms include being secondary victims of violations of the right to life and primary victims of sexual violence.<sup>219</sup> However, as it will be discussed, the Framework's recommendations for individual reparations do not include necessary details, which without careful and critical elaboration, if implemented, could exclude vulnerable women from benefiting from individual reparations.<sup>220</sup>

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<sup>217</sup> This includes massacres, summary or arbitrary executions, political assassinations, disappearance of killings of political actors and human rights defenders in which the state was complicit. See TJRC Volume IV, p. 103

<sup>218</sup> This includes "torture, inhuman and degrading treatment or punishment of political detainees or human rights defenders, arbitrary arrests and illegal/prolonged detention of political detainees or human rights defenders, rape, sexual and gender-based violence other than rape, mutilation and grievous bodily harm" See TJRC Volume IV, p. 103

<sup>219</sup> It is important to mention that women were undoubtedly primary victims of violations of the right of life and bodily integrity rights other than sexual violence, such as killings, torture, inhuman and degrading treatment, arbitrary arrests, illegal or prolonged detention and other grievous bodily harm. While these types of violations disproportionately victimized men, women also suffered from the aforementioned violence and due to their preexisting lower social position their harms may have been multiplied. However, as discussed in Chapter 1, women were disproportionately secondary victims of violations of the right to life and primary victims of sexual violence and thus this analysis will primarily focus on them.

<sup>220</sup> In the TJRC's Chapter on Reparations, roughly three pages is used to describe the individual Reparations Framework in its entirety—with the majority of those pages listing the vulnerability criteria. This is in stark contrast to the thirteen pages written about Collective Reparations.

### *4.3.1 Category One Gender-Skewed Violence Victims*

Because men were predominately killed in recurrent election violence and massacres in the northeast of Kenya, women were largely left behind as widows, mothers and dependent children of the deceased.<sup>221</sup> As discussed in Chapter Two, given that men were predominately the breadwinners of the family, the death or disappearance of a husband, child or a male relative brought about a range of socio-economic and cultural harms for women. In addition to causing psychological distress and grief,<sup>222</sup> the death or disappearance of a woman's spouse or child oftentimes negatively impacted a woman's social status and left her and her dependents economically insecure and in "urgent need of compensation and livelihood assistance".<sup>223</sup>

The recommendation that the surviving beneficiaries of victims killed or disappeared as a result of GHRV should be eligible for compensation may have a great effect if implemented. While the provision of reparations to the surviving beneficiaries of the deceased and missing will not restore victims to their previous positions or fill the void left after death, the provision of a pension can be a symbolic measure to respect the life and dignity of the deceased victim as well as assist his or her surviving loved ones in coping with their loss. Though a pension is recommended for ten years, a reliable, albeit temporary pension can result in greater economic security. A more stable income from the pension may provide widows in particular more agency and choice in whether or not she needs to remarry or participate in cultural widow inheritance out of economic necessity.

If reparations for surviving beneficiaries of victims from Category One are implemented, the way in which reparations benefits are divided amongst surviving beneficiaries will be important. The TJRC did not establish proposed regulations or guidelines for distribution of benefits to the beneficiaries of the victims. Thus, if implemented, it will be important for the implementing body to combat discrimination by providing female beneficiaries an equitable share of benefits

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<sup>221</sup> TJRC Final Report, Volume IV, p. 38

<sup>222</sup> Polly Dewhirst and Amrita Kapur, "The Disappeared And Invisible: Revealing The Enduring Impact Of Enforced Disappearance On Women." (The International Center for Transitional Justice. 2015), p. vii

<sup>223</sup> Ibid., 11.

given that women in general and widows in particular are often discriminated against in inheritance matters.

#### *4.3.2 Category Two Gender Normative Violence Victims*

Throughout the TJRC's mandate period, women were disproportionately the victims of sexual violence. As discussed in Chapter Two, the TJRC found that during periods of generalized violence, State security agencies were found to be the main perpetrators of sexual violence.<sup>224</sup> In instances of electoral and ethnic violence, the TJRC also found that gangs of men were responsible for committing sexual violence on a large scale.<sup>225</sup> In these instances, the GOK failed in its duty to protect women from violence. Thus, it is appropriate that the TJRC recommended that survivors of "rape, sexual and gender-based violence other than rape and mutilation and grievous bodily harm" should receive reparations in instances where "state agents as part of a policy or systematic course of action, non-state actors acting with complicity as part of a policy or systematic course of action, state or non-state actors as a result of the failure to protect in the context of large-scale human rights violations" committed sexual violence against the victim.<sup>226</sup>

While providing reparations to survivors of sexual violence who experienced such violence directly or indirectly as a result of the State's actions or inactions is undoubtedly important, it will likely be difficult to separate survivors who experienced SV in these 'extraordinary' circumstances from those who experienced SV in more 'ordinary' circumstances.<sup>227</sup> Moreover, as indicated in Chapter Two, it is estimated that over 20% of women in Kenya have experienced some form of sexual violence in their lifetime.<sup>228</sup> Given such a large number of survivors of SV in Kenya, it may be difficult for an implementing body to differentiate between survivors of SV who experienced violence during periods of generalized violence compared to those who experienced violence during periods of relative peace. If individual reparations for SV survivors are implemented, this will likely be a serious dilemma faced by the implementation mechanism.

<sup>224</sup> See Chapter Two. TJRC Final Report, p. vii

<sup>225</sup> Robins, "To Live As Other Kenyans Do," p.18

<sup>226</sup> TJRC Final Report, p. 102-103

<sup>227</sup> As mentioned in the introduction, through statements taken by the TJRC, the Commission identified that 2,646 women (along with 346 men) were victims of sexual violence perpetrated by or with complicity by the State. However, the number of female and male sexual violence survivors who experienced SV during these contexts is much larger in Kenya, as there were (and continue to be) serious barriers to reporting sexual violence to the TJRC as well as to the police in general. See Chapter 1 and the TJRC Final Report, Volume I, p. xiii

<sup>228</sup> TJRC Final Report, Volume IIA, Chapter 6: Sexual Violence, p. 719.

In light of these inherent difficulties, the TJRC’s recommendations for collective reparations (analyzed in the following chapter), which include building GVRCs in every county in Kenya, are appropriate.

Though reparations for SRV can never compensate survivors for the trauma they have endured, reparations may be able to play a role in countering the ‘domino effect’<sup>229</sup> of loss and suffering. While so many Kenyan women have experienced or are currently experiencing the ‘domino effect’, countering this phenomenon may empower survivors of sexual violence, who face serious stigma in Kenyan society.

#### *4.3.3 Vulnerability Criteria Analysis*

While victims of gender-normative and gender-skewed violence who meet the necessary criteria are eligible for individual reparations under the framework, their ‘vulnerability status,’ as defined by the TJRC will impact the benefits they receive. The Reparations Framework’s criteria for being considered among the ‘most vulnerable’ requires eligible victims to meet the following criteria:

- Child victims (under 18 years of age at the time of filing)
- Elderly victims (above 60 years of age at the time of filing)
- Victims demonstrating urgent health concerns with a causal relationship to the violations in categories 1 and 2
- Single heads of household demonstrating significant economic hardship with a causal relationship to the violations in categories 1 and 2
- Orphans (under 30 years at the time of filing) as a result of the violations in Categories 1, 2, & 3 above also will have their claims expedited.
- Individuals who died as a direct result of violations in Category 3 above.<sup>230</sup>

The Commission recommends that Priority A victims –who are defined as the most vulnerable – receive a ten-year pension and psycho-social as well as medical vouchers. It is recommended that victims who are not ‘vulnerable’ should only receive a five-year pension. A large proportion of sexual violence survivors and surviving beneficiaries of deceased Category One victims should be eligible for Priority A reparations given that the experience of sexual violence and its

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<sup>229</sup> See Duggan and Jacobson, “Reparation of Sexual and Reproductive Violence,” p. 124  
<sup>230</sup> TJRC Volume IV, p. 105

resulting harms negatively impacted women’s economic, social and health status, as is discussed in Chapter Two.

As discussed in Chapter Two, the TJRC documented that sexual violence directly impacted the physical health of women and oftentimes resulted in major internal and external physical injuries including fistulas and STI and HIV/AIDS infection.<sup>231</sup> Many of these injuries and infections require urgent and long-term medical attention and thus should render affected women eligible for Priority A reparations. Therefore, the recommendation that “victims demonstrating urgent health concerns with a causal relationship to the violations in categories 1 and 2”<sup>232</sup> are considered vulnerable should make many SV survivors eligible for reparations. However, ‘demonstrating urgent health concerns’ will undoubtedly be more difficult for women who experienced SV earlier in the TJRC’s mandate period.

One shortcoming in an otherwise significant eligibility criteria point of the Reparations Framework is its failure to define its interpretation of health or what health concerns should be considered ‘urgent’. While it is often assumed that the term health implies physical health, according to the World Health Organization’s 1946 Constitution (of which Kenya became a signatory in 1964) health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.<sup>233</sup> Thus, if implemented, eligibility for receiving Priority A reparations should include ‘urgent’ mental health concerns. Because the TJRC explicitly acknowledges the difficulties with implementation, it would have been helpful if the Framework clarified the meaning of ‘urgent’ health concerns. At the time of writing, it is now eight years after the cessation of the 2007/2008 PEV and the end of the TJRC’s mandate period. Given the time that has passed since the end of the mandate period, the urgency of addressing health concerns has shifted. For example, as a result of sexual violence, some women experienced unwanted pregnancies<sup>234</sup> or miscarriage,<sup>235</sup> which could be considered an urgent health issue immediately after the mandate period; however, eight years after it ended, these may

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<sup>231</sup> TJRC Final Report, Volume IIA , p. 758

<sup>232</sup> TJRC Final Report, Volume IV, p. 105

<sup>233</sup> Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

<sup>234</sup> TJRC Final Report, Volume IIA, p. 755

<sup>235</sup> TJRC Final Report, Volume IIA, p. 639, 754, 755

not be considered ‘urgent.’ Additionally, if a woman incurred a debilitating or ‘urgent’ injury directly related to her experience of SV (such as a fistula) and received treatment in the time passed since the end of the mandate period and the implementation of a reparations program, she should still be eligible to receive reparations under Priority A. This would enable her to receive psycho-social and medical vouchers that could assist in her rehabilitation, healing and recovery.

In addition to the criteria discussed above, the Framework recommends that “single heads of household demonstrating significant economic hardship with a causal relationship to the violations in Categories 1 and 2” should be eligible for Priority A reparations.<sup>236</sup> This eligibility criterion should enable beneficiaries of Category One violations to receive maximum individual reparations given the economic consequences of male breadwinners’ deaths on Kenyan women. Similarly, this vulnerability criterion point should allow female survivors of sexual violence to access full benefits. This is due to the TJRC’s finding discussed in Chapter Two that it was common for female survivors of SV to be evicted from their homes and abandoned by their male partners after they are made aware of their victim status, which had an impact on survivors’ livelihoods.<sup>237</sup>

Whilst in the aftermath of sexual violence, many men abandoned their partners who are survivors of SV, the TJRC also reports that families oftentimes evicted and disowned women and girl survivors of SV.<sup>238</sup> Thus, the general idea that children who experienced Categories One and Two violations should be considered vulnerable reflects their experiences of violence and resulting harms.

However, as written in the Final Report, the Reparations Framework limits eligibility only to child victims *under the age of 18 at the time of filing*.<sup>239</sup> Given the time lapse between the publishing of truth commission reports and the possible implementation of reparations, the TJRC should have realized that victims of Category One and Two violations would have significantly aged. Thus, as written, this provision is inappropriate for girls who have experienced sexual

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<sup>236</sup> TJRC Final Report , Volume IV, p. 105

<sup>237</sup> TJRC Final Report, Volume IIA , p. 764

<sup>238</sup> Ibid., 762.

<sup>239</sup> TJRC Final Report, Volume IV, p. 105

violence under the age of 18, but since time has passed, are over 18. This is evidenced by a study that compared the impact of GHRV during conflict on children of various ages which found that older child survivors are often “worse off” than younger children as a result of the violation in areas of physical and mental health, economic well-being and ability to “recover lost educational opportunities”.<sup>240</sup> Therefore, there should not be a limitation that only children under 18 at the time of filing should receive benefits.

