



Ending Torture. Seeking Justice for Survivors

ACCESS TO JUSTICE

SIHA and REDRESS Submission to the Committee on the Elimination of Discrimination against Women

February 2013

I. Introduction

1. REDRESS and the Strategic Initiative for Women in the Horn of Africa (“SIHA”) (together, “the organisations”) warmly welcome the Committee’s initiative to draft a general recommendation on access to justice, and thank the Committee for the opportunity to contribute to its general discussion on the issue.
2. The mandates of REDRESS and SIHA are closely linked to the topic of the proposed general recommendation. SIHA is a network of civil society organisations from Sudan, South Sudan, Somalia, Somaliland, Ethiopia, Eritrea, Djibouti, and Uganda that aims to strengthen the capacity of women’s rights organizations and address violence against women in the Horn of Africa. REDRESS is a non-governmental organisation that focuses on achieving justice and reparation for survivors of torture and ill-treatment throughout the world.
3. The concept note provided for this general discussion sets out an excellent summary of the sources of obligation in the Convention, and is comprehensive in identifying the myriad challenges women face in accessing justice, and acknowledging the social and systemic aspects of those challenges. Based on our experience of these challenges we set out below additional specific information and a number of further issues that we suggest the Committee considers in elaborating its proposed general recommendation. The submission also considers in some detail the impact of customary legal systems on women’s access to justice, and considerations in relation to access to justice in conflict and post-conflict situations.

II. Access to Justice: implementing the right to a remedy and reparation

4. The concept note is right to stress that “[r]espect and protection of human rights can only be guaranteed with the availability of domestic effective remedies. Indeed, legal rights are only meaningful if they can be asserted”.¹ The organisations welcome the explanation in the concept note of the bases of the right of access to justice within the Convention, and the recognition that it has different facets, including (i) the requirement that women subjected to discrimination have a remedy and reparation, and (ii) the requirement that women have equal protection of the law, equal access to the Courts and other tribunals, and non-discriminatory administration of justice.
5. These two aspects are **closely linked to the right recognised in general international law that individuals whose rights are violated be provided with access to an effective remedy and reparation.**² That right applies in relation to discrimination prohibited by the Convention.

¹ CEDAW, Access to Justice – Concept Note for Half Day General Discussion, available at:

<http://www2.ohchr.org/english/bodies/cedaw/docs/Discussion2013/ConceptNoteAccessToJustice.pdf>

² Universal Declaration of Human Rights (1948), Art. 8; PCIJ, *Factory at Chorzow, Jurisdiction*, Judgment No. 8, 1927, Series A, no. 17, p. 29; ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep. 1949, p. 184; ICJ, *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, Recueil, 1950, p. 228. See also Art. 1 of the Articles on State Responsibility adopted by the International Law Commission in 2001, A/CN.4/L.602/Rev.1. See also the International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art. 6); Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14); and Statute of the International Criminal Court (1998) (art. 75). See, e.g., *VelasquezRodriguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)

Equally, women have a right to equal access to justice for other violations, including where committed by non-state actors, as any inequality in accessing justice is discriminatory and prohibited under the Convention.

6. The provision of a remedy and reparation is necessary first to relieve the suffering of victims of violations, but it also has an **inherent preventive and deterrent aspect**.³ Access to justice in the form of a remedy and reparation is a process and should be transformative to address underlying inequalities which led to the violation in the first place.⁴
7. In order to provide access to justice States must take the following broad steps:
 - (i) Provide for adequate and effective remedies within their legal system which women are able to use to address alleged violations;
 - (ii) Take positive steps to overcome barriers that women face in accessing those remedies; and
 - (iii) Provide adequate, effective and transformative reparation in line with international law where violations are established.

