

Survivors and Civil society Paper

Ensuring Victims' Rights in the Law establishing the Commission for Truth Reconciliation and Healing (CTRH) as outlined in Chapter V of R-ARCSS

A Survivor-Centered CTRH

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Introduction

Chapter V of the 2018 Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) sets out transitional justice mechanisms aimed at “facilitating truth, reconciliation, healing, compensation and reparation” (Art. 5.1.3) for the people of South Sudan, as integral to the peace process. Amongst these mechanisms, provision is made for a Commission for Truth Reconciliation and Healing (CTRH).

This paper provides a legal analysis of victims’ rights following consultations by civil society in collaboration with the Ministry of Justice and other stakeholders in accordance with Article 5.2.1.3. In consideration of Article 5.2.2, “**the CTRH shall recommend processes for the full enjoyment by victims of the right to remedy, including by suggesting measures for reparations and compensation**”, the CTRH law should include best practices for promoting truth, reconciliation, and healing from the African Continent and elsewhere.¹

Why should the CTRH be survivor-centered?

- Truth commissions are designed to deal with large numbers of participants;
- Acknowledging and recognising the past is a first step towards reconciliation and healing;
- It is important to address the bitterness of those who suffered to avoid vengeance;
- Many people suffered, so they should be involved.
- [Security Council Resolution 2467 \(2019\)](#) calls for a survivor-centred approach to all prevention and response measures, including holistic survivor-centred transitional justice, which addresses root causes and provides for transformative reparations.

Survivors are key players in ensuring effective transitional justice. Their testimonies provide vital insights and details on historic events, necessary to establish the truth. Victims are also key rights holders.

1. Victims’ Rights to a Remedy and Reparation in the African Human Rights system:

Victims’ have a right to truth, to an effective remedy and to reparation. Perhaps the clearest expression of “victims’ right to a remedy and reparation”, as referenced in Chapter V, is found in Article 14 of the Convention Against Torture, ratified by South Sudan in 2015.

*“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to **fair and adequate compensation**, including the means for as full **rehabilitation** as possible.”²*

¹ In general, see the African Union Transitional Justice policy (AUTJP) https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf

² Article 14, Convention Against Torture.

Victims' rights to a remedy and reparation, also for atrocities committed by non-State actors, are found in the African Charter on Human and Peoples' Rights:

Article 7(1)(a) of the African Charter on Human and Peoples' Rights reads:

*"Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;"*³

Article 4(f) of the **Protocol to the African Charter** on Human and Peoples' Rights, on the Rights of Women in Africa (2003) puts obligations on States to:

*"Establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women."*⁴

Resolution 111 of the African Commission on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence (2007) urges States to:

- *"Put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence;*
- *Ensure that victims of sexual violence have access to medical assistance and psychological support;*
- *Ensure participation of women in the elaboration, adoption and implementation of reparation programmes;"*⁵

The CTRH as well as subsequent Rules and Procedures should give effect to victims' rights to be informed of processes that concern them, while facilitating their participation, and ensuring their right to be treated with dignity, non-discrimination, respect, and compassion. Inclusive participation should be encouraged, to reach citizens from all areas of South Sudan, including all States, Administrative Areas and Refugee Camps. The process should also enable interim reparations to be granted as well as full reparation, including restitution, rehabilitation, compensation, forms of satisfaction and guarantees of non-repetition.

Victims' rights are also conveniently grouped in the 2005 United Nations Basic Principles on Victims' Rights to a Remedy and Reparation (Annex 1). This paper will consider these rights in turn.

2. Who are the victims/survivors?

In the context of transitional justice, the UN defines **Victim** as:

³ In Zimbabwe Human Rights NGO Forum v Zimbabwe, Communication 245/02, para.213, the Commission found that 'where the competent authorities put obstacles on the way which prevent victims from accessing the competent tribunals, they would be held liable'.

⁴<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf>

⁵ <https://achpr.org/sessions/resolutions?id=163>

“Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute international crimes” (genocide, war crimes, crimes against humanity and torture).⁶

- **“Victim”** also includes those who are deceased or disappeared. It can include indirect victims, such as the immediate family or dependants of the direct victim who have suffered harm as a result of the crime (like children born of rape), and persons who have suffered harm in intervening to assist victims or prevent victimization.
- **“Survivor”** is not a legal term but is preferred by survivors and civil society as a more empowering term than “victim”.