While it is likely that many survivors of sexual violence and secondary victims of violations of the right to life could be eligible for Priority A reparations, it is inevitable that there will be victims who do not meet the vulnerability criteria. According to the Framework these individuals should receive Priority C reparations. For Priority C victims, a standardized five-year pension is proposed. Per the TJRC’s recommendation, Priority C is the only category of reparations that should be non-expedited.

Though recommendations for reparations in any low-income country must be realistic and limited in munificence due to lack of funds, the TJRC’s recommendation that individual victims of violence who are not considered among the most vulnerable are the least prioritized among all reparations beneficiaries in regards to implementation should be probed. Although a victim’s vulnerability status may influence the way she is able to cope with the violation and afford rehabilitation, the experience of a Category One or Two GHRV is equal between victims who the TJRC classifies as part of Priority A or Priority C. Understandably, the amount of money ‘vulnerable’ victims and non-vulnerable victims receive may be different as this is responsive to their financial ability and the impact of their violation. Ultimately, reparations are meant to recognize the state’s violation of a person’s individual human rights; thus, the notion that victims who suffered tremendous violence and harm should wait for all other individual and collective reparations claims to be processed and implemented before they are considered is questionable.

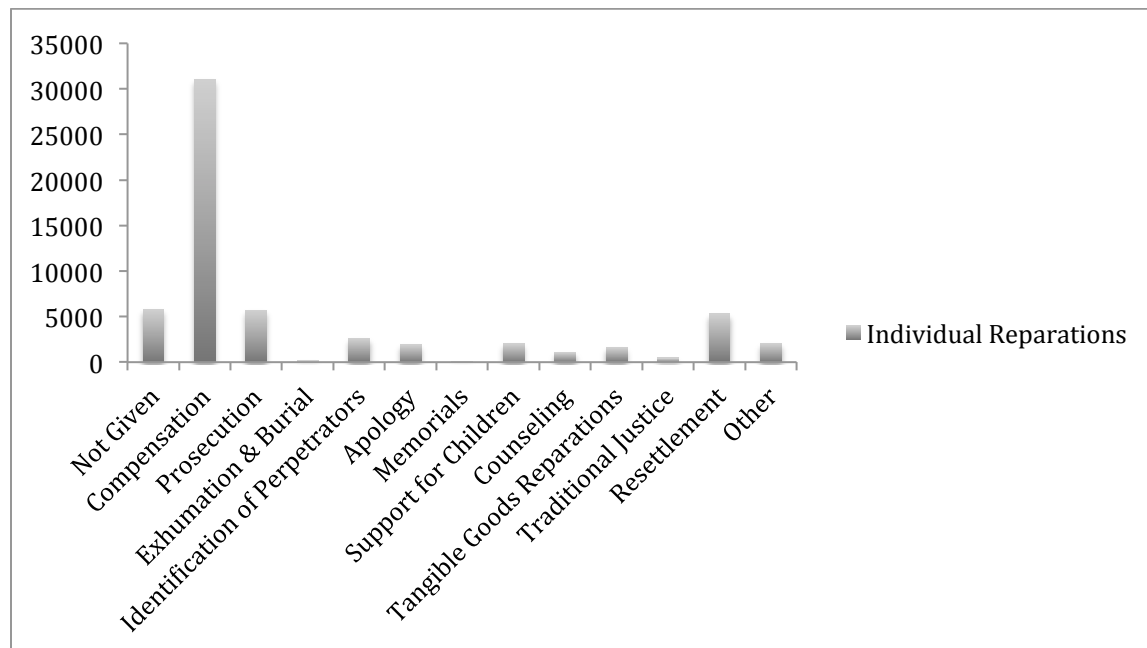
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<sup>240</sup> Dyan Mazurana and Khristopher Carlson. "Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations Against Girls and Boys During Situations of Armed Conflict and Under Authoritarian and Dictatorial Regimes." in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (2009): p. 186

#### 4.4 Selection of Individual Reparations Benefits

In the analysis of individual reparations benefits it is firstly important to determine whether or not the Framework's proposed benefits reflect the reparative priorities of women. Because victims are often disempowered in the act of GHRV, it is important that victims play a role in determining the forms of redress that are suitable to their experiences. Though the previous chapter mentioned the difficulties faced by the TJRC in recording victims' personalized recommendations for reparations measures, the documentation of victims' recommendations produced a clear answer in regards to their first preference for individual reparations. Those who provided statements to the TJRC overwhelmingly preferred compensation or financial reparation above any other form of for individual reparations.<sup>241</sup>

**Victims' Individual Reparations Preferences**<sup>242</sup>



Whereas the TJRC report did not provide this data in a gender-disaggregated manner, Robins' 2011 study of 376 victims' reparative demands in six Kenyan 'regions' indicates that the first

<sup>241</sup> TJRC Final Report, Volume IV, p. 100

<sup>242</sup> Graph made from data listed in TJRC Final Report, Volume IV, p. 100

reparative priority of women involved in the study was compensation and economic support.<sup>243</sup> Similarly, Robins found that many victims spoke about the need to undue “the damage of the violation” through rehabilitation measures.<sup>244</sup> According to Robins’ study, this was especially true for survivors of sexual violence who suggested that medical assistance was among their top reparative priorities.<sup>245</sup> Thus, the TJRC’s recommendation that individual victims should receive financial compensation in the form of a pension and psychosocial and medical vouchers reflects women’s top reparative priorities. Whilst these needs may continue to persist, Robins’ study and the TJRC Report are now a few years old. Therefore, it is likely that women’s needs have shifted.

#### *4.4.1 Pensions*

Individual reparations can play a role in improving the lived experiences of victims impacted by violence by providing the means through which victims can access and afford rehabilitative services and better secure a livelihood. Providing a standardized pension to victims is both a symbolic recognition on behalf of the State for the harm it has caused and a responsible way of restoring victims’ sense of control over their lives in the aftermath of violence. Given the pre-existing feminization of poverty in Kenya discussed in Chapter Two and the negative financial implications of violence, the provision of a pension may better secure a woman’s livelihood and allow her to satisfy her needs<sup>246</sup> in her own terms. Thus, it can be said that a reparative pension should not only be viewed as a means of redress, but also a mechanism of economic empowerment.<sup>247</sup> For women, economic empowerment is a powerful tool in assisting victims cope with the impact of violence –but also an essential feature in reducing their vulnerability to

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<sup>243</sup> Robins, “To Live As Other Kenyans Do”: A Study Of The Reparative Demands Of Kenyan Victims Of Human Rights Violations,” p.30

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.,31.

<sup>246</sup> de Greiff, “Justice and Reparations,” p.469

<sup>247</sup> Despite the positive advantages of compensation, there is some evidence that a sudden inflow of money can have some negative impacts; for example, when reparations were provided in South Africa, conflicts over financial resources were reported within families. Though conflicts may occur regarding a woman’s newfound control over resources, there are ways to avert some of the potentially negative impacts of the provision of reparations. Firstly, the TJRC’s recommendation of standardized pension (rather than one lump sum payment), dispersed over a long period of time may obviate some of the conflicts within families. Secondly, though not recommended by the TJRC, economic empowerment or financial literacy counseling groups can offset many of the negative impacts of a sudden influx of money, and thus should be considered by the implementing body. See Beth Goldblatt, “Evaluating the Gender Content of Reparations: Lessons from South Africa” in ed. Ruth Rubio-Marin *What Happened to the Women? Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, the ICTJ, 2006) p. 66

future violence.<sup>248</sup> The provision of a stable pension to women may play a small role in unsettling gender hierarchies, which Rubio-Marin argues is at the core of women's subordination and experience of violence.<sup>249</sup>

Though the TJRC explained that it was conscious of the GOK's monetary limitations, it did not provide an explanation as to why and how it came to the determination that ten and five years of pensions would suffice for victims of Priority A and C GHRV respectively. For certain victims, such as the surviving beneficiaries of a person killed as a result of a GHRV, the impact of the violation can be life-long, and thus the recommended five or ten years may not be enough time for suitable remedy.

#### 4.4.2 Vouchers

Given their experiences of a range of forms of violence, many female victims of GHRV require a variety of tailored health services to facilitate their rehabilitation. However, to date, a variety of obstacles such as the high cost of treatment, transportation costs,<sup>250</sup> stigma associated with SV itself and lack of knowledge regarding available services have prevented many women from accessing the treatment that they need.<sup>251</sup> Thus, the TJRC's recommendation that vouchers for psycho-social and medical treatment should be provided to Priority A victims is merited. Notably, research has found that existing voucher programs for health services have increased women's access to care.<sup>252</sup> If properly implemented, vouchers could satisfy victims' serious needs and seriously contribute to rehabilitation, a core goal of reparations. Similarly, the provision of vouchers could be an appropriate way for the GOK to recognize the harms endured

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<sup>248</sup> Shanaaz Mathews, Rajen Govender, Guy Lamb, Floretta Boonzaier, Andrew Dawes, Catherine Ward, Sinegugu Duma, Lauren Baraecke, Giselle Warton, Lillian Artz, Talia Meer, Lucy Jameson and Stefanie Röhrs *Towards a more comprehensive understanding of the direct and indirect determinants of violence against women and children in South Africa with a view to enhancing violence prevention*. (Cape Town: UNICEF, Forthcoming)

<sup>249</sup> Rubio-Marin, "The Gender of Reparations in Transitional Societies," p. 70

<sup>250</sup> Janisch, C. P., M. Albrecht, A. Wolfschuetz, F. Kundu, and S. Klein. "Vouchers for Health: a Demand Side Output-based Aid Approach to Reproductive Health Services in Kenya." *Global Public Health* 5, no. 6 (2010), p.582

<sup>251</sup> Planned Parenthood Federation of America Inc. and International Centre for Reproductive Health, "Facing Violence: Unveiling Sexual and Gender Based Violence Issues in Kenya." (Mombasa, 2010), p. 3

<sup>252</sup> Warren, Charlotte, Timothy Abuya, Francis Obare, Joseph Sunday, Rebecca Njue, Ian Askew, and Ben Bellows. "Evaluation of the impact of the voucher and accreditation approach on improving reproductive health behaviors and status in Kenya." *BMC public health* 11, no. 1 (2011): 177; Janisch, C. P., M. Albrecht, A. Wolfschuetz, F. Kundu, and S. Klein. "Vouchers for health: a demand side output-based aid approach to reproductive health services in Kenya." *Global Public Health* 5, no. 6 (2010): 578-594.

by victims as well as a serious effort to assist victims in coping with the impact of the violations, two important features of a gender-sensitive or transformative reparations program.<sup>253</sup>

While vouchers for beneficiaries of Priority A reparations is a promising idea, the impact of psychosocial and medical vouchers can only extend as far as the quality and availability of care that is provided in Kenya. While access to quality healthcare is important for all victims, the need for quality care and specialized services is a particularly important issue for survivors of sexual violence. As of 2012, there were just over 20 one-stop<sup>254</sup> GBV recovery centers in the entire country,<sup>255</sup> with most established in response to the PEV (after the mandate period).<sup>256</sup> While some major metropolitan areas have functioning one-stop centers, marginalized provinces lack dedicated women's health and gender violence recovery centers.<sup>257</sup> Thus, the quality of mental and physical health care that victims receive will necessarily be linked to collective reparations and development measures. As it will be discussed in the following chapter, the TJRC recommended that gender violence recovery centers should be opened in each county as collective reparations to Kenyan women.

#### *4.5 Implementation of Individual Reparations*

Though the TJRC's recommendations for individual reparations content address victims' basic needs and provide tools to assist them with coping with the impact of their loss and/or injuries, if they are implemented, women may experience difficulty in accessing them. According to Rashida Manjoo, the former UN Special Rapporteur on Violence Against Women, women's enjoyment of reparative benefits are likely to "depend more on the procedural hurdles they may

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<sup>253</sup> Rubio-Marin, "The Gender of Reparations in Transitional Societies," p. 71

<sup>254</sup> One stop GBV recovery centers provide integrated health care and legal justice services to survivors of GBV in one location. One stop Centres in East and Southern Africa include physical and mental health care, psychosocial support, police and justice sector responses. See Jill Keesbury, W. Onyango-Ouma, Chi-Chi Undie, Catherine Maternowska, Frederick Mugisha, Emmy Kageha, Ian Askew. A Review and Evaluation of Multi-Sectoral Response Services for Gender-Based Violence in Kenya and Zambia. (Nairobi: Population Council, 2012).