III. Putting adequate and effective remedies in place

8. For a remedy to be adequate and effective it must be prompt, capable of application in practice, apply clear legal standards, be sufficient to address the violation alleged, and not be vitiated by deficiencies in the decision-making body rendering the process unfair or unworkable.⁵
9. Although in many countries the judiciary has an important role to play in the development of remedies and reparation for rights violations,⁶ it is equally important that states adopt legislation that sets out applicable standards clearly, to ensure that courts have the power to deliver a remedy and that reparation awarded is in line with the state's obligations under international law.
10. Such legislation should:
 - clearly prohibit discrimination and other violations of women's rights;
 - establish accessible, independent, impartial and effective mechanisms for receiving, investigating and adjudicating complaints;
 - remove obstacles in law to the right to redress such as onerous and discriminatory rules of evidence and procedural requirements, statutes of limitation and amnesty and immunity provisions;
 - provide clear rules for the provision of adequate and appropriate reparation, and enforcement of such orders.

(Judgment of 29 July 1988) at para.174; *Papamichalopoulos v. Greece* (Art. 50) (1995), (Appl. no. 14556/89) ECHR Judgment (31 Oct. 1995) at para. 36.

² Council of Europe, Resolution 78 (8) of the Committee of Ministers, cited by G Meleander (1992), 'Article 8', in Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, p.143; IACtHR, *Blake v Guatemala* (Reparations and Costs) (1999) para. 63; See also IACtHR, *Castillo Paez v Peru* (Merits) (1997) paras. 82, 83; IACtHR, *Castillo Paez v Peru* (Reparations) (1998) para. 106.

³ See, eg. Committee Against Torture, General Comment No. 3, para. 6; 'Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment', (2000) A/55/290, para. 58.

⁴ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007), available at:

http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf; Report of the Special Rapporteur on violence against women, its causes and consequences, (2010) A/HRC/14/2, para. 78.

⁵ See, eg. Human Rights Committee, General Comment No. 31, para. 15; see also Donna J. Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, OP-CEDAW Technical Papers No. 1, pp. 5, 14.

⁶ See, eg. Human Rights Committee, General Comment No. 31, para. 15.

Need for a judicial remedy in certain cases

11. International human rights bodies, including the Committee, have made it clear that **certain violations require criminal prosecution and access to a judicial remedy.**⁷ The Committee is right to have stressed in its previous General Recommendation No. 28 that “*Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, to bring the perpetrator(s) to trial and to impose appropriate penal sanctions*”.⁸ In such cases women must also have access to independent and impartial courts to enforce this right, and to seek reparation; access to administrative remedies will not be sufficient.⁹
12. Nevertheless, states should be encouraged to provide other mechanisms through which women can seek a remedy in a procedure established by law. Judicial remedies by their nature and formal procedures may take time and may be demanding on victims, so there are good reasons to provide alternative avenues of redress.¹⁰ At the same time, states should not discourage or limit access to courts but instead make non-judicial avenues attractive alternatives.
13. The concept note lists national ad hoc entities on specific thematic issues, human rights commissions, ombudspersons, equality authorities and systems of mediation, arbitration and negotiation as quasi-judicial institutions that may be established to provide a forum for a claim for redress.¹¹ We suggest that the proposed general recommendation stress that **such mechanisms must be impartial and independent,¹² and their decisions should be directly enforceable.**¹³

Key barriers to an effective remedy

14. Part IV of the concept note comprehensively outlines numerous challenges women face in accessing justice, and the potential additional impact of intersectional discrimination and other vulnerabilities as barriers to justice.¹⁴ These concern both the effectiveness of the remedy provided, and the ability of women to access those remedies.
15. Below we set out additional issues which we have identified as key barriers to an effective remedy in the countries within which SIHA and REDRESS work:
 - **Systemic inadequacies in the timely and professional collection of medical or other evidence,** for example of sexual assault.¹⁵
 - **Lack of clarity within legislation:** A lack of clarity within legislation allows for wide interpretation in line with the personal perspectives of police, prosecutors and judges, and poses a barrier to women’s access to justice where those perspectives are coloured by discriminatory attitudes.¹⁶

⁷ See, eg. CEDAW, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, 2010, para. 34; Human Rights Committee, General Comment No. 31, para. 18.

⁸ CEDAW, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, 2010, para. 34.

⁹ See, eg. Human Rights Committee, *Giri v Nepal*, Views adopted 28 March 2011, UN Doc. CCPR/C/101/D/1761/2008, para. 6.3.

¹⁰ On this, see Human Rights Committee, General Comment No. 31, para. 15.

¹¹ At p. 14.