It is also important to note that a person should be considered a victim regardless of whether the perpetrator is known, apprehended, prosecuted, or convicted and regardless of the family relationship between the perpetrator and the victim.

3. Mainstreaming Conflict Related Sexual Violence

- **Who is a survivor of conflict-related sexual violence (CRSV)?**

Women and girls are the primary victims of CRSV. The sexual violence they experience during conflict is a manifestation of the denial of women and girls’ human rights, and is rooted in the structural patterns of gender discrimination, inequality, and sexual and gender-based violence (SGBV) which exist during ‘peacetime’.

Men and boys are also victims of CRSV, with gendered stereotypes linked to masculinity, homophobia, social taboos and biased legal frameworks underlying their victimisation and stigmatisation. Sexual violence against men and boys has often been recognised as torture, mutilation or degrading treatment, omitting the gendered and sexual aspects of these abuses.

Children born of rape are also direct victims

The appeals Chamber of the International Criminal Court held that

*“a child born out of rape/sexual slavery is a unique type of victim, and also one that has suffered a unique type of harm that merits being recognised for what it is: direct harm inflicted on the child”.*⁷

⁶ Article 8, The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

⁷ ICC Appeals Chamber, The Prosecutor v Bosco Ntaganda, Judgement on Appeals, 12 September 2022, Para.17, ICC-01/04-02/06 A4-A5, available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06187.PDF

- **How to mainstream gender-sensitivity?**

The **Guidelines on Combating Sexual Violence and its Consequences in Africa 2016** (Niamey Guidelines) provide for gender mainstreaming and a gender-sensitive approaches paying particular attention to women and girls as well as men and boys and ensuring their voices are heard.

Gender considerations should be mainstreamed across all areas of the CTRH, starting with:

- appointment and recruitment of personal;
- establishment of specific units;
- ensuring a gender lens in all areas of inquiry including disappearances, torture and other violations that might be considered 'male';
- providing appropriate forms of protection specifically adjusted to the gender of the survivor;
- ensuring accessibility from gender point of view;
- ensuring close hearings and other arrangements to ensure privacy and confidentiality;
- providing on-site childcare and other access considerations;
- ensuring strategies to counter and address gender discrimination, stigma or shaming during the process.

- **How to ensure gender-specificity?**

In addition, conflict related sexual violence must also be specifically addressed. This is vital to help reduce stigma, create openness, acknowledge the harm, and broaden the scope for remedies, including prevention. This means that there should be a specific investigation unit on conflict related sexual violence, and a dedicated chapter(s) on conflict related sexual violence, including consideration of the culture and history of conflict related sexual violence in South Sudan.

There should be dedicated hearings on conflict related sexual violence, and survivors as well a policy makers should be encouraged to also suggest reforms or other measures to ensure future prevention (guarantees of non-repetition are a form of reparation).

4. Treatment: survivor-sensitive treatment is a right

- **Non-discrimination and equal treatment**

The CTRH law should specifically acknowledge victims' rights to be treated without discrimination on any grounds including race, gender, sex, sexual orientation, birth or family status, nationality, political or other opinion, disability, ethnic or social origin.

- **Survivor-sensitive treatment**

Recognising the healing role that the CTRH should have, and that there are thousands upon thousands of survivors across South Sudan and as refugees who are living with trauma, a survivor-centred and trauma informed process is key for the CTRH's success.

This is particularly important because survivors, particularly CRSV survivors say that stigma, blame and social shaming are key reasons not to come forward. The CTRH law should provide the highest standard:

"Victims should be treated with compassion, humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families."⁸

In addition, to stating the above rights, provisions need to be made across the CTRH law to ensure that they become a reality.

To give effect to these rights in practice, specific provision should be made with respect to the appointment of personnel, the establishment of specialised committees or units, or the implementation of mandates and functions, etc. Trauma-sensitive adjustments will be necessary to support victims and CRSV survivors. The CTRH law and procedures should:

"Provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."⁹

5. Information: the right to be informed

Victims have a right to be informed not just of the information concerning the violations, they also have the right to be informed of processes that concern them. The CTRH law should envisage an outreach unit in charge of informing the public and victims in particular about the CTRH process. The establishment of the CTRH should include a widespread sensitisation and public endorsement campaign to build trust ahead of the process formally starting.

