

**REPARATIVE
JUSTICE
SERIES**



**REPARATION AND THE DARFUR
PEACE PROCESS: ENSURING
VICTIMS' RIGHTS**

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Front Cover: "Darfur Refugees Overwhelm Camps In Chad" Camp Kounoungo, Chad – September 1, 2004: Refugee women from the Darfur region of Sudan carry water back to their tents in the Kounoungo refugee camp. (Photo by Scott Nelson/Getty Images)

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The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

More information about the ICTJ is available at <http://www.ictj.org>.

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EXECUTIVE SUMMARY

This paper addresses a key aspect of the conflict in Darfur that has received relatively little attention to date, the issue of reparations. It focuses on the need to ensure that victims' right to reparation for the harm done to them is both recognized and upheld as part of any peace process. It aims also to articulate that right, and to review and address some of the main challenges to be confronted in devising and delivering an effective program of victim reparation once peace is achieved and security restored. In doing so, it draws on the experience that the International Center for Transitional Justice (ICTJ) has gained through its involvement with post-conflict legacies in other countries in Africa, and in Asia and Latin America, where reconstruction efforts have faced challenges similar, in some respects, to those presented by Darfur.

This paper is intended principally for those who will be involved in future peace negotiations, directly and in an advisory or supportive capacity, and also to assist victims' groups and others working to uphold the rights of those who have been exposed to gross abuses of their rights and suffering as a result of the conflict. While peace remains the immediate goal, these victims and their right to reparation must not be overlooked or sacrificed for lack of resources or political expediency. Having borne the brunt of the conflict, their rights should not be ignored in achieving peace.

The ICTJ is publishing this paper now in advance of an expected resumption of peace negotiations. Previous negotiations, including the ill-fated Darfur Peace Agreement, have broadly acknowledged the need for reparations and specific proposals in this regard have also been made by a UN Commission of Inquiry (though they were not taken up by the UN Security Council). These provide useful points of reference but no more than that, due to their various deficiencies. Much more consideration is needed – and much greater involvement of key stakeholders – in order to develop a comprehensive and effective reparations strategy and program of implementation for the victims of Darfur.

The case for reparations in Darfur is very clear, and becomes stronger by the day. The conflict, which began in 2003 and continues to rage, has had catastrophic consequences for the region's population. It has caused human suffering on a massive scale, with more than 200,000 people estimated to have lost their lives. In addition, between 2 million and 2.5 million people have been forcibly displaced; most remain in Darfur as internally displaced persons (IDPs), many in IDP camps where they continue to be vulnerable to attack. Some 200,000 others have fled the country as refugees.

The conflict has been marked by gross and widespread human rights abuses and violations of international humanitarian law, including arbitrary arrest and detention; abduction; torture, including rape and other sexual violence; wholesale destruction of homes and property, including livestock; burning of villages and mass forced displacement. Civilians, overwhelmingly, have been the target and the victim of these abuses, and they have had no effective remedy or redress.

Most of the abuses have been perpetrated by Sudanese government forces and groups acting with the support or acquiescence of the government of Sudan, most notably the Janjaweed, a well-armed militia-type force which has been allowed to commit gross abuses with impunity. Rebel groups fighting against the Sudanese government have also committed serious abuses.

The right to reparation is well-established under international law and was reiterated by the UN General Assembly in December 2005 when it adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The government of Sudan did not vote in favour of these Basic Principles but it is nevertheless bound by international law to provide an effective remedy to those whose human rights are violated.

In essence, the concept of reparation refers to restitution, compensation, and rehabilitation, along with measures of satisfaction and guarantees of non-repetition. In general, reparation requires that a range of measures be taken that are relevant to the particular context in order to ensure that victims' rights are acknowledged and given effect. In some situations, such measures will include monetary or other forms of compensation to redress the direct harm done to the victim while healthcare and other services are required to assist the victim's rehabilitation. At the same time, the state may need also to take symbolic action to acknowledge the injustice and harm done to victims – for example, by issuing a formal apology – and to initiate legal and institutional reforms, disarm and demobilize former combatants, and strengthen the rule of law in order to eliminate the causes of conflict and prevent its recurrence.

It is the state authorities that have the primary responsibility for affording reparation to the victims of human rights abuses and violations of international humanitarian law even when some of these abuses were committed by armed groups opposed to the state. In Sudan, in fact, government forces and their proxies, notably the Janjaweed, have been the main perpetrators of the abuses that have been committed in the conflict, although some abuses have also been committed by rebel groups. It is absolutely right, therefore, that the greatest obligation for providing reparation should fall on the state and that the state's resources should be used to help redress the harm and injustice done to the victims of the conflict. The Janjaweed and, indeed, rebel groups that have committed abuses also need to be held accountable, but this will be best done, if it can be achieved, through restitution and by a prosecutorial process in which the key perpetrators, at least, including those within the government and official state forces, are made to face justice.

The UN Security Council's referral of Darfur to the jurisdiction of the International Criminal Court has already led to such a prosecutorial process being initiated at the international level. To date, the ICC prosecutor has issued arrest warrants alleging crimes against humanity and war crimes against two principal alleged perpetrators, a senior Sudanese government official and a Janjaweed leader, but the Sudanese government has so far declined to hand them over to the Court. If and when perpetrators are tried and convicted, the ICC may make orders of reparation on behalf of their victims; indeed, the

Victims Trust Fund may be able to provide some limited assistance to victims of the conflict even in advance of the resolution of these cases.