¹² Human Rights Committee, General Comment No. 31, para. 15.

¹³ See, eg. Human Rights Committee, *Giri v Nepal*, Decision of 24 March 2011, UN Doc. CCPR/C/101/D/1761/2008, para 7.10;

IACmHR, *Colmenares Castillo v. Mexico* Report No. 36/05, Petition 12.170,

(March 9, 2005), para. 36; IACmHR, Report on the Situation of Human Rights in Mexico, OEA Ser.L/V/II.100, Doc.7 rev.1, September 24, 1998, para. 117; CAT, General Comment No. 3, para. 24.

¹⁴ For a further elaboration of some of these difficulties in the African context see REDRESS (2012), ‘Litigation Strategies for Sexual Violence in Africa’, pp. 8, available at:

<http://www.redress.org/downloads/publications/VAW%20Manual%202027%20Aug%202012%20UPDATED.pdf>.

¹⁵ See, eg. REDRESS (2012), ‘Litigation Strategies’, above, p. 9 (Sudan), p. 10 (Uganda), p. 13 (Democratic Republic of Congo).

¹⁶ For example the lack of specificity in the definition of rape, and understanding of consent, has proved a barrier to justice for women and girls in Sudan: see REDRESS (2012), ‘Litigation Strategies’, above, p. 8. Another example is Public Order legislation in Sudan, which is defined in wide and vague terms, allowing police to prosecute women on charges which violate their human rights. See SIHA (2012), ‘Women in the Horn of Africa Are Still Bending their Heads

- **Laws which may criminalise complainants:** This is a significant issue in Sudan, where rape laws impose a very high burden of proof on complainants; if this standard is not met charges may be brought against the complainant for adultery.¹⁷
- **Discriminatory legal provisions such as short limitation periods for sexual violence:** The concept note rightly recognises that discriminatory provisions in national legislation can provide barriers to justice. One such discriminatory provision identified in REDRESS's work is extremely short limitation periods for filing complaints of sexual violence, including rape, such as the 35 day limitation period existing in Nepal.¹⁸ This provision has operated as a complete barrier to justice for rape committed during the conflict period in Nepal, and for many rapes since.
- **Pervasive problems within the administration of justice:** It is essential that there are sufficient resources for the police, prisons, judiciary and associated administrative structures to allow for access to justice. This ranges from issues such as having enough resources to house prisoners (eg. in Somalia, alleged perpetrators of sexual violence have been captured but a lack of food provision to hold them until trial has enabled them to walk free), to ensuring adequate translation services for making complaints and in court (a significant issue in a number of REDRESS cases, particularly concerning women from ethnic minorities), insufficient files, transport issues, lack of capacity of administrative staff and adequate documentation of cases both to ensure that defendants are able to know and understand the charges against them but also to ensure that verdicts are recognised, sentences are properly carried out, and cases are able to be appealed.¹⁹
- **Corruption and extortion within the judicial system:** Systemic corruption in the administration of justice can prove a key barrier to justice for women, who often do not have the financial resources required to pay bribes.²⁰ Corruption can lead to difficulties or added expense in accessing judicial mechanisms, pressure to withdraw claims, concerns about protection of victims and witnesses and the violation of the right to a fair hearing.
- **Impunity for crimes committed by State actors:** Entrenched impunity for crimes committed by State actors, common across the countries in which SIHA and REDRESS work, is a further key barrier to justice. In such cases the police, prosecutors and judiciary are reluctant to accept complaints, investigate claims, and prosecute and punish perpetrators.²¹

IV. Taking positive steps to overcome barriers to access

16. The Committee highlights that states parties must identify, recognise and address barriers to justice faced by women and girls.²² This is consistent with the position adopted by other international human rights mechanisms.²³
17. In this regard, victims and their families should be adequately informed about their right to pursue redress, the procedures for seeking reparation should be transparent, and proceedings

A Report to the 52nd Session of the African Commission on Human and People's Rights', pp. 3-9, available at: <http://www.sihonet.org/index.php/sihonet-published-work/reportspublications/file/37-report-to-the-52nd-session-of-the-african-commission-on-human-and-peoples-rights->

¹⁷ See, eg. KCHRED and REDRESS (2008), 'Time for Change: Reforming Sudan's Law on Rape and Sexual Violence', p. 33, available at: <http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf>.