<sup>255</sup> Jill Keesbury, W. Onyango-Ouma, Chi-Chi Undie, Catherine Maternowska, Frederick Mugisha, Emmy Kageha, Ian Askew. A Review and Evaluation of Multi-Sectoral Response Services for Gender-Based Violence in Kenya and Zambia. (Nairobi: Population Council, 2012) p. 11

<sup>256</sup> Ibid.

<sup>257</sup> Caroline Kambona and Julie Mwabe. 2014. 'New One-Stop Recovery Center In Kenya Finds Children Are Seeking Post-Rape Care More Frequently Than Adults'. Togetherforgirls.Org. <http://www.togetherforgirls.org/safe/?p=442>. Accessed 14 October 2015

encounter” rather than the actual content of reparative measures.<sup>258</sup> As mentioned in the introduction, past experience in providing compensation to women have shown that women face unique procedural obstacles in accessing reparations.<sup>259</sup> Thus, it is critical that any reparations implementation mechanism in Kenya takes this into consideration.

The TJRC’s recommendation that a ‘more likely than not’ standard of evidence can be established through recommendations from an NGO may give expert women’s human rights and health organizations the ability to ensure that women’s claims are effectively processed. Thus, if reparations are implemented, it will be critical that the implementing bodies establish a healthy relationship with women’s organizations and experts in SV in order to maximize the number of eligible beneficiaries who receive benefits. This would ensure a greater measure of completeness, a term devised by de Greiff which refers to the degree to which a reparations program can cover all members within a potential beneficiary category.<sup>260</sup>

Though the TJRC did not specifically mention specific barriers to women’s access to reparations, it is important to identify some of these obstacles. While some barriers are specific to particular experiences of harm, generally speaking, Kenyan women face will face particular structural obstacles to obtaining individual benefits if reparations are implemented. In this regard it is important to note that there is a high illiteracy rate among Kenyan women. Though there is a trend of improving the literacy rates among women, according to 2007 figures from UNESCO women had a literacy rate of 66.9% compared to men’s literacy rate of 78.1%.<sup>261</sup> Beyond these obstacles, the TJRC struggled to interact with women through the Commission process, as noted in the previous chapter. Despite its earnest attempts in reaching out to women, the TJRC struggled with bringing forward women to testify during the public hearings and ensuring a representative statement count from female victims. Considering these obstacles and the TJRC’s past experiences, relevant bodies must develop creative procedures to sensitizing affected

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<sup>258</sup> Rashida Manjoo, “Report Of The Special Rapporteur On Violence Against Women, Its Causes And Consequences A/HRC/14/22,” (United Nations Human Rights Council, 2010), p. 12

<sup>259</sup> Fionnuala D. Ni Aolain, Catherine O’Rourke, and Aisling Swaine. “Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice.” *Harvard Law Review, Forthcoming* (2015).

<sup>260</sup> de Greiff, “Introduction.” in: P. de Greiff, ed., *The Handbook of Reparations*

<sup>261</sup> Kenya Literacy, 2014. ‘UNESCO Institute For Statistics’. <http://www.uis.unesco.org/DataCentre/Pages/country-profile.aspx?code=KEN>. Accessed 14 October 2015.

women about reparations registration and appropriate assistance measures for completing any necessary documentation to receive reparations benefits.

In addition to the structural barriers that Kenyan women face, there are specific challenges that are unique to women who have experienced particular types of harm. Firstly, surviving beneficiaries of Category One violations will face unique obstacles if reparations are implemented. Given that mostly men have died as a result of GHRV, the burden on claiming for reparations due to Category One violations will likely fall on women. Specifically in regards to providing evidence of death, families of deceased victims have disclosed that they have been unable to obtain death certificates for the deceased either due to their displacement as a result of violence or the fact that bodies have not been traced.<sup>262</sup> Similarly, for the partners and loved ones of the disappeared, enforced disappearances have seldom left physical evidence of the disappearance itself or death<sup>263</sup> –producing difficulty on behalf of surviving loved ones in obtaining documentation.

Secondly, survivors of sexual violence will also face obstacles to accessing benefits that are unique to their experiences of violence. Moreover, it may be difficult for survivors of sexual violence to show that they are ‘more likely than not’ a survivor of sexual violence years after the violation. Limited research in Kenya has shown that most women do not seek legal and healthcare services following SV; the KDHS of 2008-2009 reveals that roughly half (45%) of survivors of SV disclosed that they have never sought help or told anyone.<sup>264</sup> Some women revealed to the TJRC that they had suffered in silence for three to four decades.<sup>265</sup> This is not surprising, given a) the secondary trauma involved in reporting to ill-equipped and insensitive police officers, b) the fact that security officers were named as the primary perpetrators of SV during periods of generalized violence and c) the resultant social consequences following being identified as a survivor of sexual violence, which often amount to re-victimization. Thus, for many survivors of sexual violence, accessing and obtaining reparations benefits will be

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<sup>262</sup> Kenya Human Rights Commission. "Elusive Justice; A Status Report on Victims of 2007-2008 Post-Election Violence in Kenya." (Nairobi: 2012). p. 1

<sup>263</sup> Dewhirst and Kapur, "The Disappeared And Invisible: Revealing The Enduring Impact Of Enforced Disappearance On Women.," p. 1

<sup>264</sup> Kenya National Bureau of Statistics (KNBS) and ICF Macro. Kenya Demographic and Health Survey 2008-09. (Calverton, Maryland: KNBS and ICF Macro,2010) p. 262

<sup>265</sup> TJRC Final Report, Volume IIA , p. 714

dependent upon the gender sensitivity of the implementing body, given that there is little legal or medical paper trails that can aid women in showing that they are ‘more likely than not’ survivors of SV.

The TJRC made no recommendations regarding provisions that ought to be taken for countering the myriad of structural and administrative obstacles Kenyan women will undoubtedly face. Rather, the Framework recommended that the ‘Implementation Committee’ should establish operational guidelines to facilitate access to reparations.<sup>266</sup>

#### *4.6 Conclusion:*

The TJRC’s Reparations Framework establishes a rudimentary blueprint for gender-sensitive individual reparations. Among its limited number of violations and victims that are eligible for individual redress, the Framework includes secondary victims of violations of the right to life as well as survivors of sexual violence, two categories of violence that are respectively gender-skewed and gender-normative. Thus, if reparations in Kenya follow the Framework’s model, they will be responsive to some of the worst violations experienced by Kenyan women. Moreover, the TJRC’s proposed individual redress measures (pensions and psycho-social and medical vouchers) have the potential to provide victims with effective tools for coping with harms, addressing their needs, and improving their lives in ways that they see fit.

While the Framework should be lauded in its ability to capture some of the worst harms experienced by women and recommend suitable remedy, the Framework also made significant oversights. These oversights include the limitation of full Priority A benefits to children under the age of 18 at the time of filing and the recommendation that ‘non-vulnerable’ individual victims should only have their claims processed after all other individual and collective reparations have been implemented. Similarly, the Framework failed to establish a definition of ‘urgent health’ concerns that would qualify victims for full reparations benefits.

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<sup>266</sup> TJRC Final Report, Volume IV, P. 121

## 5. Gender Analysis of Proposed Collective Reparations

Though providing appropriate and gender-sensitive reparations to the most vulnerable and affected women is important, it is simply not enough to provide victims with tools to cope with their injuries in a society that institutionally engages in gender discrimination and tacitly condones GBV. Rather, a variety of forms of reparations are necessary at an individual *and* collective level. Individual and collective reparations, if implemented together, can begin to redress the continuum of violence, state-sanctioned discrimination and the magnitude of harms imposed on women during and after the mandate period. In order to maximize their transformative impact, individual reparations should be implemented alongside material and symbolic collective reparations.

Throughout the TJRC's mandate period, structural and physical violence violated the individual rights of scores of Kenyans and simultaneously introduced a multitude of harms into victims' lives. These harms, the subject of Chapter Two, are in part addressed through the TJRC's individual Reparations Framework, the focus of the previous chapter. In addition to the harms caused to individuals, structural and physical violence also has had an impact on groups. Because violence is often committed due to a particular individual's group affiliation or identity, it is necessary to implement collective reparations following GHRV.

Given the many reparative recommendations of the TJRC, it is impossible to provide a thorough analysis of each of the recommendations and their potential impact on women. Therefore, this chapter will describe and analyze some of the TJRC's recommendations for material and symbolic collective reparations with an explicit gender focus. This analysis will be grounded both in the experience of women as well as in the normative literature on gender-sensitive reparations. Additionally, this chapter will discuss the few steps the GOK has taken in implementing some of these and other reparative measures and identify key lessons that can be garnered for the implementation of reparations. While some reparative initiatives have been put into effect by the GOK, these initiatives have not been implemented under the framework of reparations; the reforms discussed in this chapter were not accompanied by an acknowledgement

of wrongdoing.<sup>267</sup> Nevertheless, these initiatives are important contributions to redressing collective harm and working towards guarantees of non-repetition, two major pillars of any reparations program.

This chapter advances two claims. Firstly, the TJRC's collective Reparations Framework was responsive to the violence and marginalization experienced by women and recommended measures that are in accordance with the key elements of gender sensitive and transformative reparations. Secondly, whilst the GOK has implemented some reform measures, the design and implementation of these measures have often lacked a gendered focus and some initiatives have explicitly discriminated against women.

### *5.1 Description of Collective Reparations*

In contrast to the TJRC's specific Priority A and C Individual Reparations recommendations, the Commission's recommendations for Priority B Collective Reparations remain broad and open-ended. The Framework makes several general recommendations for the content of material and symbolic collective reparations measures.<sup>268</sup> These general recommendations are highlighted in the table below.<sup>269</sup> For a more detailed description of the TJRC's recommendations for collective reparations, see the appendix.

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<sup>267</sup> As it will be discussed later in this chapter, President Kenyatta has since formally apologized for GHRV.

<sup>268</sup> Though the Framework establishes its recommendations for reparations in Chapter 3: Reparation Framework of Volume IV of the Final Report, it makes little specific gendered recommendations for remedy in this core chapter. Rather, recommendations listed in Chapter 1: Findings and Recommendations of Volume IV include gender-sensitive and specific reparative measures.

<sup>269</sup> Information from The Truth, Justice and Reconciliation Commission of Kenya, TJRC Final Report Volume IV, p. 111

### The TJRC's Collective Reparations Framework

Priority	Who is eligible?	What reparations measures are available?	What is the munificence of collective reparations?
B Second Highest Priority	Groups of victims with a common identity who have experienced violations of individual and group rights.	Land redistribution and land reparations  Socio-economic measures decided upon by collective process  Legislation  Development of marginalized regions  Apologies, memorials and monuments	More likely than not standard  The amount of financial reparations available to the group will be based on the number of victims in the specific community and the harm suffered.

#### 5.2 Gender Transformative Reparations:

Reparations are both backward and forward-looking. In their backward looking functions, reparations attempt to redress or repair rights violations or harms, but in their forward -looking function, reparations are meant –admittedly in a small way – to construct a more just society.<sup>270</sup>

In constructing a more just society in the aftermath of GHRV, it is necessary to transform serious inequalities and the widespread nature of structural and physical violence, which often lead to breakouts of violence in the first place. Specifically, transforming gender inequalities and subverting structures of gendered discrimination and violence are of critical importance to building more just societies. More so than individual reparations, collective reparations can provide an avenue to redress the gendered structural inequalities, prejudice and everyday

<sup>270</sup>

Rubio-Marin, "Gender and Collective Reparations in the Aftermath," p. 382

violence that directly contributed to generalized violence in the first place.<sup>271</sup> These measures can include security sector reform, sensitization campaigns regarding VAW, institutional reform<sup>272</sup> and other forms of guarantees of non-repetition, a category of reparations discussed below.