Suggested mechanisms, such as daily broadcasts on national television, radio and social media (for those in the diaspora), should also be mentioned in the law, to ensure publicity of the process and encourage wide public engagement.

The outreach unit should also be mandated to communicate how victims can engage with the CTRH processes as well as all available legal, medical, psychological, social, administrative, and other services to which victims may have a right of access:

⁸ Article 10, UN Basic Principles on Victims' Rights to a Remedy & Reparation, *op.cit.*

⁹ Article 10, *ibid.*

“States should develop means of informing the general public and, in particular, victims [...] of the rights and remedies and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.”¹⁰

The law should stipulate that the CTRH Report should provide the truth about the violations investigated, and that the Report shall be made public in full. The outreach unit should be mandated to ensure the publicity of the CTRH’s findings, ensuring dissemination of its reports. It should also be mandated and funded to produce summary versions that are more accessible, for instance a citizens’ version, or video as was done in Sierra Leone. External or in-kind support in producing additional versions of the CTRH Report should be possible.

6. Access to Justice:

All victims have an equal right to access an effective CTRH process. To give effect to this right, special adjustments may be necessary, in particular for CRSV survivors or those who have suffered trauma.

- **Trauma awareness and healing sessions**

Trauma awareness and healing sessions for survivors, ex-combatants and leaders should be envisioned as part of the preparation for the process, to enable and encourage broad and genuine participation. Some categories of victims such as orphans and children born of rape may need dedicated support to help them prepare for the process.

Survivor-centred and gender sensitive process in ascertaining satisfactory participation by survivors and not just taking up roles as witnesses but being the primary participants all through. It also seeks to ensure the experience of CRSV Survivors are sufficiently represented and incorporated in the CTRH Act.

- **Assistance and support**

Victims need assistance and support to access the CTRH – this is recognised in legal instruments and by regional courts. Without assistance and support their right to a remedy and reparation would be frustrated. They would not be able to access the CTRH due to financial constraints (transportation costs), psychological constraints, etc.

In accordance with the UN Basic principles, the CTRH law should:

- “Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

¹⁰ Article 24, *ibid.*

- Provide proper assistance to victims seeking access to justice.¹¹

- **Participation**

Survivors' testimony should be voluntary. Announcements made in advance to allow community and civil society leaders to prepare and support survivors for the CTRH's hearings.

In holding its hearings, the CTRH should give special consideration to vulnerable individuals or those with special needs and ensure flexible provisions able to adapt and facilitate their participation, including:

- **Children and youth participation:** procedures must be designed in the best interest of the child;
- **Persons with disabilities:** processes and reparations should be transformative and seek to elevate persons with disabilities within society;
- **Refugees and Stateless persons** must be part of the process and their testimonies sought and recorded.

Groups of victims

"In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate."¹²

7. Right to Protection

Fear of reprisals, family breakdown or violence is a serious concern raised by survivors, particularly survivors of CRSV. Special measures are required to ensure the safety, physical and psychological well-being and privacy of victims and survivors, as well as their families. Special care and attention should be given to avoid re-traumatisation and to minimise inconvenience to victims and their representatives.

Measures may include:

- Vetting of personnel;
- Use of safe spaces, safe houses or other measures to protect against interference with privacy, intimidation or retaliation before, during or after relevant processes;
 - Respect for confidentiality and privacy by all personnel should be ensured where a victim wishes to remain anonymous;
 - Closed or private hearings or remote testimony;
 - Use of pseudonyms and redacting of records to ensure anonymity;
 - Use of a veil or face covering, voice distortion and other methods should be allowed to protect identity;
 - Onsite counsellors, helpers, childcare or disabled access;

¹¹ Article 12, Access to Justice, UN Basic Principles (2005).

¹² Article 13, Access to Justice, UN Basic Principles (2005).

- Availability of accompanying personnel of the gender;
- chosen by the victim (and a relative for minors);
- Trained female personnel;
- Trauma awareness training for related staff;
- Updated definitions of sexual violence and related rules of procedure and evidence in line with international standards.