¹⁸ On this, see Advocacy Forum of Nepal (2012), 'Torture of Women, Nepal's Duplicity Continues', Chapter IV, available at: <http://www.advocacyforum.org/downloads/torture-of-women-report-june-26-2012-english.pdf>.

¹⁹ For further detail on pervasive problems in the administration of justice see SIHA (2013), 'Falling Through the Cracks: Reflections on Customary Law and the Imprisonment of Women in South Sudan', p. 53, available at: <http://www.sihonet.org/index.php/sihonet-published-work/reportspublications/file/41-falling-through-the-cracks>.

²⁰ For a detailed examination of corruption in judicial systems see Transparency International (2007), 'Global Corruption Report 2007: Corruption in Judicial Systems', available at: http://www.transparency.org/publications/gcr/gcr_2007#book.

²¹ For example, in Nepal, there has been complete impunity for violence committed during the conflict period (see, eg. Advocacy Forum (2012), 'Torture of Women', above). In Somalia, there is entrenched impunity for sexual violence committed by state actors: See SIHA (2012), 'Women in the Horn of Africa', above, pp. 14-18.

²² At p. 10.

²³ See, eg. Committee Against Torture, General Comment No. 3, para. 29 and 32; Human Rights Committee, General Comment No. 31, para. 15 (remedies must be "appropriately adapted so as to take account of the special vulnerability of certain categories of person").

should not impose a financial burden upon victims that would prevent or discourage them from seeking redress. The State party should also take measures to prevent interference with victims' privacy and to protect victims, their families and witnesses and others who have intervened on their behalf against intimidation and retaliation at all times before, during and after judicial, administrative or other proceedings that affect the interests of victims.²⁴

18. We strongly support the concept note's statement that "*achieving substantive equality within the meaning of article 15 involves that legal literacy and legal aid must be accessible to women to claim their rights*". In addition, we would stress that while states should provide legal aid directly, independent legal aid provision must not be hindered either through restrictions in funding/fundraising capacity or constraints upon the capacity for legal aid institutions to exist and function.
19. As the concept note highlights, the biases of actors within judicial and quasi-judicial systems – from those receiving complaints, including police, lawyers and doctors, to those pursuing the complaints, such as prosecutors and complaints investigators, and those determining the outcome of proceedings, including commissioners and judges – are crucial to whether women receive access to justice. Sustained and systematic training of all such actors is crucial to overcoming entrenched discrimination, and enhancing access to justice. Where such individuals act in a discriminatory manner they should be subject to disciplinary proceedings.

V. Providing adequate and appropriate reparation

20. The Committee has recognised that:

*Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.*²⁵

21. This reflects the position adopted by other treaty bodies, and which is reflected in general international law.²⁶
22. States must award forms of reparation that are **adequate, effective, appropriate and proportionate to the gravity of the violation and the physical and mental harm suffered**.²⁷ They must be holistic and comprehensive.²⁸ A holistic appreciation of the adequacy and appropriateness of reparation measures requires consideration of victims' perspectives. What may be an appropriate form of reparation in one case may not be appropriate in another. For example, in a society where a woman cannot hold property or open a bank account, an award of compensation would need to be mindful of that context, to ensure that the woman is able to use the money. Restitution may not be appropriate if it puts a person back in a situation of danger of the violation recurring.

²⁴ See Committee Against Torture, General Comment No. 3, paras. 29 and 31.

²⁵ General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, 2010.

²⁶ See, eg. Human Rights Committee, General Comment No. 31, para. 16; Committee Against Torture, General Comment No. 3, para. 6; 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 and proclaimed by General Assembly resolution 60/147 of 16 December 2005 ("Basic Principles").

²⁷ Basic Principles, Principle 15: ("*Adequate, effective and prompt reparation is intended 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*"). Other UN treaty bodies have referred to the need for particular forms of reparation to be "*adequate*" and "*appropriate*": see, eg. CAT, Conclusions and recommendations on Russia (2007) (UN Doc CAT/C/RUS/CO/4), para.20; HRCtee, General Comment No. 31, paras.16 and 20, referring to "*appropriate*" remedies.