A gender-sensitive reparations program can in part be judged on its ‘transformative potential’, discussed in part in the introduction.<sup>273</sup> The ‘transformative potential’ of a collective reparations program can be defined as “the extent to which a reparations program has the capacity to subvert, instead of reinforce, preexisting structural inequalities”.<sup>274</sup> Arguably, the two most important reparative elements of any collective reparations program that seeks to be transformative and gender sensitive are satisfaction and guarantees of non-repetition. According to the UN Basic Principles, ‘satisfaction’ is an element of reparations that is aimed in part at ending continuing violations experienced by victims, providing an official acknowledgement of their experiences through a public apology and establishing tributes to victims.<sup>275</sup> Guarantees of non-repetition are measures that are aimed at preventing violations from occurring in the future.<sup>276</sup> According to Rubio-Marín, guarantees of non-repetition provide the “greatest potential for transforming gender relations” because they seek to address the structural causes of GBV and marginalization.<sup>277</sup>

### 5.2.1 Process and Openness

As discussed in Chapter Three, the active and full participation of women in deciding upon a program of reparations is central to developing gender sensitive reparations. Thus, the TJRC’s process for determining collective reparations for women in particular and for site-specific communities can be judged by its openness.

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<sup>271</sup> Ibid., 388.

<sup>272</sup> Ibid., 337.

<sup>273</sup> Rubio-Marín, “Introduction: A Gender and Reparations Taxonomy,” p.6

<sup>274</sup> Ibid., 17.

<sup>275</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*: Resolution. UN, 2006., p.8

<sup>276</sup> Ibid.

<sup>277</sup> Rubio-Marín, “The Gender of Reparations in Transitional Societies,” p. 117

Although the TJRC recommends certain forms of material collective reparations, the Framework's recommendations focus on a participatory process that should be followed by communities eligible for collective reparations. The TJRC Report states:

In principle, the focus of the Commission's recommendations for this socio-economic collective reparation measure does not lie with the substance. The Commission's recommendations focus on the process to be followed by the community to arrive at the determination of socio-economic reparation measures.<sup>278</sup>

According to the Framework, the process must be guided by the principles of non-discrimination, equality and fairness.<sup>279</sup> In order to ensure participation that reflects these principles, the TJRC specifically suggests that communities engage in an inclusive process of deciding on socio-economic reparation measures under a "minimum standard of participation".<sup>280</sup> The TJRC recommends that a 'minimum standard of participation' should be a procedural guide to ensure inclusivity and representation of the most vulnerable and marginalized in a given community. The Framework explicitly mentions that the minimum standard of participation includes targeting women and ensuring their active participation.<sup>281</sup>

In order to adopt specific socio-economic collective reparations, the TJRC recommends that a measure must be based on a 'qualified majority'.<sup>282</sup> While the Framework leaves it to Implementation Committee to determine thresholds for qualified majority, it suggests that groups (such as women) particularly impacted by a specific violation should be given a high weighting; thus, in this regard the TJRC argues that a high percentage of people particularly impacted by a specific violation must be in favor of a certain measure.<sup>283</sup>

While the TJRC recommends that inclusive procedural participation in recommending socio-economic community reparations measures is important, in order to ensure sustainability and impact there must be oversight of the participation process. The Framework recommends that the Implementation Committee itself or a selected "local actor" oversee the participation process.<sup>284</sup> Additionally, following the recommendation of specific socio-economic community reparations

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<sup>278</sup> TJRC Final Report, Volume IV, p. 110

<sup>279</sup> Ibid.

<sup>280</sup> Ibid., 111.

<sup>281</sup> TJRC Final Report, Volume IV, p. 111-112

<sup>282</sup> Ibid., 112.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

measures, an “independent and credible” impact assessment of the proposed measure must be conducted.<sup>285</sup> The Framework recommends that the assessment be shared in an accessible way “so as to enable them [communities] to be fully informed and give their opinions”.<sup>286</sup>

It is notable that the TJRC recommended that a ‘minimum standard of participation’ and qualified majorities be used in determining reparations measures. In principle, a minimum standard of participation and qualified majorities reflect ‘openness’ by encouraging the full participation of women in decisions regarding reparations. However, in practice, maximizing the participation of women in designing and implementing a reparations program is more difficult given women’s marginalized societal status and stigma regarding GBV and therefore takes specific and creative measures.<sup>287</sup>

### 5.2.2 *Guarantees of Non-Repetition and Satisfaction*

As previously mentioned, reparations that include guarantees of non-repetition and satisfaction catered to women and their experiences have the greatest transformative potential. As guarantees of non-repetition seek to prevent the types of violations experienced during a certain period from occurring again in the future, they seek to redress the root causes of violence that have long existed in society. Thus, guarantees of non-repetition can be viewed as macro-level responses to persistent structural and physical violence. At a more micro level, reparative satisfaction measures in part attempt to end continuing violations experienced by victims.

Guarantees of non-repetition and satisfaction can work at the level of primary, secondary and tertiary violence prevention of VAW. Primary prevention strategies attempt to proactively prevent violence before it has been perpetrated.<sup>288</sup> Secondary prevention can be defined as the types of strategies used to address violence immediately after it has occurred.<sup>289</sup> Tertiary

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<sup>285</sup> Ibid., 111.

<sup>286</sup> Ibid.

<sup>287</sup> See Chapter Three.

<sup>288</sup> Mathews et al, *Towards a More Comprehensive Understanding of the Direct and Indirect Determinants of Violence Against Women and Children in South Africa with a View to Enhancing Violence Prevention*.

<sup>289</sup> Ibid.

prevention of VAW “addresses the long term consequences of VAW” and often includes victim services<sup>290</sup> that address the long-term physical and mental impacts of violence.

### 5.2.3 Police Reform

The TJRC recommended that the National Police Service Commission establish a new code of Conduct and Ethics for the National Police Service that creates new enforceable disciplinary and accountability mechanisms that reflect the values of the 2010 Constitution.<sup>291</sup> This is a significant recommendation, given the negative nature of relationship between police and Kenyan women in general and with sexual violence survivors in particular.

Kenyan police officers as well as other State security agencies failed in their duties to keep Kenyans safe from violence and assist victims in pursuing justice in the aftermath of serious crimes. As discussed in Chapter Two, State security agencies were found to be the main perpetrators of bodily integrity violations.<sup>292</sup> Moreover, when women reported to authorities in the aftermath of sexual violence, they often experienced insensitive treatment and harassment,<sup>293</sup> which can work to exacerbate the trauma they experienced as a result of the initial violence.<sup>294</sup> Given that during periods of generalized violence police officers and other security personnel were perpetrators of violence, victims were expected to report to the perpetrators or their colleagues at police stations.<sup>295</sup> In these instances, the TJRC Report details that personnel at the stations intimidated and threatened victims and covered up violence including sexual violence and intimidated victims at specific times.<sup>296</sup> Due in part to the secondary trauma experienced by survivors at the hands of police and their historic mistreatment, many sexual violence survivors were discouraged from reporting their experiences to the police.<sup>297</sup>

Since 2011, the State and the Kenyan Police Service have begun to institute reforms that contain elements of non-repetition and primary prevention strategies. Each of these reforms can be

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<sup>290</sup> Ibid.

<sup>291</sup> TJRC Final Report, Volume IV, p. 36

<sup>292</sup> Ibid.

<sup>293</sup> TJRC Final Report, Volume IIA, 716-17

<sup>294</sup> TJRC Final Report, Volume IIA, p. 719

<sup>295</sup> Ibid., 717.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

viewed as part of broader security sector reform, which seeks to protect individuals and communities by changing the abusive culture of the security sector to one that is accountable and transparent.<sup>298</sup> Since the establishment of the TJRC, the GOK passed three interrelated acts in 2011, namely the National Police Service Act, the National Police Service Commission Act and the Independent Police Oversight Authority Act. These laws create greater oversight and regulation of the actions of Kenya's Police Force prior to employment, during training and whilst within active service. Thus, in principle, these reforms provide greater accountability to the Police Force.

The National Police Service Act of 2011 includes accountability and gendered measures. The Act requires that the Police Service have a greater balance in the staffing of Kenya's Police Force. The Act obliges the Service that "as far is reasonably practicable" no more than two-thirds of appointments of the police service should be comprised of the same gender, thus reflecting the Constitutional requirement.<sup>299</sup> This is a notable and ambitious goal, considering that estimates suggest that women make up only around 11% of the total police service in 2012.<sup>300</sup> Additionally, Section Seven of the Act compels all police officers to be vetted<sup>301</sup> by the National Police Service Commission to determine their "suitability and competence" to serve within the force.<sup>302</sup> The Act does not, however, outline the procedures and criteria that ought to be used in the vetting process. According to the ICTJ, as of January 2015, 198 senior police officers had been vetted by the National Police Service Commission and ten were found unfit for service.<sup>303</sup> While this should be considered progress, this is a particularly small amount when in comparison to the estimated 73,000 members of Kenya's police service.<sup>304</sup>

Given the Kenyan Police Service's direct role in violating human rights and introducing secondary trauma to survivors of violence, the TJRC appropriately recommended that the Police

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<sup>298</sup> Eirin Mobekk. "Gender, Women and Security Sector Reform." *International Peacekeeping* 17, no. 2 (2010), p. 279

<sup>299</sup> National Council for Law Reporting. 2011. National Police Service Act No. 11A Of 2011.

<sup>300</sup> UN Women, 'Kenya Moves To Increase Women In Its Police Force, And Improve Their Work Environments'. 2012. Accessed 24 November 2015

<sup>301</sup> Vetting can be defined as the process in which public employees' personnel backgrounds are reviewed in order to remove abusive and corrupt employees from a public institution. See the ICTJ's definition International Center for Transitional Justice, 2011. "Institutional Reform". <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>.

<sup>302</sup> "From Force To Service: Engaging Kenyans In Police Reform" (New York: the ICTJ, 2015).. <https://www.ictj.org/news/kenya-police-reform>. P. 9 Accessed 24 November 2015

<sup>303</sup> Ibid.

<sup>304</sup> Figure from. "Kenya Moves To Increase Women In Its Police Force, And Improve Their Work Environments"

Service alter its Code of Conduct. Though establishing new accountability measures within the Service are important for reducing police violence and improving service delivery to victims of crime, in order to make a tangible difference on victims' lives these reforms must be properly implemented.

The Independent Police Oversight Authority Act of 2011 established an oversight body with its namesake, the Independent Policing Oversight Authority, a body with the mandate to ensure that Kenya's Police Service is accountable to the public. This Act sets forth a way for the independent body to receive public complaints regarding police abuse and misconduct.<sup>305</sup> While the Act has established the structure for creating a more accountable police, the active involvement of civil society and those who have been violated by police actions must engage with the National Police Service Commission in order to determine the suitability of police officers and the functioning of the vetting process.<sup>306</sup>

While these reforms are central to improving the services that women receive from the police and for working towards guarantees of non-repetition, these reforms alone are unlikely to end all abuses on behalf of the police. The violence –including sexual violence –that has been carried out by police against Kenyan citizens indicates that abuses by the police are systemic. The long history of police committing sexual violence and retraumatizing sexual assault survivors exhibits that patriarchy is strongly embedded within the institutional culture of the Kenyan Police Service. As evidenced above, the patriarchal culture, attitudes and actions of the Kenyan Police Service have negatively impacted the lives of women all throughout the country. Therefore, in order to combat the deeply embedded impunity and patriarchy within the Police Service, serious reforms, sensitization and gender trainings of all police officers will be required. This may assist in improving the vital services police provide to all Kenyans, and to survivors of GBV in particular. While the recruitment and retention of female officers within the force is important, this should not be the only strategy in making the Police Service more gender-sensitive. Nevertheless, these reforms coupled with a focus on improving the professionalism and sensitivity of Kenyan police when dealing with GBV survivors can be a method of reparative

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<sup>305</sup> "From a Force To Service: Engaging Kenyans In Police Reform," the ICTJ

<sup>306</sup> National Council for Law Reporting,. 2011. Independent Policing Oversight Authority Act No. 35 Of 2011.

satisfaction. Moreover, as the laws discussed in this section seek to instill accountability within the Service and prevent police abuse and violence, they contain elements of non-repetition.