The UN Security Council referred Darfur to the ICC on the recommendation of an International Commission of Inquiry – known generally as the Cassese Commission – that it had appointed in October 2004 to investigate violations of human rights and international humanitarian law and to determine whether acts of genocide had been committed in Darfur. The Commission, which reported that violations “likely to amount to” war crimes and crimes against humanity had been committed, also recommended that the Security Council establish a Compensation Commission to provide a remedy to the victims, proposing that it should have a three year mandate, be composed of international and Sudanese experts and should sit in Darfur. In the event, the Security Council did not take up this recommendation and certain of its proposals appear impractical, but it is significant, nevertheless, as a reflection of international recognition of the need for reparations.

In a similar way, the Darfur Peace Agreement between the Sudan government and one rebel group also includes some provision for reparation under the rubric of “compensation” to those described as “war affected.” The DPA also envisages the creation of bodies whose role it would be to resolve land ownership and other claims and disputes and provide redress for other harms, including “physical or mental injury, emotional suffering or human and economic losses, in connection with the conflict.” As well, a Compensation Fund would be created, to which the Sudanese government pledged US \$30 million, subsequently more than tripling this, though both pledges appear inadequate compared to the scale of the problem. Partly for this reason, the agreement was repudiated by some rebel groups and, most notably, the IDPs.

To an extent, the proposals in the DPA resonate with traditional forms of grievance and dispute resolution in Darfur and more widely in Sudan, which generally prize reconciliation over other considerations and, for example, allow the payment of a “blood price” to the victim or his family to assuage the consequences of an assault or killing of one person by another. As well, the Sudanese government has previously conducted “national reconciliation” events in which it has called for people to respond to the “historical call of reconciliation,” even if it has delivered little, tangibly, to give substance to this rhetoric. As with the ideas and proposals sketched out by the Cassese Commission and in the DPA, traditional mechanisms have real limitations but could provide some frame of reference for the development of a comprehensive and effective program of reparations for Darfur.

The first challenge, when peace negotiations resume, however, is to ensure that the issue of reparations remains on the agenda and receives the priority and attention that it merits. Inevitably, there will be many other issues to be resolved and there is a danger that the issue of reparations may be exploited for political and sectional interests by the parties to the negotiation. As the paper describes, even when the right to reparation was well-acknowledged in other countries recovering from periods of conflict and massive abuse,

victims have taken second place and been made to wait for a remedy even while those who perpetrated abuses are assisted to reintegrate into society.

A second challenge is to ensure that whatever may be agreed about reparations complements and is complemented by other policies and measures intended to facilitate post-conflict reconstruction and begin a process of genuine national reconciliation. Wherever possible, policies need to be designed so as to have the greatest reparative effect for all those affected by the conflict if peace and security are to be assured for the future, though specific measures must be devised to address, and begin to redress, the worst abuses and to assist those who were exposed to them start to recover their lives.

In Darfur, as in certain other situations, devising an effective reparations program will be especially difficult because of the enormity of the problem, including the huge numbers of people affected and the great range of abuses to which they have been exposed and their severity. To an extent, the DPA has not helped matters, referring as it does to the prospect of compensation for all those who can be considered “war affected.” At one level, this is a helpful definition in that it recognizes the commonality of victims, but it also is seriously deficient insofar that it blurs together many different levels of abuse, diminishing the sense of the individual and his or her rights, and obscuring also the question of responsibility – and criminal culpability – for certain grave crimes.

In this paper, the ICTJ considers this challenge and argues that those devising a reparations program for Darfur will need to distinguish different categories and levels of victims, and to do so using clear, fair and reasonable criteria taking into account the views of victims themselves. They may need to develop a flexible palette of measures which, at one level, address the wrongs done through collective or community-based measures, and at another attend to more specific needs, such as those experienced by women who were raped or victims of other torture who are likely to require medical or long term psychosocial support.

A further complication arises from the fact that some victims of gross human rights abuses were also perpetrators of such abuses against others. Should they be treated the same or differently from other victims, the paper ponders, or will that serve to create a sense of “good” and “bad” victims that could prove signally divisive?

And when the victim categories are devised, if such an approach is followed, a number of other questions follow. What are the reparative measures that will be most effective in redressing the wrongs done to each category? What processes or mechanisms can be developed to ensure effective identification of potential beneficiaries? What are the standards of proof should victims seek reparations? These too are crucial questions that must be factored in to the design of any reparations program. Victims should not be re-traumatized in pursuing their claims for reparation, so developing a process of documentation requires great care and sensitivity, as evidenced by the experience of other broadly comparable situations – for example, in Peru and in Guatemala, where post-conflict reparative bodies struggled with many of the same issues.

As the ICTJ paper emphasizes, the relative success of initiatives such as Peru's reparations plan stems from the fact that those devising the reparative programs engaged directly and proactively with victims' groups and were attentive to their assessments of the harms done and how they could best be addressed. Victims' views will be crucial in determining not only who should receive reparations and the form and nature of the measures required, but also relative priorities – what are the needs that must be most urgently addressed, perhaps through interim and incomplete measures, and which are those that will require long term attention and investment of resources? These are the types of questions that need to be considered but which cannot adequately be answered unless victims' voices are truly heard.