²⁸ See the Basic Principles, Principle 18. See also Juan Mendez, Remarks at conference on "Strengthening the Prohibition against Torture: The Evolution of the UN Committee against Torture", Panel II: Ensuring Reparations for Victims of Torture and Other Ill Treatment, reproduced in (2010) 17 *Human Rights Brief* 26-27 at 26, referring to the work of Theo Van Boven, as Independent Expert concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, and subsequently reaffirmed in the reports of Rapporteurs Joinet, Bassiouni and Orentlicher.

23. As the concept note recognises, **appropriately crafted reparation orders have the potential to be transformative in situations where structural discrimination has led to the violation** (either the infliction of the harm itself or in a failure to respond to the violation). Such an approach has been developed by the Inter-American Court of Human Rights to respond to violations connected to systemic gender-based discrimination.²⁹ Although reestablishment of the situation that existed before the violation, or the situation that would have existed if the violation had not occurred, is usually seen as the objective of reparation, this is inappropriate where structural discrimination has led to the violation in the first place.³⁰ In such cases reparation should be “*designed to identify and eliminate the factors that cause discrimination*”, thus aspiring not only to restitution but also to rectification.³¹

VI. Impacts of informal justice mechanisms on access to justice

24. The concept note rightly recognises that women may be faced with a plurality of legal mechanisms, including customary and informal mechanisms (including traditional, community-based, tribal and religious systems, referred to here collectively for ease of reference as “customary systems”). The concept note also highlights that customary systems may be easier to access for certain groups of women or certain communities, notably in rural areas, and “*may not be CEDAW compliant or may result in a discriminatory remedies, unfair sanctions or absence of compensation or reparation*”.³²
25. One expressed aim of the general discussion is to understand further the impact of customary and informal justice systems on the formal justice system and its consequences on women’s access to justice. We therefore set out below some aspects of SIHA’s experience of these issues in the Horn of Africa. Such customary systems exist in Somalia, Ethiopia, South Sudan, Sudan, Uganda and religious legal bodies exist in Sudan, Somalia and Somaliland, and to some extent in Uganda and Ethiopia. SIHA’s experience is that the operation of such customary systems limits women’s access to justice, particularly in relation to family and marital matters, custody of children, inheritance and concerning violence against women, and can lead to further violations of their rights.

Lack of application of existing human rights standards

26. Regardless of whether the practice and existence of customary law is recognised within the constitution of a state, such systems are usually not subject to the requirement to comply with human rights protections in the constitution. Subsequently, considerations for human rights and in particular the rights of women are often not present in judgments or practices. **States must assert greater control over customary systems to ensure that they uphold human rights protections recognised in international law and national constitutions.**

Perpetuating discriminatory social norms through customary law mechanisms

27. Customary law is a mechanism through which norms and standards of behaviour are perpetuated, entrenched and legitimated in a community. The limited consideration and regard for the rights of women is often a product of social norms which fail to confer women an equal status to men, whether with respect to their bodily integrity or land or property or inheritance rights.
28. More often than not, violence against women – whether it be rape, abduction or forced marriage – is regarded as an acceptable norm within a marriage or barely recognised in society. Such acceptance bears significantly upon decisions by customary chiefs in cases where

²⁹IACtHR, *González et al. (“Cotton Field”) v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) (2009) paras. 450-451.

³⁰IACtHR, *Cotton Field Case*, *ibid.* at para. 450 (“*bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable*”). See also the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, para. 3, available at: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

³¹IACtHR, *Cotton Field Case*, *ibid.*, paras. 450 and 451. See also the Report of the Special Rapporteur on violence against women, its causes and consequences, (2010) A/HRC/14/2, para. 78.