The CTRH should be flexible and enable dedicated hearings and special arrangements making statements for women, youth or other vulnerable groups. If security is to be provided by the police or security personnel, they must be well paid, and the international community should be on standby to step-in, in case there are threats against individuals testifying or insecurity in the context of the CTRH's work.

8. Right to Truth

- **Priority areas that survivors have emphasized for investigation include:**

- The ethnic dimensions of the violence;
- Child abduction, the plight of child soldiers and other child victims, including those orphaned and born of rape;
- Enforced disappearances and torture;
- Starvation inflicted on civilians;
- Widespread land disputes and land grabbing, truth-telling about land issues;
- Corruption, unequal distribution and exploitation of natural resources, as well as how land resource issues have contributed to cattle raiding;
- The jurisdiction of the CTRH should cover non-State actors like the LRA and the possibility to look into violations up to the date the CTRH is established.

In looking at causes of conflict, specifically:

- People want to know why the fighting started in 2013, and that the people who caused it are to come out and explain;
- Provide explanation for the proliferation of small arms within communities.
- To ensure lessons learnt, those testifying **should be asked what they might have been done differently** and how we can combat tribalism.

9. Reconciliation and Healing

- **Encouraging perpetrator participation**

Careful thought, and **public consultation is needed on how to encourage perpetrators without compromising the legitimacy of the process** given the gravity of the harm and impact on

survivors. Opportunities and procedures for such participants to tell their stories, make apologies and seek forgiveness need to be set out.

To this end, incentives to encourage participation should not include blanket amnesties like in the case of South Africa, but rather take an alternative form of justice such as a reduced sentence in addition to community service.

The truth telling should not be a box ticking exercise but a genuine process that brings about healing and ensures survivors derive satisfaction rather than secondary victimization.

The leaders from different factions (militias, rebel groups) should be encouraged to come forward. Survivors are particularly interested to understand what they are fighting for, **what they could or might have done differently to avert war, and what they can personally do to prevent further violence**. Responses from combatants or ex-combatants should form part of the CTRH's recommendation as guarantees of non-repetition.

A bottom-up approach to reconciliation, through traditional and community-based approaches is an important, given the various underlying causes that have significantly contributed to the conflict. Chiefs and tribal leaders should mobilize communities to mend the tense social fabric that informed ill feelings and ultimately led to war.

- **Reconciliation hearings**

Reconciliation hearings will require specific procedures to ensure protection of the rights of both victims and perpetrators. Such hearings may engage traditional justice mechanisms insofar as they are able to give effect to victims' rights, including women's rights to equality as per the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

Reconciliation hearings should enable perpetrators and survivors to tell their stories in a way that does no harm, and above all respects victims' rights to be treated with dignity, compassion and respect. Provision for additional protection against reprisals should also be foreseen.

- **Traditional practices and mechanisms**

In applying traditional and cultural mechanisms, the CTRH must adopt measures to promote compliance with regional and international standards of protection for the rights of women and girls to guarantee the rights of the victims of sexual violence and to eliminate the discrimination that persists in these systems. To this end awareness and training for traditional authorities and other stakeholders should be made compulsory and conducted to ensure respect for women as well as their participation in this system.

10. The Right to Reparation

Reparation should be adequate, effective, prompt and proportional to the gravity of the violations. It should aim to repair the harm suffered. The CTRH law should provide recommendations for reparation as per Article 5.2.2.1 of R-ARCSS, and make specific reference to a Compensation and Reparations Authority, which might be a designated Unit within an appropriate Ministry, or an external agency, such as the Global Survivors Fund (that is mandated to implement reparations for survivors of CRSV). This may be useful to provide institutional support to the implementation rather than requiring the establishment of a new entity. This was done in Sierra Leone, where an existing government agency, the National Commission for Social Action (NaCSA), was tasked with implementation in collaboration with IOM.

Such administrative reparation programmes do not release individual perpetrators from obligations to pay compensation in accordance with South Sudan's national laws or traditional justice mechanisms.

- **Urgent and Interim reparations**

It is vital that the CTRH be mandated to make recommendations for interim-reparations during its lifetime. This is needed to avoid delay in providing urgent rehabilitation and other measures to categories of victims, such as victims of CRSV, torture or children.