While it is the state that has the responsibility for providing reparation, the international community also has an important role to play, not least in the context of Sudan. Other governments should insist that the Sudanese authorities respect their obligation to provide reparations to the victims of abuses in Darfur, and support efforts that will help make reparations feasible, but in general, they should not make available financial or other resources directly to assist the Sudanese government to meet its obligation. To do so would undermine the specific state obligation and also let the key perpetrator government off the hook. Other states that wish to facilitate the peace process and reconstruction in Darfur should play a role in guaranteeing the political space for victims' right to reparation and the technical assistance needed to facilitate it. Their assistance to refugees and the displaced, to reconstruction, and to speeding the processes of political, legal and institutional reform should insist that these measures be victim-sensitive and lend reparative effect to what should be the central role of government with regard to reparations. The international community's role can help ensure that the people of Darfur never again are exposed to the sort of calamity that has been imposed on their lives and communities during the past four years.

The ICTJ paper makes no claim to be exhaustive in considering the many and complex aspects of devising and delivering an effective program of reparations in Darfur, nor does it seek to be prescriptive. However, the paper makes a number of recommendations addressed to the parties to the conflict, the government of Sudan and the rebel groups opposing it, and to the mediation team established under the joint auspices of the AU and UN to help bring a resolution to the conflict.

It calls on the government of Sudan to acknowledge formally its responsibility for the gross rights violations that have been committed by its forces, including the Janjaweed, for rebel groups to acknowledge the abuses they have committed, and for both sides to take urgent action to cease abuses. It calls too for both sides to affirm the status of victims of the conflict and their entitlement, as rights holders, to prompt, adequate and effective reparations as soon as peace and security is achieved, and to engage actively with victims groups and other stakeholders to devise an effective program of reparations which are, and are seen to be, fair, reasonable, just and appropriate to the harms that they address, and capable of timely and efficient delivery to those whom they are intended to benefit. Reparations should also be sensitive to women's disproportionate suffering and ensure that in both process and content they recognize women's voice and role.

Addressing the AU and UN, the ICTJ calls for an expert on design and implementation of reparations to be included in the joint international mediation team in order to help ensure that the parties to the conflict give due attention to reparations and to assist them in devising an effective reparations program. It calls too for the mediation team to take a lead in ensuring that victims' voices are heard and that such reparations measures as may be developed overcome, not entrench, the inequalities which lie at the root of the conflict in Darfur and have continued to fuel the violence.

The ICTJ paper is intended as a contribution to the peace-building process and, once peace is achieved, to the processes of recovery, rehabilitation and, in the longer term, reconciliation.

I. INTRODUCTION

This paper is intended to contribute to the process of designing and implementing an effective reparations strategy to assist the victims of human rights abuses and violations of international humanitarian law committed during the course of the conflict in Darfur. Set against a backdrop of colonial legacy, struggles over resources and a long history of marginalization and inter-tribal conflicts, that conflict continues to rage. Since it began in 2003 the violence has caused untold thousands of deaths and the forced displacement of some 2.5 million people; some of these have fled as refugees to Chad and other countries but most remain in Sudan as internally displaced persons (IDPs) and continue to be at risk. The conflict has been characterized by massive human rights abuses – political killings, torture and other ill-treatment, including a systematic pattern of rape of women, destruction of homes and forced displacement – mostly committed with impunity and in a context where victims have no recourse to remedy or redress.

To date, international efforts to facilitate a resolution of the conflict, led by the United Nations (UN) and the African Union (AU), have been unsuccessful. A 7000 strong international peacekeeping force deployed by the AU, with the agreement of the Sudanese government, has proven ineffective in protecting Darfur's remaining residents, including IDPs. Recognizing this, the UN Security Council agreed on 31 July 2007, in Resolution 1769, that this AU force should be replaced and augmented by a new joint UN/AU peacekeeping force comprising 26,000 troops and civilian police. This new force is not yet in place but is expected to be deployed by early 2008. A Darfur Peace Agreement (DPA) signed by the Sudanese government and one rebel group in 2006 proved unsuccessful. It was rejected by other rebel groups and failed to win popular support among those displaced by the conflict; its outcome was further divisions within the rebel factions and renewed violence.

Against this backdrop of continuing conflict, it may seem premature to consider the issue of reparations but this is not the case. Although peace and security have so far proved elusive, it is important, even as negotiations to achieve a durable peace continue, that consideration is given to the need for reparations, what form they should take and how they can most effectively be delivered. When peace is achieved, efforts must be made promptly to redress the worst consequences of the conflict, particularly the damage caused to human lives and the social fabric of communities in Darfur, and to reassert victims' rights through a program of reparations. This will be necessary also to help cement the peace and foster reconciliation.

Moreover, the issue of compensation – one of the forms that reparation may take – has already been raised during the course of previous, unsuccessful negotiations to resolve the Darfur conflict. The DPA clearly acknowledged the need for those described as “war affected” to receive monetary or other compensation for their losses and the injury done to them in the course of the conflict. The agreement was rejected by a number of rebel groups for multiple reasons, including that they considered the level of compensation on offer to be inadequate. It can be expected, therefore, that the question of compensation

and the need for other forms of reparation will be key issues in future peace negotiations, including those which are expected to begin in the last quarter of 2007.