³² At p. 13.

violence against women is apparent, either as a contextual aspect of a case or in the ability for a woman to seek a divorce, as well as in the presentation of evidence by women affected by marital issues who may have internalised such violence as a norm and fail to recognise it as an abuse of their rights. In addition, social pressures may act to prevent a woman from “complaining” about domestic violence for fear of being cast as a trouble-maker. As such, even where customary law may have provisions for addressing domestic violence for example, these are rarely used.³³

29. **Shifting such discriminatory attitudes both for judges in customary systems and for society is essential in upholding women’s rights and enabling a woman to access justice for violence committed against them.** In some countries workshops have been conducted with customary chiefs, however it is important to recognise that brief workshops are by themselves insufficient to transform entrenched attitudes and opinions of chiefs. In such trainings SIHA has frequently encountered attitudes such as that expressed by a chief who stated “*my mother was beaten, what’s wrong with that?*”³⁴ Such attitudes take concerted effort to shift, demanding greater investment and attention. **One strategy is to provide advisors to customary chiefs who are trained in human rights and how customary court judgments can better uphold women’s rights. Similarly, training of customary chiefs should take place, but in a more systematic and extensive manner. There should also be greater monitoring and oversight of customary court decisions and restrictions on customary court chiefs from practising if they fail to comply with human rights standards:** this could be achieved, for example, through a licensing system requiring extensive training for all chiefs as a pre-cursor to practising.

Negative interplay of dowry considerations, access to justice and violence against women

30. Dowry is a significant social and economic issue influencing the operation of and judgments made within customary systems. SIHA has noted that customary law and its engagement with domestic and family issues in countries such as South Sudan and Ethiopia is frequently tied into considerations of dowry, and the possible repayment of dowry in violation of marriage contracts. Dowry considerations have both motivated violence against women and presented barriers to accessing justice for such violence and in family matters.
31. The reluctance of families to return dowry has often resulted in women being forced, both by family members and customary chiefs, to persevere in a violent marriage.³⁵ In South Sudan, this has encouraged women to commit adultery, an act considered a crime, with a view to obtaining a divorce.³⁶ Such commission of adultery then entails either a fine, or a prison sentence or both. In prison, women have then commonly been faced with further violence and ill-treatment.³⁷
32. Women are therefore doubly punished for seeking to leave a violent or unhappy marriage, first, by not being able to obtain a divorce through a customary court, and then by being punished for committing adultery as a means to break the marriage bond and the associated financial or imprisonment penalties the commission of adultery confers. Frequently, when cases are heard, little reference is made to the background of the case, such as previous attempts at obtaining a divorce, and there is little or no acknowledgment of what would be considered prima facie grounds for a divorce, such as domestic violence or a husband absconding from his marital obligations.³⁸
33. Reparation and sentencing when a woman has been raped are also often tied into dowry considerations. As such, reparation in customary law for a young unmarried woman who has been raped may be significant (as their dowry price will be affected), for a married woman it

³³ See generally, SIHA (2013), ‘Falling Through the Cracks’, above, pp. 63 and 64.

³⁴ SIHA (2013), ‘Falling Through the Cracks’, above, p. 18.

³⁵ Ibid., p. 29. For example, the escalation of dowries in South Sudan has led to increased commodification of women, such that a woman’s value is tied into her ability to command a high dowry – be it through age, virginity or family background.

³⁶ Ibid., p. 22-24.

³⁷ Ibid., p. 1.

³⁸ Ibid., p. xv.

may be less, and for a woman who is no longer of child-bearing years, minimal reparation may be made.³⁹ In addition, reparation may be made to the family or husband of the woman at the heart of the case as opposed to the woman in question, such that where a fine has been administered it is given to the family as opposed to the victim and additional forms of justice, such as imprisonment of the perpetrator(s), are often not applied.

34. Ultimately, the respect and protection of women's rights should not be related to or overridden by respect for the marital bond or to dowry and the wider implications of dowry. The intertwining of dowry with the financial/social value of a woman/girl, the sentencing/reparation to victim and the marital status of a woman are key in perpetuating practices that discriminate against women and result in violence against women. It is therefore critical that these factors are acknowledged and addressed with a view to guaranteeing non-repetition when administering justice.

Inconsistency across customary legal traditions and conflicts and conflation with the statutory system

35. Inconsistency across customary legal traditions can be prohibitive of accessing justice. At times crimes may be committed or the interpretation of a course of events differs depending on the customary norms and laws governing differing ethnic, tribal, geographical areas. With high levels of migration, the ability to know whether one is acting outside the bounds of customary law in any given area is at times impossible.
36. Customary law may also interact with the statutory system in a way that causes confusion and injustice. For example, the use of imprisonment as a form of punishment is new to South Sudan and its application is still in need of clarification in terms of its scope and deployment. The practice of imprisonment for criminal and civil acts has infused both the statutory and customary systems, and given that the legal frameworks run in parallel, has led to confused and overlapping jurisdiction in relation to incarceration.⁴⁰
37. Previously, in customary systems, the use of fines was common when addressing adultery cases. However with the use of prison now available, customary systems have seen the joint application of both imprisonment and financial penalties. The use of incarceration alongside fines has limited the ability of women to pay fines, as they are unable to work. Similarly, sentencing structure and obligations are often unclear, and SIHA has subsequently encountered cases whereby women could pay their way out of prison, and others languished in jail not knowing their obligation in terms of obtaining release.⁴¹ Such confusion is exacerbated by poor documentation of cases and sentences and limited knowledge of the legal framework by chiefs, prison officials and those imprisoned.

The need for genuine choice of system

38. **Because of the potentially negative impact on women's human rights, where parallel legal systems do exist, it is essential that women have a genuine choice in which legal forum their case is heard.**⁴² SIHA's experience is that this is often not the case, particularly in relation to marital and domestic issues
39. Even where there are provisions within the statutory system for family-related cases to be heard, it is common that such cases are referred to the customary system as a matter of course. In other cases, even where the statutory system is engaged in relation to marital or family related disputes, customary chiefs have been enlisted to provide advice to statutory judges in their judgments.⁴³ The statutory system therefore needs to be strengthened in terms of its capacity to address marital and domestic issues.

³⁹Ibid., p. xiv.

⁴⁰ Ibid.

⁴¹ Ibid., pp. 46-48.

⁴² Ibid., pp. 36-38.

⁴³ Ibid., pp. xvii.

40. Articles within the Ethiopian constitution both legitimate customary legal mechanisms and facilitate a space by which they can be immune from the obligations of the rights of women enshrined within the constitution.⁴⁴ Although reference is made within the constitution for consent of the disputing parties to use customary systems, such consent for a woman is often not a real act of choice, but one of compulsion and limited alternatives. A woman is often in a weak position to push her case for use of a statutory system that she may be unfamiliar with and her community may frown upon. It is often difficult for a woman to refuse the use of customary law in favour of a statutory court hearing due to social pressures and lack of access to and understanding of the statutory system. States must therefore make greater efforts to promote public awareness of the operation of the statutory system through civic education, and ensure the operation of services facilitating access to it.

VII. Transitional justice and post-conflict contexts

41. The concept note is right to recognise that transitional justice and post-conflict contexts provide particular challenges, and should be addressed in the proposed general recommendation.

42. The obligation to ensure that all victims are provided with the right to seek and obtain reparation equally applies post-conflict and during periods of transition.⁴⁵ Nonetheless, ensuring adequate and effective reparations for mass violations poses a particular challenge, taking into account that most societies coming out of a period of mass violations, even with the best of will, will have weak legal infrastructures, competing demands for scarce resources and a large number of victims with a range of rights and needs.

43. In response to these challenges, some states have developed policies and specific administrative programmes to deal with reparation for mass claims. These can only ever complement rather than substitute access to the courts as victims of violations, particularly of a serious nature, have a right to a judicial remedy: ideally, the design of administrative reparation programmes will be sufficiently inclusive, responsive to the wishes and needs of victims, transparent, easy to use, efficient and seen as just, that the advantages of using the programmes will outweigh the prospect of gaining reparation before the courts or other established mechanisms.

44. To be compatible with international law, an administrative reparation programme for mass violations should involve broad participation of a wide range of victims in its design; explicitly acknowledge that the provision of reparation is a moral, political and legal obligation of the state and that recognition of victims as human beings whose fundamental rights were violated is “the central goal” of reparations;⁴⁶ be comprehensive in the sense that it makes reparation available to all victims of serious violations, and provides for a spectrum of reparation measures, including satisfaction and guarantees of non-repetition; be transparent and accessible; provide “adequate” and “fair” reparation;⁴⁷ have directly enforceable recommendations;⁴⁸ and allow individuals to pursue individual judicial remedies if that is their preference.⁴⁹ Such programmes should never allow amnesties for serious human rights violations.⁵⁰

⁴⁴ SIHA (2012), ‘Between Modernism and Heritage: The application of the parallel legal system to the Oromo Women of Ethiopia’, pp. 25-26, available at: <http://www.sihanet.org/index.php/sihans-published-work/reportspublications/file/36-between-modernism-and-heritage>.