#### *5.2.4 Establishment of Gender Violence Recovery Centers*

Among the TJRC's most important recommendations for reparative satisfaction and guarantees of non-repetition is the recommendation that each county in Kenya should have its own GVRC. If implemented, a GVRC in each of Kenya's 47 counties would add considerably to the roughly 20 GVRCs in the country<sup>307</sup> and expand access to victim-centered psycho social, medical and legal care. One-stop GVRCs typically offer a variety of services to victims of sexual violence in one setting including urgent medical care, forensic examinations, post-exposure prophylaxis, emergency contraceptives, crisis and longer term counseling, referrals to longer-term counseling and criminal justice services. After exposure to sexual violence, these services are meant to address the immediate consequences of such violence and over the longer term weaken the continuing violations experienced by victims in violence's aftermath. Moreover, by linking services in one setting, one-stop GVRCs are equipped to assist survivors who decide to take legal action against their perpetrators.<sup>308</sup>

While nearly 20 GVRCs are currently operating in Kenya, not every center provides comprehensive services under one-roof; according to The Population Council's study on Kenya's GVRCs, 'most' of Kenya's GVRCs provide medical and psychosocial support on site, however they have to refer survivors outside the center for police or legal services.<sup>309</sup> Thus, it can be said that the linkages between the centers and the criminal justice system remain weak.<sup>310</sup> Combining these services within one roof typically reduce survivors' secondary trauma and may better their cases through the criminal justice process and improve case outcomes.<sup>311</sup>

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<sup>307</sup> As of 2012, there were just over 20 one-stop GBV recovery centers in the whole of Kenya, with most being implemented in the aftermath of the PEV. See Keesbury et al. "A Review and Evaluation of Multi-Sectoral Response Services One-Stop Centers for Gender-Based Violence in Kenya and Zambia."

<sup>308</sup> Keesbury et al. "A Review and Evaluation of Multi-Sectoral Response Services One-Stop Centers for Gender-Based Violence in Kenya and Zambia.", p. vii

<sup>309</sup> Ibid., 11.

<sup>310</sup> Ibid.,vii;.11.

<sup>311</sup> Ibid.,19-20, 29

The TJRC's recommendation to open GVRCs is gender sensitive and responsive to reparative satisfaction, which is meant to end continuing violations experienced by victims. One-stop GVRCs have been identified as an international best practice for addressing and preventing VAW.<sup>312</sup> GVRCs can be viewed as both secondary and tertiary violence prevention, which address the symptoms of violence after they manifest and contain elements of satisfaction.

Given that over 20% of women in Kenya have experienced some form of sexual violence in their lifetimes,<sup>313</sup> a large percentage of Kenyan women could benefit from the short and long-term services GVRCs provide. The establishment of GVRCs in each county may improve access to these services for all survivors of sexual and gender-based violence. Establishing GVRCs as collective reparations is both a concrete material reparative measure as well as a symbolic acknowledgement that many women in Kenya are personally impacted by SV and are in need of victim-centered services. Moreover, establishing GVRCs that can be accessed by all women addresses the continuum of violence in Kenyan society and the divide between SV experienced during generalized violence and SV endured during times of relative peace. As discussed in the previous chapter, the TJRC proposed that only survivors of SV who endured such violence in instances where “state agents as part of a policy or systematic course of action, non-state actors acting with complicity as part of a policy or systematic course of action, state or non-state actors as a result of the failure to protect in the context of large-scale human rights violations” committed sexual violence against the victim.<sup>314</sup> Therefore, the establishment and full operation of GVRC in each county could cross the divide between past and continuing violence.

If GVRCs are to be implemented on a large scale as recommended in the TJRC Report, they must overcome some serious obstacles. Firstly, to some extent, development will be required for women to be able to access the services within GVRCs. In many areas, new infrastructure will be required and roads or transportation services must link survivors to the GVRCs. Currently, a

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<sup>312</sup> Mathews et al, *Towards a more comprehensive understanding of the direct and indirect determinants of violence against women and children in South Africa with a view to enhancing violence prevention.*

<sup>313</sup> TJRC Final Report, Volume IIA, p. 719.

<sup>314</sup> TJRC Final Report, Volume IV, p. 102-103

lack of infrastructure and transportation acts as a huge barrier for women in seeking treatment.<sup>315</sup> Secondly, it will be important to effectively train and educate doctors, nurses, social workers in the delivery of sensitive and victim-centered care, as it has been reported that there is a “shortage and poor distribution” of healthcare workers in Kenya.<sup>316</sup> Thirdly, and arguably the most challenging obstacles to the successful implementation and operation of GVRCS will be the lack of knowledge regarding seeking services and the massive stigma that comes with being a SV survivor in Kenya.

In order to combat the lack of knowledge regarding available and future services, government and civil society can employ creative strategies to increase public awareness regarding the widespread nature of SV and the steps that can be taken in order to seek treatment and criminal justice services.<sup>317</sup> Arguably, the more difficult task in ensuring that more survivors seek services will be the massive stigma associated with being a SV survivor. As discussed in Chapter Two, stigma has prevented many women from seeking services that would aid in their recovery and have exacerbated the harms they experienced as a result of SV. In order to provide sensitive services to survivors of SV, survivors will need to come forward and seek these services. As some Kenyan women revealed to the TJRC, they had kept their experience of sexual violence secret for three or four decades.<sup>318</sup> In order to reduce this stigma that prevent women from seeking treatment and other services social norms regarding gender and SV will need to change. While this is a large and long-term task, educational campaigns and sensitization in schools, communities and across the country may create a more enabling environment for survivors.<sup>319</sup>

### *5.2.5 Lessons from Compensation and Resettlement Schemes*

Though this chapter has analyzed recommendations for reparations that are focused on women, the TJRC includes a large list of gender-neutral recommendations for reparations. While collective reparations should be available to all Kenyans, as men and women were both directly

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<sup>315</sup> *The Long Road: Accountability for Sexual Violence in Conflict and Post-Conflict Settings* (Human Rights Center, UC Berkeley School of Law, 2015) <https://www.law.berkeley.edu/wp-content/uploads/2015/07/The-Long-Road-Accountability-Study-Executive-Summary.pdf> p. 2

<sup>316</sup> “USAID Kenya Health Systems Strengthening” (Washington, DC: USAID, 2013). <https://www.usaid.gov/news-information/fact-sheets/usaaid-kenya-health-systems-strengthening> Accessed 24 November 2015

<sup>317</sup> See *The Long Road: Accountability for Sexual Violence in Conflict and Post-Conflict Settings*

<sup>318</sup> TJRC Volume II A, p. 714

<sup>319</sup> See *The Long Road: Accountability for Sexual Violence in Conflict and Post-Conflict Settings*, p. 71

impacted by GHRV and systemic marginalization, if reparations are implemented it will be critically important that they do not exclude women from their benefits. As previously discussed, the exclusion of and discrimination against women from the benefits of reparations limits a reparations program's 'transformative potential', given that exclusion and discrimination reinforce preexisting inequalities.<sup>320</sup> Thus, it is notable that in the years that have passed since the PEV, certain compensation programs, such as the compensation and resettlement scheme focused on in this section, have excluded women.

Compensation and resettlement are inherently important issues for Kenyan women. As discussed in Chapter Two, forced displacement as a result of the PEV was gender skewed; women were disproportionately impacted by and bore the brunt of harm as a result of displacement. Moreover, during periods of generalized violence women intensely experienced subsequent violence and trauma. Despite this, the GOK did not prioritize women's access to compensation and resettlement. Rather, women were systematically excluded from the benefits of government compensation schemes.

Beginning in 2008, the GOK introduced a series of initiatives to resettle and compensate IDPs impacted by electoral violence and evictions. In May 2008, the government announced "Operation *Rudi Nyumbani*," (translated in English as Operation Return Home), a program to encourage IDPs living in camps to return to the locations from which they fled during the PEV.<sup>321</sup> Operation Rudi Nyumbani (ORN) offered IDPs transport costs, building and farming materials and KES 10,000 to those deciding to return.<sup>322</sup> ORN was directed towards land *owning* IDPs who could prove that they had their homes destroyed in the violence were eligible to receive an additional KES 25,000 or roughly \$245.<sup>323</sup>

Despite the government's intentions to resettle and compensate some victims of forced displacement, the very foundations of the program ignored and reproduced the systemic discrimination women face regarding their access and ownership to land. While not technically

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<sup>320</sup> Rubio-Marin, "Introduction: A Gender and Reparations Taxonomy," p. 6

<sup>321</sup> *Crying For Justice: Victims' Perspectives On Justice For The Post-Election Violence In Kenya*.

<sup>322</sup> *Ibid.*, 39.

<sup>323</sup> Chaloka Beyani, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Mission to Kenya* (Geneva: United Nations Human Rights Council, 2012) p. 18

implemented as a form of reparation, ORN provides a useful example of how explicit and implicit gender discrimination and exclusion can impact reparative measures. The government did not take into consideration that some women did not have homes to which they could safely return. For example, in the Kenya Human Rights Commission (KHRC) and the Kenyan Section of the International Commission of Jurists' (ICJ Kenya) study of 800 victims and key informants, many unmarried and recently widowed female IDPs informed researchers that they were not welcome back to their matrimonial or ancestral homes.<sup>324</sup> As discussed in Chapter Two, women were often evicted from their land upon the divorce from or the death of their husbands.<sup>325</sup> Given that the death toll from the PEV was mostly comprised of men, many widowed women were not welcomed back to their homes.

When women attempted to access benefits from ORN and subsequent government programs, they faced systemic gendered obstacles. Firstly, according to ICJ Kenya and the KHRC, the GOK typically dispersed compensation to male heads of family.<sup>326</sup> Thus, the GOK's practice of establishing men as the gatekeepers of compensation reinforced traditional norms regarding women's public positions and barred many women from accessing benefits that would aid in improving their day-to-day lives. Secondly, as previously mentioned, only land *owning* IDPs were eligible for a KES 25,000 (roughly \$250) payment if their homes were destroyed in the PEV. Due to customary laws and historic exclusion and discrimination against women, Kenyan women only own up to 5% of land in the country.<sup>327</sup> Thus, the very criteria for accessing a level of compensation more than the symbolic KES 10,000 from the resettlement program was exclusionary. Thirdly, female IDPs reported to the TJRC that they experienced gender discrimination and general insensitivity from registration officials during ORN and subsequent compensation schemes.<sup>328</sup> Women revealed to the TJRC that they believed that registration officials harshly questioned female IDPs; according to one witness to the TJRC, this type of harassment was done in order to "defeat" women and discourage them from pursuing

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<sup>324</sup> "Elusive Justice: A Status Report on Victims of 2007-2008 Post Election Violence in Kenya," p.39

<sup>325</sup> Walsh, Janet, LaShawn R. Jefferson, and Joseph Saunders. *Kenya, Double Standards: Women's Property Rights Violations in Kenya*. Vol. 15. Human Rights Watch, 2003.

<sup>326</sup> "Elusive Justice: A Status Report on Victims of 2007-2008 Post Election Violence in Kenya," p. 39

<sup>327</sup> The International Women's Human Rights Law Clinic, 'Women's Land And Property Rights In Kenya--Moving Forward Into A New Era Of Equality: A Human Rights Report And Proposed Legislation'. 2009. Georgetown Journal Of International Law 40.

<sup>328</sup> TJRC Final Report, Volume IIC, p. 128

compensation.<sup>329</sup> Due to gender discrimination and other administrative failures, the TJRC notes that a “considerable number” of displaced women were unable to obtain resettlement or any form of monetary compensation.<sup>330</sup>

If collective reparations are to be implemented in Kenya, it will be necessary to learn from the mistakes of ORN in order to craft gender sensitive reparations and enable women to access reparative measures. ORN reinforced preexisting gendered inequalities by allowing discrimination and exclusion to influence the compensation program. In light of ORN’s mistakes, the implementing body of reparations will need to be cognizant of how it disperses material reparations to individuals and/or communities to ensure that women are able to equitable access reparative measures. Moreover, the implementing body will need to be aware of the ways in which social, economic, political and cultural norms render women less visible in society and therefore create obstacles in allowing them to access and benefit from reparative measures. Additionally, given the discrimination and sexism women faced by administrative officials in obtaining compensation and resettlement, it will be important for reparations administrators to sensitively engage with survivors of violence and with women in general.

### *5.3 Symbolic Reparations*

Symbolic reparations refer to the set of ‘things done or given’<sup>331</sup> to acknowledge victims and survivors of conflict such as official apologies, creation of commemorative holidays, changing of the names in public spaces, museums, memorials, among others.<sup>332</sup> Symbolic reparations may provide a space for official recognition of harm and suffering victims and survivors feel in the aftermath of conflict and thus provide an element of satisfaction. Essentially, symbolic reparations are meant to convey acknowledgement, worth and dignity to victims in the aftermath of violence and oppression. Given that symbolic reparations are typically provided to either the nation or specific groups of victims, it is argued that symbolic reparations fall within the category of collective reparations.