Assuming that discussion of reparations must occur in the negotiating process, it will assist the process if all parties are familiar with the concept of reparations and what is entailed in practice in devising, developing and delivering an effective program of reparation to the victims of the conflict once peace has been achieved. It is important too that victims and their representatives have a clear understanding of their rights, are empowered to articulate them and have the opportunity to help determine the nature of whatever reparative measures they receive – not least to ensure the suitability and efficacy of these measures, having regard both to the victims' needs and to their relevance in the local context.

Inevitably, there is a danger that in pursuing an agreement to end the conflict, the parties to the negotiations may be inclined to sacrifice the right to reparation to secure their own political objectives or to hijack it to serve sectional interests, but this must be resisted, including through pressure from the international community. Even if there are good intentions and sufficient political will, a reparations program will only be effective if its contents are properly thought through taking into account the views of victims' groups, relevant local factors such as traditional mechanisms for providing redress, the requirements of international law, and experience from other post-conflict situations in which a legacy of massive human rights abuses has had to be addressed.

By signaling some strategic challenges, international lessons, and technical solutions, the International Center for Transitional Justice (ICTJ) hopes that this paper can serve as a resource for those working towards effective justice for victims in the Darfur context and a prompt and lasting resolution of the conflict. The aim is to ensure that the right to reparation is fully recognized throughout the peace-making process and that fair, just and reasonable reparations are devised and delivered to victims, their families and communities. This paper makes no claim to be exhaustive and to discuss fully all the relevant issues. Nor does it seek to prescribe a specific content to the reparations that may ultimately be agreed. Its purpose, rather, is to point out the limitations of the agreements, proposals and models that have been arrived at to date and to suggest directions the process could take to resolve some of the significant challenges ahead.

The paper first considers the basic concept of reparations as a right and the events that give rise to a legitimate demand for reparations in the Darfur context (Part II). In Part III we examine the precedents and models on the table in the negotiation process and consider the essential objectives that can preserve the right to reparations in the context of future peace negotiations and what will be a complex agenda for reconstruction and reform. We then discuss the challenges of reparations policy design (Part IV) and delivery (Part V), taking into account experience from other situations, and key considerations for Darfur. Finally, we offer some general conclusions and recommendations (Part VI).

II. THE VICTIMS' RIGHT TO REPARATION

The issue of reparations arises in post-conflict situations from the legal and moral obligation to provide redress to those whose human rights were seriously violated during the conflict. Recent decades have seen a growing recognition among states that future political stability cannot be assured if the victims of past grave human rights abuses and violations of international humanitarian law are ignored and left without remedy or redress for the harms done to them. No one form of reparation is adequate to all situations, and the specific contents of the right may vary to fit the context, but there is a developing consensus about the need for reparations, and states emerging from periods of abuse are giving increasing attention to them.

A. The Right to Reparation

As the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹ recently confirmed, victims of such abuses have a right under international law to prompt, adequate and effective reparation.² It is the state's obligation to make that right accessible. Such reparation is not to be provided only by monetary or other compensation, although this is one form, but rather by a range of additional means that are also calculated to redress the harm and injustice done to the victim, including restitution, rehabilitation, guarantees of non-repetition of the abuses and other steps satisfactory to victims.

Reparations are crucial to any process of transitional justice. They focus on the victims and are intended to address directly the wrongs to which those victims were exposed and the ongoing consequences of those wrongs, ameliorating both at least to some extent. Reparations should convey the status of victims as rights holders and serve as a vehicle for acknowledgment of the violations they have suffered, and of the obligation of the state to provide a remedy. This means that all reparations, in addition to any material element such as monetary compensation or the provision of healthcare or other services to the victim, also have a symbolic value. How reparations are designed and delivered – and the messages that process conveys – can be as important as what they contain.

In situations such as that prevailing in Darfur, where very large numbers of people have been exposed to great suffering as a result of the conflict, it is especially challenging to provide meaningful reparations. Courts are not adequate to the task. Not only would they be overwhelmed by the numbers of claims, they would operate under other limitations, such as inadequate legislation, strict evidentiary requirements or a continuing reluctance

¹ Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005. Accessible at: <http://www2.ohchr.org/english/issues/remedy/principles.htm>

² For more information about reparations generally, see ICTJ, “*Reparations in Theory and Practice*,” (2007); Ruth Rubio Marin, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (ICTJ and Social Science Research Council: 2006), both available on-line, at www.ictj.org and <http://www.ssrc.org/blog/2006/12/29/what-happened-to-the-women/>, respectively. For a comprehensive review of reparations programs in various settings and a discussion of critical issues in reparations, see Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford University Press, 2006).

or inability on the part of some victims to come forward and submit their claims in a formal proceeding. Perhaps most importantly, developing reparations by the presentation of individual cases excludes most victims and creates short-sighted remedies that do not take into account the bigger picture of what victims suffered and how society is being rebuilt. Reparations programs that are designed by law or agreement to establish a policy applicable to all victims may be deficient because they fail adequately to resolve the unique features of each individual's situation, but they can be more purposeful, efficient, and effective if well designed and delivered in a timely way. This is the policy option discussed in this paper, considering the different forms it might take, including measures that are both meaningful and concrete, and that recognize the harm to both the individual and the collective.