- **Reparations Principles**

- Development or humanitarian programmes targeting the population at large should not be confused with reparations.
- Obstacles which would impede woman and girls' access to reparations must be addressed. For instance, structural, administrative and cultural norms which may exclude women from the right to own land.¹³
- The reparations recommended by the CTRH should be survivor-centred, gender sensitive and transformative in nature and properly articulate needs of survivors in a manner than ensure guarantees of non-recurrence.
- Holistic reparations should be recommended and should in turn cover physical, psychological, material, financial, and social consequences. An aspect of policy reforms should be included to remedy structural and political inequality as a measure to ensure guarantees of non-repetition by perpetrators.
- The CTRH law should prioritise certain categories of victims including survivors of CRSV, children born out of rape, child victims/child soldiers and people with physical injuries like amputations.
- Reparation programmes should be transformative and promote equality, non-discrimination and participation of victims and other stakeholders.
- A victim-centred reparations should involve victims in their design and implementation to ensure their needs are met.

¹³ *Ibid.*

- **Addressing specific categories of victimization and harm**

A matrix and database of victimization and harms suffered might be put in place to inform recommendations for reparations. Victims should individually be asked which categories of victimization they suffered, as well as the types of harm. Technical assistance in drawing up a matrix is recommended.

- **All forms of reparation should be included**

The CTRH law should specifically provide that the recommendations for reparations may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition in accordance with articles 64, 65 and 66 of the AU Transitional Justice Policy:¹⁴

- **Restitution** should restore the victim to the situation before the violations occurred. Including: restoration of liberty, enjoyment of rights, citizenship, employment, return to one's place of residence, or return of land and property.
- **Compensation** should be provided for assessable damage, proportional to the gravity of the violation, including:
 - Physical or mental harm;
 - Lost opportunities, including employment, education and social benefits;
 - Material damage
- **Rehabilitation** should include medical and psychological care as well as legal and social services
- **Satisfaction** should include any or all of the following:
 - Measures to end violations
 - Verification of facts and disclosure of the truth
 - Search, identification and reburial of disappeared
 - Public apology or declaration restoring dignity
 - Public declaration: for instance, recognising children born of rape as direct victims of sexual violence (which may serve as both a measure of satisfaction but also a guarantee of non-repetition)¹⁵
 - Judicial sanctions against those liable
 - Commemorations, memorialisation or tributes
- **Guarantees of non-repetition** includes security sector and other reforms, strengthening judiciary, etc. The African Union Transitional Justice Policy identifies success of a Truth Commission by its ability to issue recommendations that address the root causes.

¹⁴ See also Article 53(iii), African Union Transitional Justice Policy (AUTJP)

¹⁵ Ntaganda case, the Appeals chamber, supra note 8

Collective reparations

The African Union Transitional Justice Policy also advocates for collective reparations. Where harms have been suffered collectively by groups, recommendations may include restitution of communal lands, rebuilding health, education, security, judicial and other public service infrastructure as well as moral reparations to include disclosure of facts about the actors and circumstances of a victim's mistreatment or death, public acknowledgment and apology, support for burial ceremonies and memorialization.

11. Commission outcomes

- The law establishing the CTRH should place an obligation on the government to implement the CTRH's recommendations¹⁶. This can be done through providing timelines in the final recommendations and providing for monitoring and evaluation of the process;
- The CTRH final Report should include chapters dedicated to survivors of CRSV and list all crimes and violations committed against women and set out findings on the major contributory factors that enabled this, with proposed solutions;¹⁷
- Publication and dissemination of reports should be provided for by the law and ensure it is done in a timely manner, ample time and adequate powers should be bestowed upon the commission to carry out their mandate;
- Implementation of recommendations should be prioritised
- Monitoring and evaluation of recommendations should be provided for, and preferably allocated to different ministries;
- Recommending educational programmes to address root causes should be included, such as programmes to address stereotyping and social prejudice against women and that promote respect for ethnocultural diversity should be envisaged through school curricula, religious and cultural teachings, radio and television shows.

¹⁶ See Part V Articles 17,18, of the Sierra Leone TRC Law (2000), available at <https://www.refworld.org/pdfid/3fbcee4d4.pdf>

¹⁷ See the Nairobi Declaration on women's and girl's right to a remedy and reparations, available at https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf