



A Guide to Reparation focusing on a Law to establish the Compensation and Reparation Authority (CRA) in Accordance with the 2018 Peace Agreement (R-ARCSS)

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Introduction

Chapter V of the Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS) provides the basis for the establishment of Transitional Justice Mechanisms in South Sudan. These include the Commission for Truth Healing and Reconciliation (CTRH), the Hybrid Court for South Sudan (HCSS) and the Compensation and Reparations Authority (CRA). The discussion on reparations begins in Clause 5.2.2.3.7 mandating the CTRH to develop detailed recommendations for legal and institutional reforms to ensure non-repetition of human rights abuses, which already constitutes a form of reparation. Further, the Agreement mandates the CTRH to recommend processes for the full enjoyment by victims of the right to remedy, including by recommending measures for reparation and compensation.

Chapter V then goes on to provide for the establishment of the Compensation Reparations Authority (CRA), a body tasked with providing reparations to citizens. It specifically provides for material and financial support to citizens whose property was destroyed by conflict.

This paper provides a legal analysis of victims' rights with regard to reparations following consultations with survivors and relevant stakeholders. It discusses international standards and provides for a holistic and victim-centred approach to reparations in view of informing a law to establish the Compensation and Reparations Authority (CRA)

Objective of a Law establishing a Compensation and Reparation Authority

- Provide specific measures defined categories of victims of the conflict (e.g., survivors of conflict-related sexual violence or survivors of torture) that will allow for effective repair of specific harm suffered
- Assist survivors/victims to regain dignity and rebuild their lives
- Provide for legal and institutional reforms to ensure non-recurrence

Legal Basis for Reparation in International Law

The right to reparation in human rights law is found in numerous human rights instruments and international judgements, which are brought together in the UN Basic Principles on Victims' Rights to a Remedy and Reparation.¹

The 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations applicable to all states under international law.

The UN Guidelines specifically provide that States should endeavour to establish national programmes for reparation and other assistance to victims when those liable are unable or unwilling to repair the harm. To meet international obligations, victims' rights to a remedy and reparation should be reflected in domestic law. To that end, South Sudan should ensure:

- Access to relevant information concerning violations and reparation mechanisms.
- Measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy and ensure their safety from intimidation and retaliation;
- The right to equal and effective access to justice;
- Adequate, effective and prompt reparation for harm suffered; and
- That reparation is adequate, effective and prompt, and proportional to the gravity and the harm suffered;
- That measures should include restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition (defined below).

The African Union Transitional Justice Policy (AUTJP) provides that reparative justice consists of effective and adequate financial as well as non-financial redress or restitution for violations or losses suffered.²

¹ 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, Adopted 15 December 2005, General Assembly Resolution 60/147, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

² African Union Transitional Justice Policy (AUTJP) 2019, at paragraph 65(ii) available at https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf

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

“Every individual shall have the right to have his cause heard. This comprises 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)** mandates 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 the participation of women in the elaboration, adoption and implementation of reparation programmes.”⁵

Definitions

“Victim”

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

“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

The Niamey guidelines define a victim of sexual violence as;

³ The African Charter on Human and People's rights (1986) (<https://au.int/sites/default/files/treaties/36390-treaty-0011 - african charter on human and peoples rights e.pdf>)

⁴ Protocol to the African Charter on Human and people's rights on the rights of women in in Africa <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf>

⁵ <http://www.forestpeoples.org/sites/fpp/files/publication/2011/08/english.pdf>

⁶ 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), principle 8 <https://www.refworld.org/docid/4721cb942.html>

“Persons who individually or collectively have been harmed or injured, through physical, psychological or economic loss, or serious infringements to their fundamental rights, caused by an act of sexual violence. The term “victim” must also apply to the close family and persons in whose care the victim is, especially to children born from rape and persons who have been harmed as a result of providing assistance to victims or attempting to prevent their victimization. A person is considered to be a victim, irrespective of whether the perpetrator of the violence has been identified, arrested, prosecuted or sentenced.”⁷

Convention against Torture General Comment No. 3 further elaborates that a person’s status as a victim is not reliant on ‘whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. This is reflected in the UN Basic Principles:

Principle 9: “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted”

The appeals Chamber in the case of Ntaganda, at 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”.⁸

“**Survivor**” is not a legal term but is often preferred by survivors and civil society as a more empowering term than “victim”.

Conflict-related sexual violence includes acts or patterns of sexual violence against people of all genders and ages occurring during a conflict or post-conflict setting that have direct or indirect links with the conflict or that occur in other situations of concern such as in the context of political repression. CRSV includes all violations of a person’s sexual autonomy and sexual integrity; it can be an expression of discrimination exacerbated by the conflict and is generally characterised by humiliation, domination, and destruction. CRSV can take many forms, including but not limited to acts of rape, forced pregnancy, forced sterilisation, forced abortion, forced prostitution, sexual exploitation, trafficking for sexual purposes, sexual enslavement, forced circumcision, castration, sexual torture, forced nudity, or any other form of sexual violence of comparable gravity

“Reparation”

Reparation refers to a range of material and symbolic measures to repair the harm suffered by victims or their families. To restore the conditions to before the violation took place, while also transforming these conditions if they constituted conditions that enabled the violations to occur in the first place, such as gender inequality A reparations program should uphold the

⁷ The Guidelines on combating sexual violence and its consequences in Africa (Niamey guidelines) (2017) page 16 available at <https://achpr.au.int/en/node/848>

⁸ The Prosecutor v Bosco Ntaganda’, Judgement on Appeals, 12 September 2022, Para.17, ICC- 01/04-02/06 available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06187.PDF.

status of victims as bearers of rights and reinforce that it is upon this basis that reparations are awarded.

The UN Basic Principles stipulate that an award of reparation should be;

“adequate, effective and prompt and intend to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.”⁹

The Attorney General’s guidelines on CRSV defines a victim/survivor of conflict related sexual violence (CRSV) as;

“Persons who, individually or collectively, suffered such violence but also family members, such as children or partners, and children born as a result of pregnancy from rape. Persons who depend on the victim of sexual violence and others may also be victims as a consequence of the harm inflicted through the violation. Victims may also include persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁰

Reparation Principles

- **Survivors as rights holders:** **Survivors** should be considered key participants and their role as right holders reinforced by the duty bearer which is the State. This means tailor made reparations ‘specifically adapted to their needs, interests and priorities, as defined by them; and that measures of access to equality (positive discrimination) are required in order to take into account the reasons and consequences of the crimes and violations committed, and in order to ensure that they are not repeated.
- **Survivor centred approach:** This is an approach that places the victim at the centre of all processes and ensures active participation and decision-making in the design, strategy, implementation and evaluation of measures. Consultations and other opportunities for victims’ views to be supported and heard are prioritized.¹¹
- **Non-discrimination:** Measures should be implemented without any discrimination on the basis of sex, gender identity, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability. Equal treatment of victims should be advanced and reparations awarded specifically geared towards the individual victim’s circumstances.
- **Transformative effect:** Reparations must not only restore victims to the position prior to the harm but should address structural inequalities that created the conditions for the harms to occur in the first place. Providing restitution for the individual harm but not addressing the structures of inequality which fostered or caused the harms fails to ensure

⁹ Supra note 6 principle 10

¹⁰ Guidance note of the Secretary-General; Reparations for conflict-related sexual violence (2014) available at <https://www.ohchr.org/sites/default/files/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>

¹¹Ibid

non-recurrence thereby returning women to a position of discrimination, vulnerability and inequality and therefore retrogressive. This kind of reparations seeks to subvert pre-existing unequal and discriminatory structures. Reparations should also be able to solve the cross-cutting structural subordination and systematic marginalization.¹²

- **Independence and transparency:** the independence and integrity of the process must be assured. All processes and decisions must be made in the best interest of the victims and all finances accounted for.
- **The best interest of the Child:** while dealing with child victims, child-sensitive approaches must be utilised. Child-sensitive procedures need to be used to ensure that their claims for reparations are adequately heard.¹³
- **Gender-sensitive:** A gender-sensitive approach requires a gendered understanding of reparations. Gender inequalities in implementing reparation measures must be addressed. Religion and culture should be factored in, for instance ensuring adequate female personnel trained to collect testimonies of female victims or taking child care obligations and other responsibilities that women have, such a limitation regarding mobility, including costs and security into account.¹⁴
- **Presumption of good faith:** Processing of applications for reparation shall regard the testimonies of CRSV survivors in good faith given the that the stigma and shame involved in reporting result in many women not coming forward
- **Mainstreaming gender-sensitivity:** The Guidelines on Combating Sexual Violence and its Consequences in Africa 2016 (Niamey Guidelines) provide for gender mainstreaming and gender-sensitive approaches paying particular attention to women and girls as well as men and boys and ensuring their voices are heard.
- **Individuality of the harms:** Survivors of CRSV should not only be compensated as survivors but also receive reparations for any violations they suffered in addition to that.

Victims' Procedural Rights in Accessing Reparation

- **Treated with humanity and dignity:** Survivors/victims as rights holders shall be regarded with respect and consideration of their feelings and well-being during evidence collection. Measures should be put in place to ensure easy access and participation in the process and receipt of reparation measures.
- **Do no harm:** A do no harm approach must be upheld throughout the process to avoid secondary victimisation or re-traumatizing survivors during collection of documents. In addition, personnel collecting information should be trained on survivor sensitive-treatment, including trauma-awareness training to avoid re-traumatization or causing further harm during engagement or interaction with survivors.

¹² Supra note 1

¹³ See Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC resolution 2005/20, principles 29 to 31 and 35 to 37 available at <https://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>

¹⁴ Nairobi Declaration on women's and girl's rights to a remedy and reparation at paragraph 7 available at https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf

- **Confidentiality:** respect for confidentiality shall be maintained at all stages of the reparation process as appropriate, from identification receiving reparation measures. This will act as a measure for encouraging victims to come forward.
- **Access to information:** Awareness-raising on the right to reparation and outreach is essential to ensure survivors of conflict-related sexual violence (CRSV) are aware of their rights and of the mechanisms available to them. Outreach should take place in a language and through means that victims/survivors, literate or not, can understand in a culturally appropriate manner. A mapping of the existing networks and organizations supporting victims is important to support these efforts. Awareness-raising should also manage victims' expectations. Mechanisms like daily broadcasts on national television, radio and social media (for those in the diaspora), should also be mentioned in the law to adequately sensitize the process.
- **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-traumatization and to minimize inconvenience to victims and their representatives throughout the reparations process including collection.

Measures may include:

- Confidentiality of information obtained during evidence collection and privacy during such collection.
- Closed or private rooms during document/evidence collection.
- Trauma awareness training for related staff;
- Updated definitions of sexual violence and related rules of procedure and evidence in line with international standards.
- Adequate awareness on reasons for reparation and why it is awarded to the person especially women who have little to no say due to cultural beliefs and restrictions.

Scope of Eligibility

- **Material scope-** Crimes as prescribed according to law to include war crimes, crimes against humanity as well as others as recommended by the CTRH.
- **Temporal scope-** Although silent on the targeted periods, the reparations programme should begin from December 15th 2013 until the end of the transitional period or when the 2018 Agreement was signed whichever is most preferred.
- **Territorial Scope-** reparations should cover crimes committed within the territory of South Sudan.

Forms of Reparation

States must take the necessary measures to guarantee that the victims of sexual violence have access to different types of reparation, including individual and collective reparation. These measures must be determined by the appropriate authorities based on their relevance,

taking into account the context in which the violence was perpetrated.¹⁵ Reparations awarded should fall under the following categories.

- **Restitution**

This should aim as far as possible to restore victims to the same or similar situation they were in before the violations took place to the extent that it doesn't rubber stamp past injustices. According to the principle of transformative reparation, restoration must only be attempted when it does not lead to replicating or perpetuating discrimination against women and girls, or discrimination based on sexual orientation or gender identity. In cases of sexual violence, restitution may include the following: **the exercise and enjoyment of human rights, particularly the rights to dignity, security, and health, including sexual and reproductive rights; enjoyment of family life and return to employment and education.**¹⁶

- **Compensation**

Compensation must be granted for all damages that can be quantified from an economic perspective, such as physical damages, job loss, loss of income or potential income, loss of social services and learning opportunities, lost educational opportunities, and compensation for legal, medical and social costs. Many factors need to be taken into consideration before rolling out payment. Such include women's bank accounts and confidentiality. In most cases women do not own bank accounts and the money is usually deposited in the males account. Payment should be done in a way that doesn't enforce ostracization and stigma and the names of victims of CRSV should remain confidential. The committee when calculating amounts for compensation to be rendered to victims of CRSV should consider a gender sensitive approach for such damages, since often traditional women's work is at home looking after family, or working on family land, where they do not receive any income.

- **Rehabilitation**

Rehabilitation must include medical, psychological, legal and social care for the victims. In situations of conflict and crisis, the psychological rehabilitation of the victims may require community therapy and awareness-raising activities for members of their communities, with a view to reducing the stigmatization of victims, encouraging a sense of trust and promoting peaceful coexistence. Providing training to members of the community to lead this type of activity will make it possible to guarantee long-lasting reparation. Income-generating and community solidarity initiatives can promote the social rehabilitation of victims.

- **Satisfaction**

Satisfaction is intended to promote the recognition of the damages undergone by the victims of sexual violence. This type of reparation can include verification that the acts of sexual violence took place; full and public disclosure of the truth. inasmuch as this does not cause new an official declaration or a court decision that restores the rights of the victims; public apologies from the perpetrators of the violence and the State, especially acknowledgement of the facts and acceptance of responsibility; administrative and court-ordered sanctions

¹⁵ Supra note 5

¹⁶ Supra note 7

against the perpetrators; commemorations and homages to the victims. Active participation in the process also holds an important place in the victims' rights by re-instating them as right holders and involving them in making decisions that seek to repair certain harms.

- **Guarantees of non-repetition**

Guarantees of non-repetition of the violations, which can also contribute to prevention. Transformative reparations also fall under this category as it calls for reforms to prevent further perpetuation of violations. They can include;

- Effective control of armed and security forces by civil authorities and command structures in order to prevent the members of these forces from perpetrating sexual violence; in the case of South Sudan Chapter 2 of the Revitalized Agreement on the Resolution of conflict in South Sudan (R-ARCSS)
- Education on human rights, including women's rights, in all sectors of society, and training on this topic for those responsible for applying laws and for the personnel of armed and security forces;
- Encouraging compliance with codes of conduct and ethical standards, according to international norms on combating sexual violence;
- Reform of discriminatory laws that contribute to or permit the perpetuation of sexual violence. These are considered guarantees of non-repetition and can be implemented through law and institutional reform, caution should however be exercised in ensuring this is not used to replace individual reparations.
- Political and institutional reform should ensure respect for the dignity of all members of society based on their inclusion and effective participation in decision-making processes. Particular attention should be paid to the representation, participation and voices of women and youth through law reform and other policy measures that address patterns of discrimination and inequality that make them vulnerable to violations.

In awarding collective reparations, due regard must be given to the benefit derived by the immediately affected and not seeking to benefit everyone from the community collectively. In developing collective reparations, adequate consultation should take place with victims of conflict related sexual violence and, if necessary, with the presence of persons who would help victims to speak out. Seeking the assistance of survivor victim groups will ensure objectivity in the award as well as the usefulness of the award to the victims of. Cooperation with relevant stakeholders like women's groups, defenders of the rights of minority and marginalized groups, and other civil society organizations working on conflict-related sexual violence and reparations becomes key as it will ensure the wholesome nature of such engagements.¹⁷

Standard and Burden of Proof

¹⁷ Supra note 10

The standard of proof for administrative reparations is different to the one applied in Judicial programmes. An administrative reparations programme is an out-of-court process used by States to facilitate reparation to massive numbers of victims of gross violations of international human rights law and/or serious violations of international humanitarian law. A simplified evidential threshold is used in consideration of the difficulty of providing evidence for these violations.

In such programmes, States define the categories of violations to be redressed and provide systematised individual or collective measures through an established procedure.¹⁸ Appropriate evidentiary standards which survivors are subjected to factor in special considerations owing to the fact that the crimes are often committed in the absence of witnesses and are not easy to prove.¹⁹

Presumptions of truth are used, based on patterns of violence and other established facts.

National Victims' Register

The processing of applications based on a form should ensure a gender-sensitive approach, ensuring:

- **Accessibility and Non-Discrimination.** The Compensation and Reparation Authority should ensure that reparations are accessible to all victims who qualify, without excluding or marginalizing groups. This means adequately identifying the legal, cultural, economic and other obstacles found by victims, as well as their concerns, including lack of security conditions, lack of economic resources and fear of retaliation or ostracism.
- **Victims of sexual violence and displaced** persons may be hard to reach and therefore less able to participate or be consulted. Measures should be put in place to enable or facilitate contact with these groups to avoid unintended discrimination.