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<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

<sup>331</sup> Hamber, “Gender, Memorialization, and Symbolic Reparations,” p. 324

<sup>332</sup> Ibid.

### 5.3.1 Apologies

In regards to symbolic forms of reparations, the Framework recommends that Government formally acknowledge its responsibility for wrongdoing and its involvement in imposing suffering on victims of GHRV through formal apologies and memorialization measures. The Commission specifically recommends that the President formally apologize and acknowledge the perpetration of GHRV, which has, to an extent been fulfilled in March of 2015.<sup>333</sup> Additionally, the Commission recommends that State security agencies, with the greatest violators of GHRV during the mandate period, namely the National Defense Forces, National Intelligence Service and the National Police Service to specifically apologize for their involvement in extra-judicial killings, torture, arbitrary and prolonged detention and sexual violence.<sup>334</sup> Similarly, the TJRC's Reparations Framework recommends that the Kenyan Judiciary apologize to Kenyans for its "failing to address impunity effectively and perform its role of deterrence to prevent the perpetration of gross human rights violations"<sup>335</sup>. In addition to the Framework's recommendation that the GOK must apologize for their actions and omissions that contributed to GHRV, the Commission's *Findings and Recommendations* chapter suggests that the Government of Britain apologize for their soldiers' perpetration of SV in Samburu and Laikipia.<sup>336</sup>

In order for an official apology to be reconciliatory to the victims of GHRV, the Framework recommends that an apology must include "at least" the following six-point criteria. The TJRC recommends that any official apology must 1) accept blame on behalf of the State for abuses and therefore acknowledge that it has failed its duty to the country; 2) be specific in respect to the types of violations committed during the mandate period and include apologies for victims of gender discrimination and survivors of sexual violence; 3) recognize the suffering of victims in the pursuit of restoring their dignity; 4) acknowledge the immorality of the violations committed; 5) recognize the necessary nature of reform and promise redress and non-repetition; 6) be made in a public manner so that it victims are able to hear the apology.<sup>337</sup>

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<sup>333</sup> TJRC Volume IV, p. 119

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.,36.

<sup>337</sup> TJRC Final Report, Volume IV, p. 116

Since the publication of the Report, the President of Kenya as well as Chief Justice Mutunga of the Kenyan Judiciary have officially apologized for wrongdoing. Notably, State security agencies as well as the British Government<sup>338</sup> have not responded to the TJRC's recommendations to officially apologize for their role in general violence and gendered violence in particular. Given the symbolism and importance of a head of state's apology, it is necessary to analyze President Kenyatta's apology in detail. President Kenyatta provided an apology to the nation 26 March 2015 during his State of the Nation address to Parliament. In his speech on the status of the country, Kenyatta acknowledged some of the violence and harms experienced by Kenyans during the TJRC's mandate period.<sup>339</sup> Kenyatta continued to provide his apology:

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. I seek your forgiveness and may God give us the Grace to draw on the lessons of this history to unite as a people and, together, embrace our future as one people and one nation...<sup>340</sup>

President Kenyatta's apology satisfied three of the six criteria established by the TJRC for a suitable public apology. Kenyatta's apology fulfilled the TJRC's first criteria point by officially accepting blame individually and on behalf of the Government for "all past wrongs". Given that Kenyatta's State of the Nation speech also included the announcement of a Restorative Justice Fund meant to, in part, benefit victims of "past wrongs", the apology fulfilled the fifth criteria point which recommends that an apology must acknowledge the "necessary nature" of reform and promise redress. Additionally, due to the public nature of the State of the Nation address, Kenyatta's apology also fulfilled the TJRC's sixth criteria point, which recommends that an

<sup>338</sup> In 2013 William Hague, the British Foreign Secretary, provided an official apology and acknowledgement regarding the torture and abuse of Mau Mau during the colonial period. The British announced that they would pay over 5000 claimants reparations of £2,600. Aside from reparations to the Mau Mau, the British have not provided reparations to its role in committing GBV against Kenyans during various periods throughout the TJRC's mandate period. See The Guardian, 2013. 'Britain Has Said Sorry To The Mau Mau. The Rest Of The Empire Is Still Waiting'. <http://www.theguardian.com/commentisfree/2013/jun/06/britain-maumu-empire-waiting>.

<sup>339</sup> Kenyatta acknowledged "To this day as a nation we are still plagued by painful memories of unresolved murders, the existence of torture chambers and detentions without trial, events such as the Wagalla tragedy and violence against proponents of expanding our democratic space.... These have shaken the nation, excluded some Kenyans from the full promise of citizenship and fractured our national fabric. We have been witness to violence linked to elections which have left many Kenyans dead, maimed and indeed dispossessed. In 2007/2008 this reached its most tragic expression with the PEV that left 1,300 Kenyans dead and more than 650,000 displaced from their homes across the country. Collectively, all of these incidents have disunited us and held our people hostage to this tragic history by providing the foundation and rationale for cynical and destructive politics, of hate and division." "President Uhuru Kenyatta's State of the Nation full speech" [sic], YouTube video, 1:11:04, posted by "KTN News Kenya," March 26, 2015, <https://www.youtube.com/watch?v=AGnYyik6NJ8> Accessed 24 November 2015

<sup>340</sup> "President Uhuru Kenyatta's State of the Nation full speech" [sic], YouTube video, 1:11:04, posted by "KTN News Kenya," March 26, 2015, <https://www.youtube.com/watch?v=AGnYyik6NJ8> Accessed 24 November 2015

apology be made in a public manner in order for victims to hear the apology. Though Kenyatta's apology fulfilled half of the TJRC's recommendations for an acceptable apology, Kenyatta's speech disregarded criteria points three and four. Therefore, the apology failed to seriously recognize the suffering of victims since the violations and acknowledge the inhumanity of the violations committed. From a gendered perspective, Kenyatta failed to be specific in regards to the widespread sexual violence perpetrated during this period as well as gender discriminatory state policy. Because the TJRC recommends that a reconciliatory public apology must "include at least" the six-point criteria set out in the Report, it is argued that President Kenyatta's apology was not suitably complete.

As detailed above, President Kenyatta spoke in some detail about violence of physical experienced by Kenyans. Kenyatta mentioned murder, torture, detention without trial, violence against and repression of activists, death, displacement as well as the Wagalla massacre and the 2007/2008 PEV. However, nowhere in his apology did Kenyatta acknowledge that sexual violence accompanied breakouts of violence and acutely impacted women. For women in particular, it is argued that official acts of apology can facilitate the psychological rehabilitation of victims who suffer from crimes such as SRV, which carry a great stigma.<sup>341</sup> By explicitly acknowledging the widespread nature of SRV and the state's responsibility for this violence, Kenyatta could have contested the 'private' nature of these violations. Therefore, it can be seen that Kenyatta's failure to mention sexual violence not only ignored the recommendation of the TJRC, but it also contributes to the silencing of so many women's experiences during the violence.

### *5.3.2 Memorialization*

In respect of symbolic memorialization and other satisfaction initiatives, the Reparations Framework recommends that sites of GHRV be converted to museums or memorials, with the consultation of the impacted communities.<sup>342</sup> The Commission recommends that through expositions in museums or through education curricula, facts regarding GHRV throughout

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<sup>341</sup> Rubio-Marin, "The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations," p. 115

<sup>342</sup> TJRC Final Report, Volume IV, p. 120

Kenya's history can be clarified.<sup>343</sup> Specifically, the Framework recommends that the airstrip in Wagalla be made into a national monument to “commemorate the victims” of the Wagalla massacre, which occurred as a result of a security operation in February 1984. This would be done to commemorate the victims who experienced sexual violence, destruction of property, detention, torture and murder at the hands of security forces.<sup>344</sup> The TJRC found that roughly 1000 were killed in the massacre, though no number was provided for victims of the other forms of violence.<sup>345</sup> While the TJRC reports that men were detained and taken to the Wagalla airstrip to be massacred, the aforementioned violence also occurred in the surrounding villages and directly impacted women.<sup>346</sup> Likewise, the Framework recommends that the Nyayo House basement, the site of torture chambers, should be converted to a museum and monument to the victims of torture.<sup>347</sup> The Nyayo House basement was used by state security agents to illegally detain, question and torture men and women critical of the authoritarian government.<sup>348</sup> In light of the State's past involvement in GHRV and the growing commitment to human rights, the Commission also recommends that the GOK should establish an annual National Human Rights Day on 10 December, which is National Human Rights Day, in order to promote and advance human rights in the country.<sup>349</sup>

The TJRC's recommendation that sites of GHRV should be memorialized and/or turned into museums is an appropriate one. The establishment of museums and memorials can assist in building a collective memory of the past and acknowledge the suffering endured by victims of GHRV. However, in the process of remembering the past, it is important not to overlook the experiences of women and their active contribution towards building a more peaceful and democratic Kenya as highlighted in Chapter Two. Whilst the TJRC's recommendation that the Wagalla Airstrip be transformed into a monument is a significant and thoughtful recommendation, if implemented, the monument ought to also commemorate what happened in the villages, where women were also subject to horrific violence. While men were the majority of those impacted by targeted killings, detention and torture, women were also direct and indirect

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<sup>343</sup> Ibid., 114.

<sup>344</sup> Ibid., 18.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> TJRC Final Report, Volume IV, p. 120

<sup>348</sup> Ibid., 29-30.

<sup>349</sup> Ibid.,120.

victims of the violence employed in Wagalla and in the Nyayo House basement. If memorials are established at these sites, the implementing body should be cognizant of the trend in memorialization to depoliticize and marginalize women's experiences of violence<sup>350</sup> and to counteract this by incorporating women's histories of violence into public memorials, which overwhelmingly tend to honor men.

### *Conclusion*

This chapter evaluates some of the TJRC's gendered material and symbolic recommendations for collective reparations to determine whether the recommendations are gender sensitive and transformative. In this evaluation, it was determined that the selected proposed collective reparations measures contain elements of openness, guarantees of non-repetition, satisfaction and have a transformative potential. Most notably, the TJRC's recommendations to introduce a new Code of Conduct within the Kenyan Police Service and open GVRs in every county within the country are two critical elements of guarantees of non-repetition and satisfaction. Because women commonly experienced violence and mistreatment at the hands of police and frequently experience SV, these recommendations are responsive to the types of violence commonly experienced by Kenyan women.

In respect of symbolic reparations measures, the TJRC recommended certain measures that would provide some satisfaction to victims. The TJRC's recommendations that the President, State security agencies, the Kenyan Judiciary and the British Government apologize to the country and to Kenyan women in particular for their actions and omissions that caused SV throughout the mandate period. To date, President Kenyatta and Chief Justice Mutunga have apologized for GHRV committed in the country. However, these apologies did not explicitly mention the wide-scale impact of GHRV on women and the perpetration of systematic SV, thus missing a major opportunity to acknowledge the experiences of so many women. Whilst the TJRC explicitly states the need to incorporate the experiences of women into official apologies, the TJRC's recommendations for memorialization measures remain silent regarding the need to

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<sup>350</sup> See Hamber and Palmary. "Gender, Memorialization, and Symbolic Reparations."

commemorate women's contribution to the country and to reflect upon of women's experiences during the mandate period.

## 6. Conclusion

This dissertation has provided an in-depth critical gender analysis of the TJRC's recommendations for reparations. The main question explored throughout the dissertation is: to what extent does the TJRC's Reparations Framework a) address the types of violence and harm commonly experienced by women, b) encourage their participation in developing the framework, c) promote a change to female victims and survivors' lived realities and d) address the root causes of this violence? In response to this question, it is found that notwithstanding the challenges faced by the TJRC in including women in the development of its recommendations and a few oversights, the TJRC proposed a gender sensitive framework for remedy. The TJRC's recommendations contain elements of openness, rehabilitation and transformation, which are respectively discussed in this conclusion.

### *6.1 Openness*

Overall, the TJRC had good intentions in its plans to mainstream gender throughout the work of the Commission and consider women's experiences and reparative justice wishes. Ultimately, however, the TJRC's earnest commitment to gender mainstreaming did not easily translate into securing the full participation of women in processes (such as statement taking and hearings) that contributed to the development of its recommendations for reparations. While the TJRC's limited budget, marred reputation, poor relationship with civil society and social mores regarding women's public participation undoubtedly impacted the TJRC's ability to reach out to women, more research should be done to explore the disconnect between the TJRC's intentions and the results of limited female participation. It is argued that future research into this dynamic would help any future Kenyan reparations program in developing strategies to reach women, better ensure their input into proposed policies and enable them to benefit from reparations. Moreover, this research would go a long way in assisting future truth commissions in other contexts to maximize women's full participation throughout the truth commission process and in the development of reparations programs.

Despite the TJRC's struggle to secure 'openness' in the process of developing reparations, the substantive content of the TJRC's recommendations for reparations is strong and for the most

part, gender-sensitive. While the TJRC was relatively specific in regards to its recommendations for individual reparations, the TJRC makes few concrete recommendations for collective remedy as mentioned in Chapter Five. Therefore, in moving forward with advocating for, developing and implementing collective reparations in Kenya, relevant bodies will need to ensure that women are fully able to participate in the process of determining reparations. Greater participation of women and female victims in particular may better ensure that gendered discrimination and exclusion does not influence the implementation of collective remedy, as it has influenced programs such as ORN. Therefore, the TJRC's recommendation that decisions regarding collective reparations be based on 'a qualified majority,' a term describing the high weighting of groups (such as women) particularly impacted by a specific violation in decisions regarding reparations is significant.

### *6.2 Response to Violence*

A gender sensitive reparations program responds to the types of violations commonly experienced by women and attempts to redress their resulting harms. It is argued that the TJRC's recommendations for individual reparations strike an appropriate balance between being responsive to the types of violence experienced by women during the mandate period *and* keeping the costs of the proposed reparations program in check for a government with financial constraints. This is reflected in the TJRC's eligibility criteria for full Priority A reparations (ten year pension *and* vouchers) which proposes that individual reparations ought to be limited to the most serious of all violations *and* only the most isolated and physically and economically vulnerable of these victims. Narrowing the eligibility criteria necessitates that many women who suffered serious abuses will be excluded, which can be a difficult task in a context where so many have been impacted by the primary or secondary effects of GHRV. However, as discussed in the introduction, women's experiences of GHRV were often overlooked by reparations programs in the past; therefore, it is notable that the TJRC's recommendations captured some of the worst types of gender-skewed and gender-based violence experienced by women during the mandate period. While the TJRC's recommendations are ostensibly gender neutral, the eligibility criteria for individual reparations includes survivors of those killed and victims of sexual violence and forced displacement which were types of violence and harms commonly experienced by women. While the TJRC's recommendation to limit individual reparative

benefits to those who a) have experienced the worst types of violations and b) are most vulnerable limits the ‘comprehensiveness’ of the individual reparations scheme, ultimately it is a pragmatic recommendation that may improve its chances for implementation.

### *6.3 Rehabilitation*

As detailed in Chapter Two, the impact of GHRV has negatively impacted the physical, psycho-social and economic well-being of women in Kenya. While past violence and its resulting harm cannot be undone, certain measures may assist women with their rehabilitation and enable them to rebuild their lives. The rehabilitation of survivors of gender violence could be assisted with the individual remedies proposed by the TJRC as well as its recommendation to open GVRCs in every county across Kenya.

In principle, the TJRC’s proposed individual reparations benefits (pensions and vouchers) are appropriate remedies that, if properly implemented, may help victims to cope with the negative impacts of violence in the way they see fit, which as Duggan and Jacobson have argued, is the most urgent goal of any gender-sensitive reparations program.<sup>351</sup> While vouchers can provide victims with rehabilitative services, progress made through medical and psycho-social services coupled with a standardized pension may also provide or restore a sense of agency to victims. Though the TJRC did not provide details regarding its proposed psycho-social and medical vouchers, the TJRC’s recommendations for individual reparations are strong building blocks for a future gender-sensitive reparations program, given their empowering and rehabilitative components.

In addition to the proposed individual reparations, the TJRC’s recommendation to open GVRCs in every county as a form of collective reparation could be particularly influential in the rehabilitation of multitudes of women, including those who will be unable to qualify for individual reparations. The opening and operation of GVRCs in more settings across Kenya could assist the nearly 39% of Kenyan women who have experienced either physical or sexual violence in their lifetimes, a statistic cited in Chapter Two.<sup>352</sup> If implemented, the disbursement

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<sup>351</sup> Duggan and Jacobson, “Reparation of Sexual and Reproductive Violence”

<sup>352</sup> The nationally representative Kenya Demographic and Health Survey (KDHS) of 2008-2009 found that 39% of 6,318

of pensions and vouchers, coupled with the opening of GVRCs could not only lead to the short-term rehabilitation of victims, but also aid in their long-term recovery from such violence.

#### *6.4 Transformation*

As the TJRC's recommendations for individual reparations are limited to a small group of beneficiaries, a well-constructed and gender-sensitive collective reparations program could expand the beneficiaries of reparations to those who do not qualify for individual reparations. While individual reparations and some collective remedies such as the opening of GVRCs contain elements of rehabilitation, collective reparations are better situated to address the root causes of violence and *contribute to* greater societal transformation.

The TJRC's recommendations for collective reparations are mostly gender-sensitive as they contain elements of openness, guarantees of non-repetition, satisfaction and have a transformative potential. Though the strengths of these recommendations will be discussed, it is important to acknowledge the oversights of the TJRC's recommendations for collective remedy. Though the TJRC recommended that gendered considerations be brought into any public apology, the TJRC failed to recommend gendered memorial measures, which ought to be considered essential for any gender-sensitive reparations program. While symbolic memorial measures such as statues, museums and public renaming may not address the critical human needs of victims or prevent violence in the short term, symbolic memorials are nevertheless key tools necessary in *transforming* public spaces, which are overwhelmingly male-dominated. Memorials, coupled with other forms of symbolic reparations such as gender-sensitive apologies (which was not included in President Kenyatta's 2015 State of the Nation apology) could furthermore challenge the notion that women's experiences of violence as well as their social roles should be private and out of the public sphere. Over the longer term, the greater representation of women in commemorative memorials, museums and statues may assist in normalizing the agency, activism and experiences of Kenyan women, which are so often ignored.

Though the TJRC's proposals for reparations failed to directly recommend gendered memorial measures, the TJRC included gender-sensitive guarantees of non-repetition and satisfaction for women. Reforming the Kenyan Police Service, which has been involved in committing GHRV, and opening GVRCs across the country could aid in improving the services women utilize in the aftermath of violence. Specifically by attempting to improve the behavior of police and by introducing enforcement mechanisms, the Kenyan Police may begin to slowly address their patriarchal and violent institutional culture, which has had significantly negative impacts on Kenyan women. This may lead to the reduction of violence perpetrated by police and ultimately the non-repetition of their past abuses and violence. Additionally, the establishment of GVRCs in every county has the potential to improve the quality and sensitivity of psycho-social and medical care that is provided to women who have been affected by SV. Reducing secondary trauma in service delivery to survivors of violence and providing care in one location may play a role in stopping or positively altering the 'domino effect' experienced as a result of violations.

Collective reparations measures can begin, in a *small* way, to tackle the root causes of VAW and assist women who have been affected by physical and structural violence. Ultimately, reparations, no matter how well-constructed, will be unable to completely rid any society of its deeply held gendered hierarchies and its related gender violence. As indicated in Chapter Two, gender-based human rights violations, discrimination and marginalization are common in Kenya and have occurred on a continual basis, prior to breakouts of generalized violence, during generalized violence and afterwards during periods of relative 'peace'. Patriarchy has been strengthened and fortified through discriminatory laws, cultural, political and economic institutions and violence throughout Kenya's history and thus will be difficult to dismantle. However, as suggested by Rubio-Marin, reparations may *begin* to undermine gendered hierarchies and enable victims and survivors of past violence to better cope with the impact of past violence in their everyday lives.<sup>353</sup>

Arguably, in order to maximize the transformative impact of a reparations program, a reparations program ought to be 'complex.' For example, a reparations framework that has elements of

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<sup>353</sup> Rubio-Marin, "Introduction: A Gender and Reparations Taxonomy." in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*

material and symbolic individual and collective reparations is likely to have a greater transformative impact on society than a reparations program that solely consists of a small lump sum payment to victims. Therefore it is significant that the TJRC's recommendations for reparations combine material and symbolic individual and collective reparation. If these reparations are fully implemented, they could play a role in combating both the micro and macro impact of sustained gender violence in society, which are the twin aims of a transformative and gender sensitive reparations program. Namely, the reparations recommended by the TJRC could counteract the negative impact of violence on women's lives and could, in a small way, begin to prevent future violence and transform patriarchal institutions.

### *6.5 Moving Forward*

In light of President Kenyatta's apology (which admittedly failed to include explicit mention of GBV) and announcement of a 10 billion Kenyan Shilling Restorative Justice Fund, this dissertation is submitted at an appropriate and significant time. It is hoped that this dissertation will be able to influence transitional justice practitioners' analyses of the TJRC's recommendations for reparations as well offer a contribution to the growing literature on gender-sensitive reparations.

If reparations are implemented, the needs and reparative wishes of Kenyan victims may need to be reassessed, given that roughly eight years have passed since the mandate period ended and victims are likely to have changing financial, medical and psycho-social needs. This would be an important task, given that victims and survivors of GHRV should be considered experts of their own experiences and thus uniquely situated to contribute to the determination of the types of reparations that would suit their needs. A gender-sensitive needs assessment could better tailor reparations benefits to the needs of victims and inform the implementation of any pension or voucher system as well as any form of collective reparations. Additionally, through a needs assessment of victims, practitioners and government representatives may want to update the eligibility criteria for individual reparations, as victims' vulnerabilities may have changed with time. Moreover, as previously mentioned, it is suggested that further academic and civil society research be undertaken in order to identify both the challenges and best practices in enhancing women's participation in the reparations process as well as their ability to benefit from future

reparative benefits. This research would aid in maximizing the ‘completeness’ of any Kenyan reparations program.

Ultimately, the TJRC established a significant and workable blueprint for reparations that should be seriously considered, improved and ultimately implemented within Kenya’s Restorative Justice Fund. The TJRC’s recommendations effectively addressed the types of violence and harm commonly experienced by women, encouraged a change to female victims and survivors’ lived realities through its proposed remedies and encouraged transformation of gendered inequalities and violence in society. This dissertation concludes that if civil society, victims and government work together to address the few weaknesses, gaps and oversights of the TJRC’s recommendations for reparations, a truly gender-sensitive and victim-centered reparations policy can be built.

## Appendix

### *Individual Reparations*

Under the TJRC's Reparations Framework, an individual or group's initial eligibility for reparation measures is based on meeting each of the following three criteria. First, the GHRV experienced by the victim<sup>354</sup> must have been perpetrated by "state agents as part of a policy or systematic course of action, non-state actors acting with complicity as part of a policy or systematic course of action, state or non-state actors as a result of the failure to protect in the context of large-scale human rights violations".<sup>355</sup> Second, the GHRV experienced by the victim must also have taken place during the TJRC's mandate period.<sup>356</sup> Third, the nature of violence experienced by victims must be within the TJRC's Reparation Framework's five categories of GHRV. The categories of GHRV determined by the Reparations Framework are defined as the following: Category One: Violations of the right to life;<sup>357</sup> Category Two: Violations of the right to personal integrity;<sup>358</sup> Category Three: Forcible transfer of populations;<sup>359</sup> Category Four: Historical and contemporary land injustices;<sup>360</sup> and Category Five: Systematic marginalization.<sup>361</sup>

Once a person or a group has met each of the above criteria, they may be eligible for either individual or collective reparations under the TJRC's proposed Framework. Recognizing certain unfavorable factors such as the inherent difficulties of convincing a government with limited

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<sup>354</sup> According to the framework, persons are considered victims of a gross human rights violation –and thus may obtain a form of reparations if they a) have been personally violated by a GHRV named in the frameworks' 5 categories or b) are among the surviving beneficiaries of a victim who died as a direct result of a GHRV.