⁴⁵ See, eg. HRCtee, General Comment No. 29, para. 14 (right to a remedy is non-derogable and applies even during a state of emergency); HRCtee, *Giri v Nepal*, Views adopted 28 March 2011, UN Doc. CCPR/C/101/D/1761/2008, para. 7.10; IACtHR, *Barrios Altos v Peru* (Reparations and Costs), Series C, No. 87 (2001) Judgment of 30 November 2001, paras. 41–44.

⁴⁶ Such as in the programme proposed by the Truth and Reconciliation Commission in Peru (the Comprehensive Reparations Plan “PIR”); See, Truth and Reconciliation Commission of Peru, ‘Summary of the Comprehensive Reparations Plan (PIR)’, English translation available at: http://www.aprodeh.org.pe/sem_verdad/informe_final/english/reparations_plan.pdf, para. 2.2.2.1.

⁴⁷ See eg. the Committee Against Torture’s concern in relation to the National Commission on Political Imprisonment and Torture in Chile, that “*austere and symbolic*” reparation is not the same as “*adequate and fair*” reparation as set out in Art. 14 of the CAT (CAT/C/CR/32/5, para. 6(g)(v)).

⁴⁸ See, eg. the Committee’s concerns that recommendations of the Peruvian Truth and Reconciliation Commission had not been implemented, especially in relation to vulnerable groups (CAT/C/PER/CO/4, para. 21).

⁴⁹ For an overview of some of these best practices see ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, By Professor Diane Orentlicher’ (2004)

45. In this regard we draw the Committee's attention to the **Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation**, adopted in 2007, as an essential elaboration of the relevant principles in international law and suggest that it is referred to in the proposed general recommendation. Those principles establish, among other things, that:

- Full participation of women and girls victims should be guaranteed in every stage of the reparation process, i.e. design, implementation, evaluation, and decision-making;
- Structural and administrative obstacles in all forms of justice, which impede or deny women's and girls' access to effective and enforceable remedies, must be addressed to ensure gender-just reparation programmes;
- Practices and procedures for obtaining reparation must be sensitive to gender, age, cultural diversity and human rights, and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety;
- Indicators that are sensitive to gender, age, cultural diversity and human rights must be used to monitor and evaluate the implementation of reparation measures;
- Ending impunity through legal proceedings for crimes against women and girls is a crucial component of reparation policies and a requirement under international law.⁵¹

46. Furthermore, the principles stress that:

*Governments should not undertake development instead of reparation. All post-conflict societies need both reconstruction and development, of which reparation programmes are an integral part. Victims, especially women and girls, face particular obstacles in seizing the opportunities provided by development, thus risking their continued exclusion. In reparation, reconstruction, and development programmes, affirmative action measures are necessary to respond to the needs and experiences of women and girls victims.*⁵²

VIII. Conclusion

47. The Committee has already done a significant amount in its concluding observations and jurisprudence to elaborate the right of access to justice within the Convention, and the steps that States parties need to take to implement that right. REDRESS and SIHA warmly welcome the proposed general recommendation and urge the Committee to ensure that its understanding of justice is compatible with and builds upon the understanding of remedy and reparation as developed in international law, by other treaty bodies and regional human rights courts, and taking into account the experiences of victims and women's rights groups. We wish the Committee every success in its endeavour, and are ready to provide any further comments or input as required.

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E/CN.4/2004/88. See also Report of the Special Rapporteur on violence against women, its causes and consequences (2010) A/HRC/14/2.

⁵⁰ See OHCHR (2009), 'Rule of Law Tools for Post-Conflict States: Amnesties', pp. 11-24, available at: http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf.

⁵¹ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007), available at: http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf, Basic Principles, Sections 1 and 2.

⁵² Ibid., Section 3.