Principles in designing a reparations form

- Involving survivors, civil society groups, government stakeholders and agencies that have experience in dealing with massive human rights violations and survivors, ensuring their expertise in drafting and formulating reparation policies and programmes.
- Short forms and easy to understand language, avoiding legalese.
- Do no harm and avoid re-traumatization in the form and questioning.

¹⁸ ibid

¹⁹ NGOs and experts raise concerns over requirement for survivors to file criminal complaints to receive reparation available at <https://www.icj.org/ngos-and-experts-raise-concerns-over-requirement-for-survivors-to-file-criminal-complaints-to-receive-reparation/>

- Make the registration process reparative by acknowledging harms and reaffirming victim's feelings.
- Ensure outreach is based on mapping of different categories of victims and how best to ensure their access to the process
- Ensure accessibility by consider the socio-economic circumstance of the victims including financial circumstances, literacy, logistic and emotional challenges that low-income victims may face. Other factors to consider include insecurity, fear and mistrust of authorities, concerns surrounding potential stigma, and other difficulties victims will need to overcome to participate in the process²⁰

Implementation of Measures and Funding

Creation of a National Fund

To facilitate access to reparation for victims, the reparation programme should have a clear strategy for resource mobilization – this could include a reparation fund. A specially dedicated and transparent national fund, for reparation for victims of acts of sexual violence, should be created where possible, and partners including international agencies who support different groups should be encouraged to contribute. Funding might be sourced for instance from the

UN Peace Building Fund as was done for reparation for CRSV in Sierra Leone where the UN women also contributed to the fund to specifically cater for survivors of CRSV.

International actors working with women should also support this fund to ensure the rights of survivors and their children born out of rape are addressed.

- To be effective, these mechanisms must be appropriately financed by States, their technical and financial partners, private sector stakeholders, and if possible, by the perpetrators of the violence.²¹
- The government must ensure that these national funds have a governance structure to further transparency and accountability in the usage of funds.
- To guarantee their transparency, sustainability, inclusiveness and effectiveness, their members should include representatives of the State or national leaders (including religious leaders) selected on the basis of their good-standing and capacity, victims' associations, professional associations (bar associations, medical colleges, etc.) and other relevant civil society organisations with expertise in working with survivors or relevant technical capacity.²²
- Urgent Interim reparations should be enabled during the lifetime of the Commission for Truth Reconciliation and Healing to address immediate needs and avoid irreparable harm²³

²⁰ A guide to designing reparation application forms and registration processes for victims of human rights violations available at <https://www.ictj.org/publication/forms-justice-designing-reparations-forms-and-processes>

²¹ Supra note 7

²² Ibid

²³ Supra note 10

- Guidelines for coordination between the different actors involved in reparations programmes must be developed to ensure that the approach is comprehensive and the widest range of groups affected by the conflict are reached;
- There should be proper oversight of reparation programmes, which may include the submission of regular reports to the appropriate designated body regulated by national law.
- Along with the reparative measures, forward-looking redistributive measures that address underlying socio-economic or gender marginalization and exclusion and contribute to preventing relapse to violence should be adopted.
- Reparation programmes should be transformative and promote equality, non-discrimination and participation of victims and other stakeholders. They should build solidarity across victim communities, restore dignity, be fair and just and tailored to the needs of different categories of victims, particularly children and youth.

Recommendations

- **Urgent Interim reparations should be awarded to victims/survivors with immediate needs and to avoid irreparable harm.**
 - **Urgent interim reparation should be distinguished from social or humanitarian assistance measures, as they are based on the recognition of State responsibility and require State and political support.**
 - Mechanisms will be needed to ensure displaced persons and refugees adequately informed of the reparation process, can actively participate and benefit from it. These should be clearly laid down to ensure inclusivity.
 - Gender-sensitive and transformative measures should be considered from the outset
 - Participation of child victims needs to be carefully managed, taking into account their age, abilities, intellectual maturity and evolving capacities, and in a manner that does not risk further harm or trauma. Child victims should be allowed to express their views freely in all matters affecting them, including judicial and administrative proceedings.
 - **That reparations not only be awarded for property destruction but also to all victims who suffered human rights violations during the 2013 and 2016.**
-