<sup>355</sup> TJRC Volume IV, p. 102-103

<sup>356</sup> TJRC Volume IV, p. 103

<sup>357</sup> This includes massacres, summary or arbitrary executions, political assassinations, disappearance of killings of political actors and human rights defenders in which the state was complicit. See TJRC Volume IV, p. 103

<sup>358</sup> This includes "torture, inhuman and degrading treatment or punishment of political detainees or human rights defenders, arbitrary arrests and illegal/prolonged detention of political detainees or human rights defenders, rape, sexual and gender-based violence other than rape, mutilation and grievous bodily harm" See TJRC Volume IV, p. 103

<sup>359</sup> This includes "conflict-induced displacement, development induced displacement without appropriate consultation, compensation, and resettlement plans for communities, deaths or disability directly resulting from conditions of forced displacement, violations of ECOSOC rights within the context of forced displacement." See TJRC Volume IV, p. 103

<sup>360</sup> This includes "Illegal acquisition or occupation of land of communally held land, State seizure of private, community or Trust lands without sufficient public purpose or for evident personal gain, Violations of the right to free, prior and informed consent in allocation of rights to, or legal designation of, the ancestral lands of indigenous communities specifically including hunter-gatherers, fisher peoples, and pastoralists." See TJRC Volume IV, p. 104

<sup>361</sup> This includes "direct discrimination through state policy (including identifiable patterns of action or lack of action, facially neutral laws that have a discriminatory effect, violations of minority rights to language, culture and religion, violations of the right to nationality, violation of indigenous peoples' rights to identity and recognition, violation of the group right to participation in decisions that directly affect the minority or indigenous group in question, violations of ECOSOC rights in the context of marginalization." See TJRC Volume IV, p. 104

political will to engage in the TJ process and the restricted funds possessed by the State the TJRC took the decision to limit the number of beneficiaries eligible for individual reparations to certain victim groups.<sup>362</sup> Given the large number of persons victimized by GHRV and the aforementioned ‘unfavorable factors’, the TJRC recommended that “extremely vulnerable individuals, groups who have suffered injustice specifically... and individuals who have been victims of violations of the right to life as well as the right to personal integrity” should be prioritized.<sup>363</sup> According to this principle, the TJRC divides the beneficiaries and their eligible benefits for individual and collective reparations into three categories: Priority A, Priority B and Priority C. Each category has different eligibility criteria and different benefits.

The Framework recommends that the Priority A category, consisting of the ‘most vulnerable’ individual victims, should receive the most urgency in terms of registration, processing and the distribution of benefits. The TJRC recommends that after the individual reparations claims under Priority A are underway, the State should implement collective reparations for the Priority B category, comprising of groups of victims with a common identity who have suffered GHRV as a result of their identity or geographical location. According to the Reparations Framework, Priority A and B reparations are to be expedited.<sup>364</sup> In contrast, the Priority C category, consisting of individual victims who endured GHRV but who, according to the TJRC, are not among the most vulnerable victims, is ‘non-expedited’.<sup>365</sup>

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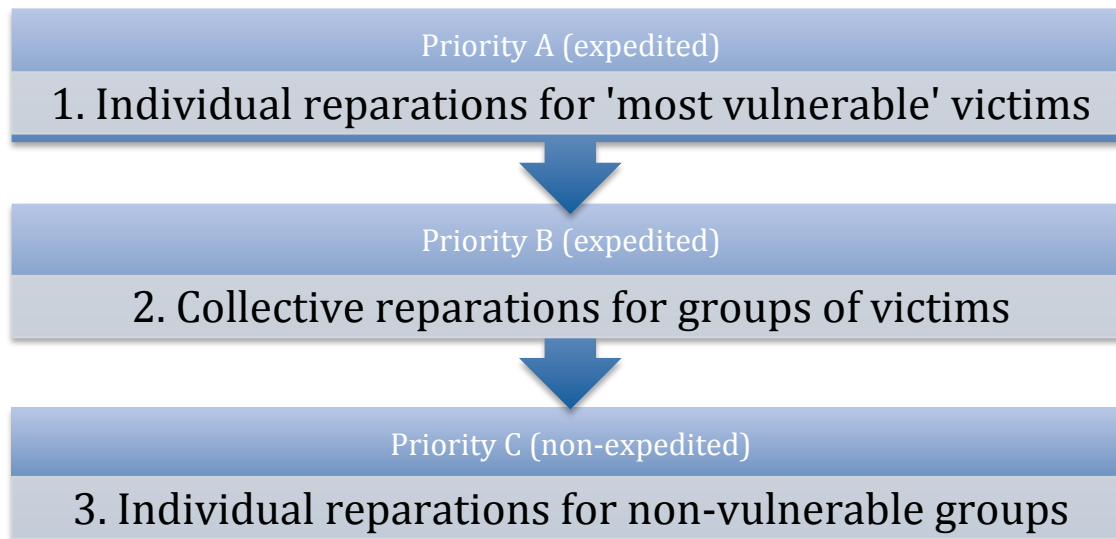
<sup>362</sup> TJRC Volume IV, p. 98

<sup>363</sup> TJRC Volume IV, p. 104

<sup>364</sup> TJRC Volume IV, p. 105

<sup>365</sup> TJRC Volume IV, p. 120

Priority Levels for Registration and Processing



The TJRC's Reparations Framework recommends that selected individuals who have experienced gross violations of their human rights from Categories One and Two and in some instances Category Three (respectively the violations of the right to life, the right to personal integrity and forcible transfer of populations) should be able to receive individual reparations. Victims of Category One are those who were killed or disappeared as a result of a GHRV and by symbolic extension, his or her surviving beneficiaries. The TJRC recommends that the surviving beneficiaries of Category One victims should receive individual material reparations "subject to regulations established by the Implementation Mechanism".<sup>366</sup> In respect to Category Two GHRV, victims are defined as individuals who have personally experienced a violation to their right to bodily integrity. In circumstances where a Category Three violation (forcible transfer of populations) resulted in the death of a person, the surviving beneficiaries may have grounds for reparations.

As previously mentioned, the experience of enduring a GHRV from Category One to Three is only one factor in being eligible for individual reparations. The second and most decisive factor

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<sup>366</sup> TJRC Volume IV, p.105

in determining the benefits for a victim is the identification of an individual as among the ‘most vulnerable’ of victims. The Reparations Framework considers individuals as among the ‘most vulnerable’ if they meet one of the following criteria:

- Child victims (under 18 years of age at the time of filing)
- Elderly victims (above 60 years of age at the time of filing)
- Victims demonstrating urgent health concerns with a causal relationship to the violations in categories 1 and 2
- Single heads of household demonstrating significant economic hardship with a causal relationship to the violations in categories 1 and 2
- Orphans (under 30 years at the time of filing) as a result of the violations in Categories 1, 2, & 3 above also will have their claims expedited.
- Individuals who died as a direct result of violations in Category 3 above.<sup>367</sup>

If a person meets the vulnerability criteria for Priority A reparations, set out by a more likely than not standard, the TJRC Reparations Framework recommends that they should be entitled to two forms of reparative measures. Firstly, the TJRC proposes that the most vulnerable victims receive monetary compensation. The TJRC recommends that a standardized ten-year annual pension should be distributed to the primary victim or in the case of death, the primary victim’s “immediate family”.<sup>368</sup> Secondly, the Reparations Framework suggests that medical care and psychosocial service vouchers should be offered to victims “demonstrating need”.<sup>369</sup>

According to the Framework’s recommendations for individual reparations evidentiary standards, an individual can register for reparations benefits, “if on the face of the claim it appears more likely than not” that he or she is eligible for reparations; it is recommended that final eligibility ought to be established through a “preponderance of the evidence”.<sup>370</sup> This can be established by providing evidence in the form of a birth and death certificate, medical records or a recommendation from a partner NGO.<sup>371</sup>

The TJRC’s Reparations Framework suggests that individuals who have met the criteria for receiving individual reparations, but who are not among the ‘most vulnerable’ victims should

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<sup>367</sup> TJRC Volume IV, p. 105

<sup>368</sup> TJRC Volume IV, p. 106

<sup>369</sup> TJRC Volume IV, p. 106

<sup>370</sup> TJRC Volume IV, p. 107

<sup>371</sup> TJRC Volume IV, p. 107

receive ‘non-expedited’ reparations.<sup>372</sup> The Framework outlines that those who have accessed material reparations under Priority B’s collective reparations should be ineligible for Priority C reparations. The non-expedited Priority C reparations benefits differ from those of Priority A. The Final Report argues that in contrast to Priority A’s ten year pension, Priority C victims should receive a standardized five-year pension. The Framework argues that the five-year pension should function as a “symbolic payment designed only to acknowledge the violation and state responsibility”.<sup>373</sup> While the TJRC argues that Priority A benefits ought to include medical care and psychosocial service vouchers, the Framework makes no such provision for Priority C victims. The TJRC recommends that victims and survivors should receive reparations within 36 months after the publishing of the Final Report;<sup>374</sup> however, the Commission does not recommend a specified time frame for ‘expedited’ vs. ‘non-expedited’ reparations.

*Collective Reparations:*

In order to “maximize the efficient use of available resources” and redress the GHRV and harm inflicted on entire groups of people, the TJRC recommended that collective reparations (Priority B) should receive the second highest priority for victim registration and processing.<sup>375</sup> According to the TJRC Report, groups of victims that are eligible for collective reparations under Priority B are those who have either experienced discrimination or violence due to their common identity or those who have collectively experienced a violation.<sup>376</sup> More specifically, the Framework establishes that victims of systematic marginalization, historical land injustices, area-specific GHRV (including marginalization and environmental degradation), structural inequalities and identity-based violations (on the basis of gender, ethnicity and religion) should be eligible for material and symbolic forms of reparations.<sup>377</sup>

According to the recommendations of the TJRC, the munificence of collective reparations should take into account the number of victims in the given community and the magnitude of the harm

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<sup>372</sup> TJRC Volume IV, p. 120

<sup>373</sup> TJRC Volume IV, p. 120

<sup>374</sup> Summary: Truth, Justice And Reconciliation Commission Report. 2013. Kenya Transitional Justice Network. P. 38

<sup>375</sup> TJRC Volume IV, p. 107

<sup>376</sup> TJRC Volume IV, p. 107

<sup>377</sup> TJRC Volume IV, p. 108

endured by victims.<sup>378</sup> Additionally, the implementing body should evaluate whether the group at hand has received certain measures that have addressed harms resulting from GHRV.<sup>379</sup> Given that women make up half of the Kenyan population<sup>380</sup> and widespread GBV, marginalization and exclusion has impacted the lives of multitudes of women, collective reparations for Kenyan women ought to be munificent.

Within the TJRC's Reparations Framework, the Commission recommends that collective reparations should be "handled" by a locally grounded Group Claims Unit to assist communities with documenting, registering and implementing community reparations.<sup>381</sup> The Final Report did not state whether this Unit should be an independent NGO or a pre-existing or new government agency. The Commission leaves out serious details regarding its recommendations for the 'Group Claims Unit' and its relation to the Commission's proposed independent Implementation Committee. Although details in the Final Report are sparse, the report suggests that this unit, along with other units within the Implementation Committee "should ensure access for women in the reparations process".<sup>382</sup>

The TJRC includes multiple recommendations for collective reparations, some of which are described and highlighted in Chapter Five. Specifically in respect to gendered remedies, the TJRC recommends that"

- The British Government should apologize and provide compensation for sexual violence committed against women in Samburu and Laikipia
- The Kenyan government must establish the Office of the Special Rapporteur for Sexual Violence and create gender violence recovery centers in each county.
- The Kenyan government explicitly apologize for their role in allowing sexual and gendered violence to be widespread throughout the country.
- The Equality and Gender Commission raise awareness of harmful cultural practices

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<sup>378</sup> TJRC Volume IV, p. 111

<sup>379</sup> TJRC Volume IV, p. 111

<sup>380</sup> The World Bank, 2015. 'Population, Female (% Of Total)'. Accessed 24 November 2015. <http://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS>.

<sup>381</sup> TJRC Volume IV, p. 107

<sup>382</sup> TJRC Volume IV, p. 79

- The Kenyan government determine whether Kenyan refugees in Uganda desire to return to Kenya and if so, resettle them
- Land dispute tribunals meet the Constitutional gender ratio.

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