Whatever specific measures are taken, however, their effectiveness in providing reparation to victims will always be enhanced by making various measures complement each other. This includes making sure that reparations are themselves a coherent package, but also that they complement and are complemented by truth-seeking initiatives, efforts to ensure justice and hold perpetrators of past human rights abuses to account, as well as by institutional reform and other initiatives that seek to address the causes of the conflict and prevent its recurrence. Such efforts will assist in making reparations more effective, but they are distinct from and cannot substitute for reparations.

B. Darfur: The Case for Reparation

Since the current conflict commenced in 2003, it has had profound and devastating consequences for the population of Darfur. There are no precise figures and estimates vary, but as of 2007 it is generally accepted that between 2 million and 2.5 million people have been forcibly displaced,³ over 200,000 deaths have occurred⁴ and more than 200,000 of Darfur's inhabitants have fled Sudan and become refugees. Moreover, there continues to be a high rate of displacement, with some 107,000 civilians reported to have been newly displaced in the first three months of 2007.⁵ More than 1600 villages have been destroyed in Darfur and along the Chad-Sudan border.⁶ Civilians, overwhelmingly, constitute the majority of victims: men have been targeted for arbitrary detention or summary, extrajudicial killing while women have been killed, abducted, tortured, raped, and subjected to sexual slavery. According to research conducted at a camp for IDPs near the Chad-Sudan border, over 60 percent reported the death of a family member, 25 percent reported cases of abduction, 16 percent reported rape, and over 80 percent

³ "Sudan: arms continuing to fuel serious human rights violations in Darfur," Amnesty International, AI Index: AFR 54/019/2007, May 8, 2007; "Report of the Secretary-General on the Sudan," Darfur Peace Agreement (DPA) Monitor, UN Mission on Sudan (UNMIS), April 17, 2007, 11.

⁴ "Sudan: arms continuing to fuel serious human rights violations in Darfur," Amnesty International, AI, Index: AFR 54/019/2007, May 8, 2007, p. 4

⁵ "Report of the Secretary-General on the Sudan," Darfur Peace Agreement (DPA) Monitor, UN Mission on Sudan (UNMIS), April 17, 2007, 11.

⁶ United States Holocaust Memorial Museum, "United States Holocaust Memorial Museum and Google Earth," United States Holocaust Memorial Museum at <http://www.ushmm.org/googleearth/>, accessed July 16, 2007.

reported the destruction of their villages.⁷ Many also reported the theft of their livestock and looting of their personal property, the loss of which eradicated their livelihoods.⁸

Forced displacement has been pursued as a strategy of war in Darfur by the government, through its own forces and the Janjaweed; the intentions apparently are to undermine the rebels' base of support and at the same time satisfy the demand of militia leaders and fighters for land and resources. The strategy transforms internal displacement from a secondary consequence of the fighting to a military and economic objective which has its own local and national logic.⁹

Armed groups, particularly the Janjaweed, are reported to have attacked IDP camps, killing, looting, and raping the inhabitants, and deliberately attacking humanitarian workers.¹⁰ In this way, some victims of grave abuses have been exposed to new violations at their place of refuge. The security of IDPs in camps has continued to deteriorate since 2006 due to the increased presence of armed groups and they remain constantly vulnerable to further abuses, such as arbitrary detention, abduction and killing, theft and extortion, and severe limitations on their freedom of movement. The Janjaweed and other armed groups that have been permitted to operate with impunity by the government have been responsible for widespread rape and sexual violence against women and girls both within and outside camps, with the number of attacks surging when there has been increased military presence by government forces in an area.¹¹ The widespread destruction of property - including houses, farms, livestock, and communal infrastructure - has undermined any possibility that most IDPs will be able to make a sustainable return to their places of origin when peace is eventually achieved and security conditions allow.¹²

Abuses against women and girls have been especially acute. The Janjaweed militia, in particular, have targeted women and girls in their villages, while they have been in transit, and in IDP camps, abducting, raping and subjecting them to other torture with impunity and the acquiescence of government forces.¹³ Gang rapes, sexual slavery, and rapes of pregnant women have been reported,¹⁴ while women who have resisted rape

⁷ "Documenting Atrocities in Darfur." US Department of State, Bureau of Democracy, Human Rights, and Labor and the Bureau of Intelligence and Research, State Publication 11182, September 2004.

⁸ Ibid.

⁹ Internal Displacement Monitoring Centre, "Sudan: Slow IDP return to south, while Darfur crisis continues unabated," August 17, 2006, 13-14

¹⁰ IDMC, 17 August 2006.

¹¹ Darfur Humanitarian Profile No.26, Humanitarian Information Centre for Darfur, January 2007, 11.

¹² Ibid.

¹³ "Darfur: Rape as a weapon of war: sexual violence and its consequences," Amnesty International, July 19, 2004; see also Adrienne Fricke, "Laws Without Justice: An Assessment of Sudanese Laws Affecting Survivors of Rape," Refugees International, June 2007, accessible at: <http://www.refugeesinternational.org/content/publication/detail/10070>.

¹⁴ "Darfur: Rape as a weapon of war: sexual violence and its consequences," Amnesty International, July 19, 2004.

have been beaten, tortured, killed or have had their legs broken to prevent their escape.¹⁵ Some rapes by rebel forces have also been reported.¹⁶

Used as a tactic of war by the Janjaweed, the main goal of the rapes appears to be community destabilization. Rape is used as a means not only to abuse and degrade the woman victim but also to humiliate her and the male members of her family and community by exposing their inability to protect her. This practice has been marked by unrelenting cruelty, with no quarter shown even to women who are obviously pregnant, many of whom are reported to have been killed apparently because they are seen to symbolize the enemy and its reproductive capacity.¹⁷ For the woman victim, the impact of rape can be catastrophic. Not only does she suffer the pain and humiliation of the assault but, having been so sexually abused, she may then face being ostracized by her family and community for cultural reasons but through no fault of her own. Yet, women in the IDP camps continue daily to run the risk of rape when they leave the camp to gather food, water or other necessities for their families. This victim community has been shaken to its core as it struggles to cope with dishonor and separation.

The Darfur conflict has generated an enormous number of victims, both individual and collective, and a very wide range of human rights abuses. This will present a major challenge for the development of an effective reparations policy and indicates that difficult decisions will need to be made as to which victims or categories of victim should fall within its ambit and what measures of reparation can be made available to them. The task of accurately assessing the numbers of victims will also be a challenging one due to the extent of under or possibly over-reporting that has already occurred and arises from the problems of access and security which continue to inhibit contact with victims.

C. Responsibility for Reparations

Under international law, states are responsible for ensuring that citizens and others within their jurisdiction are able freely to enjoy and exercise the full range of their human rights and are afforded an “effective remedy”¹⁸ when their rights are violated. It is states, therefore, that have the primary responsibility for ensuring that victims of human rights abuses committed within their jurisdiction receive appropriate reparation. This is so irrespective of whether the abuses were carried out directly by state agents or by others acting on their behalf or with their support or acquiescence such as militia forces and, in the case of Sudan, the Janjaweed.

It holds true also even when the abuses that warrant remedy, including reparation, were committed by the former authorities of the state; in such case, the continuity of the state means that the new authorities have to assume responsibility for redressing the abuses and crimes committed by the predecessor regime and there are extensive examples of state practice in this regard.

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ International Covenant on Civil and Political Rights, Article 2 (3).

In other cases, grave human rights abuses are committed by armed groups which oppose the state and are outside its control and it is clear that the state had no direct responsibility for the abuses. Here too, however, the state should accept the primary responsibility for providing reparation to the victims for two main reasons. The first is that the state failed in its duty to uphold the rights of its citizens and others within its jurisdiction whose rights were abused by the armed group, and has an obligation to redress that failure.¹⁹ The second is one of fairness and the importance of the principle of non-discrimination, which requires that states do not discriminate against one set of victims because their rights were abused by a non-state group. Further, such an even-handed approach on the part of state authorities can help foster social reconciliation. The state's assumption of responsibility for providing reparations to all victims can serve as a positive acknowledgement of its duty to guarantee the well-being of all citizens.

Gross human rights abuses and serious violations of international humanitarian law have been committed by various parties to the conflict in Darfur. In particular, Sudanese government forces and their proxy, the Janjaweed, have committed widespread and systematic human rights violations, as described above. Although many abuses by these forces have been clearly documented by international human rights organizations and UN agencies, the Sudanese authorities have failed to take effective steps to arrest and prosecute alleged perpetrators; rather, they have allowed them to commit gross abuses with impunity. Similarly, although Sudan is a signatory to the treaty establishing the ICC, to date the government has resolutely refused to hand over to the court former State Minister of the Interior Ahmad Harun, and Janjaweed leader Ali Kushayb. In April 2007,²⁰ the ICC's Office of the Prosecutor issued arrest warrants against both men on 51 counts of alleged crimes against humanity and war crimes.²¹ The government has maintained a policy of impunity, and the domestic justice system, specifically the Special Courts on the Events in Darfur, has generally been incapable of trying alleged human rights violators.²²

Sudan is a state party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international human rights treaties, including the African Charter on Human and Peoples' Rights, and it is bound by the obligations contained in these treaties including the obligation to provide effective remedy to those whose rights under these treaties are violated. Sudan's representative abstained when the UN General Assembly voted to adopt the UN Basic Principles and Guidelines concerning the right to a remedy and reparation but the Sudanese authorities are nevertheless obliged under the ICCPR to uphold the full range of human rights it contains, including the non-derogable rights to

¹⁹ This is a duty that has been well-developed within the inter-American human rights system, for example. See the seminal decision in the Velasquez-Rodriguez case by the Inter-American Court of Human Rights, Series C, No. 4, 29 July, 1988, paragraph 172.

²⁰ http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf.

²¹ "Sudan: War crimes suspects must be brought before International Criminal Court," Amnesty International, May 2, 2007.

²² Human Rights Watch, "Lack of Conviction: the Special Criminal Court on the Events in Darfur: A Human Rights Watch Briefing Paper," New York, June 2006, 4.

life, freedom of religion and not to be tortured or subjected to slavery. They are also obliged to prevent and take action against abuses such as abduction and hostage-taking, forcible population transfers, and incitement to discrimination, hostility or violence on national, racial or religious grounds and, as stated above, to provide an effective remedy for anyone whose rights have been violated. In this connection, it is increasingly recognized that states must provide effective avenues of redress for victims of massive abuses of human rights and violations of international humanitarian law such as have occurred, and are continuing, in Darfur.²³

Common Article 3 of the Geneva Conventions binds both the state forces and insurgent groups to respect human dignity. The state is responsible for international crimes committed by militia groups if it can be shown that the state retained “overall control” over such groups “in organizing, coordinating or planning the military actions.”²⁴ That many or most abuses have been committed by the Janjaweed,²⁵ therefore, does not alleviate the government of its responsibility to provide reparation; on the contrary, the government’s role in facilitating the commission of crimes by the Janjaweed is an additional reason to hold it accountable through reparations.

This does not mean that the Janjaweed should escape all responsibility for providing reparations. However, their susceptibility to legal proceedings and their capacity actually to contribute to the costs of reparations will determine the extent to which they can be held directly accountable to victims, if at all. In the future, court judgments against individual perpetrators may result in some orders for compensation or other reparation being made against individual Janjaweed leaders but even if this were to occur, it would almost certainly benefit only a very small minority of victims and not contribute significantly to the costs of an effective reparations program. The state authorities might require the Janjaweed to contribute resources to the provision of reparations as part of their demobilization, but this seems unlikely.

Once peace is achieved, the process of demobilizing the Janjaweed and their future location will have important implications for victim communities who seek to return to the lands from which they were forced to flee but which may now be occupied by or in the possession of the Janjaweed. The role of perpetrator groups in ceding possession of lands illegally and unjustly gained may be one of the most important contributions they can make to reparations for victims. This issue will inevitably come into play in relation to land restitution. Moreover, a careful assessment is needed of how reparations, restitution, and demobilization plans combine to further goals of reconciliation, before decisions are taken to locate perpetrator and victim communities in proximity to one another.

²³ See Richard Falk, “Reparations, International Law, and Global Justice,” in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford University Press, 2006), 478.

²⁴ “Entrenching Impunity: Government Responsibility for International Crimes in Darfur,” *Human Rights Watch*, Volume 17, No. 17(A), Dec 2005, 71-72.

²⁵ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General.” Geneva, January 25, 2005, 54.

Various rebel groups fighting against the government, and against each other, are also reported to have committed serious human rights abuses, though on a lower scale than those committed by the government and its proxy forces,²⁶ and may also potentially be considered liable for reparations. In practice, this is unlikely to be realized except, as with the Janjaweed, through court actions or as part of a peace agreement in which such groups agree to contribute to a state-administered program of reparations.

Victims can be expected to derive considerable satisfaction from successful prosecutions of key perpetrators of human rights abuses, including Janjaweed leaders and state officials, if they can be mounted by the ICC or other courts, and this can have an important reparative effect. As well, in any post-conflict processes of military demobilization or institutional reform, vetting could be used to exclude perpetrators from positions of authority. Most importantly, however, demobilization and other programs that provide benefits, such as compensation, goods, or services, to perpetrators in order to facilitate their disarmament and reintegration into civilian life and society must not be done at the cost of providing reparation to victims.

Experience from other countries that have experienced internal conflict indicates that it is usually not feasible to hold armed groups, whether pro or anti-government, directly accountable for reparations. In Colombia, recent prosecutions of paramilitary leaders have led to some lands and other of their assets being seized for use as reparations, but this is exceptional and has led to concern that it could distract from the government's own responsibility for abuses and affect some individuals' right to restitution. Generally, the approach taken in Peru is more helpful. There, even though a truth commission found that Shining Path guerrilla fighters were responsible for more than half of the political killings and "disappearances" and a significant share of other grave abuses that were committed during the internal armed conflict, it was decided that the state should assume full responsibility for reparations. The reasoning for this was that the state authorities had failed to uphold their obligation to protect the rights of all citizens and to defend them from the depredations of Shining Path, and so it was right that the state should seek to make amends by providing reparations to all victims irrespective of whether their rights had been abused by government forces or Shining Path. Under Peru's reparations law, however, while undertaking to bear primary responsibility for reparations, the state authorities did reserve the right to pursue damages from individual perpetrators where this was possible; victims also retained that right.

While recognition of responsibility is critical to the symbolic impact of reparations, defining reparations policy and sources of reparations around the responsibility of specific parties to the conflict is generally ill-advised. The Sudanese state authorities have a legal, political and ethical duty to create conditions conducive to the well-being of all Sudanese. An excessive focus between direct responsibility and reparations could mean that some victims are overlooked or excluded because it is not clear who committed the crimes they suffered. The overriding responsibility of the Sudanese government for providing reparations should be clearly established, not only because of the crimes and

²⁶ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General." Geneva, January 25, 2005, 77.

abuses for which it and its proxy, the Janjaweed, are directly responsible but because it has an overall responsibility towards all the victims of the conflict in Darfur.

In this connection, the government's acceptance in principle of its responsibility for compensation, as set out in the DPA, is an important step towards recognition of its overall responsibility in this area. The parties' discussions of the reparations agenda in negotiating that agreement were influenced by the thinking of the Geneva-based Darfur Relief and Documentation Centre, a Darfurian civil society organization.²⁷ However, the government had resisted calls by this group for a comprehensive approach to reparations that would require the government publicly to admit responsibility and apologize for the harm inflicted on victims of abuses and atrocities committed during its counterinsurgency campaign in Darfur. This indicates that the question of responsibility and the message that any agreement on reparations will convey is still something that must be addressed. Even so, the government's agreement to the establishment of a Compensation Commission and Compensation Fund can be considered as an implicit acknowledgement of responsibility and a commitment, in principle, to reparation.²⁸

III. REPARATIONS AND THEIR RELATION TO THE PEACE PROCESS

A. Precedents and Models on the Table

The question of reparations for victims of human rights abuses and violations of international humanitarian law committed during the conflict in Darfur has already been raised by the United Nations (UN), arises in the context of the International Criminal Court's actions, and has been discussed in the context of previous peace negotiations, including the 2006 DPA signed between the government and one armed group. Consequently, as peace negotiations continue, discussions relating to reparations are likely to be informed and influenced, both positively and negatively, by these previous

²⁷ A paper presented by the Centre to the parties' delegates and international mediators explained the theoretical and practical underpinnings of the concept of reparation. It also explained the relevance of reparations in the context of Darfur's customary practices and how affirmative action programs might address the root causes of the conflict and prevailing structural, political and economic disparities between the center and peripheries of Sudan, including Darfur. Darfur Relief and Documentation Centre, "Reparations, Compensation and Affirmative Action and their Role in Peace-making and Peace-building within the Context of the Armed Conflict in Darfur Region of Western Sudan," Geneva, December 2005, see: <http://www.darfurcentre.ch>.

²⁸ Sudan's rulers since the country became independent in 1956 have generally shown little disposition to assume responsibility for the abuses and misconduct of their administrations. In recent years, however, a growing number of top former officials and politicians have demonstrated some willingness to break with this tradition and acknowledge wrongs. Most notably, Pagan Amom, Secretary-General of the Sudan People's Liberation Movement (SPLM), the junior partner in the Government of National Unity, issued a public apology to northerners who were harmed by his movement's 20-year war against the central government. "Sudan will not stay united as one country if no apologies for the past are forthcoming," he warned, speaking at a commemoration two years after the death of SPLM leader John Garang. See "Thousands lit candles at the second anniversary of the passing of SPLM leader; Sudan will not stay united as one country if no apologies for the past are forthcoming; the SPLM criticizes the NCP and accuses it of letting go of Naivasha," *al-Ray al-Aam*, in Arabic, accessed on 31 July, 2007, at: <http://www.rayaam.net/news/news1.htm>.

proposals and agreements. As well, other legal and policy precedents in Sudan and customary forms of resolving conflict and providing redress may have some impact in determining what is ultimately agreed.

1) The UN Commission of Inquiry

At the request of the Security Council, in October 2004 the UN Secretary-General established the International Commission of Inquiry on Darfur to investigate violations of human rights and international humanitarian law, and to determine whether acts of genocide had been committed in Darfur. The Commission (known as the Cassese Commission after its chairperson) submitted a full report on its findings to the Secretary General in January 2005.

The Commission concluded that Sudanese government forces and their proxy, the Janjaweed militias, were responsible for violations of international human rights and humanitarian law which appeared “likely to amount to war crimes” and also, given the systematic and widespread pattern of many of the violations, crimes against humanity. The Commission concluded too that “in many instances” rebel groups had also committed “violations which amount to war crimes.”²⁹

The Cassese Commission made two main recommendations to the Security Council.³⁰ One, which the Security Council accepted, was that the situation in Darfur should be referred to the ICC in order that those responsible for perpetrating human rights crimes should be held to account. The other recommendation, not taken up by the Security Council, was that a Compensation Commission should be established to provide a remedy to victims of serious violations of human rights and international humanitarian law in Darfur. The Cassese Commission proposed that this Compensation Commission should be given a three year mandate and should sit in Darfur. It should comprise 15 members, 10 of whom – including the chairperson - would be appointed by the UN Secretary-General with the five others being appointed by an independent Sudanese body. Those appointed were to include persons with established international reputations and expertise in criminal law, accounting, loss adjustment, and environmental damage, and it was proposed that the compensation commission should comprise five chambers, each with three members; four of these chambers would deal with compensation for any international crimes perpetrated in Darfur, while the fifth chamber would be concerned specifically with the crime of rape.

2) The International Criminal Court and Victims Trust Fund

With the first arrest warrants having been issued by the Office of the Prosecutor, the International Criminal Court (ICC) may also become involved in the question of reparations if and when alleged perpetrators are convicted. In that event, the court may

²⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary- General, Geneva, January 25, 2005, paragraph 630, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

³⁰ Ibid, paras 571-603.

order that the victims of the specific crimes on which the conviction is based should receive reparations, to be realized by the perpetrator or through the Trust Fund for Victims. It is possible that some victims who are currently seeking to participate in proceedings may eventually request reparation.³¹

The Trust Fund for Victims (TFV), established to provide assistance to victims of crimes within the ICC's jurisdiction, may also develop some capacity on its own initiative to provide early assistance of some kind to victims from Darfur, even before any Darfur-related trials have occurred in the court. As yet, the TFV has not established any victim assistance projects in Darfur. However, during the past year it has taken preliminary steps to establish some modest projects to assist victims of human rights abuses in both northern Uganda and the Democratic Republic of Congo (DRC).

Both the ICC's capacity to order reparations and the TFV's role in relation to victim assistance should act as a positive pressure on the government to demonstrate that it has both the will and the capacity to ensure justice, nationally within Sudan, for those affected by the conflict in Darfur, including through the provision of reparations for victims. In any event, neither the ICC nor the TFV will convey the kind of acknowledgment of responsibility that reparations should signify, nor will they be an adequate substitute for a state-funded reparations program designed to aid all victims of serious international human rights abuses and violations of international humanitarian law.

3) The Darfur Peace Agreement (DPA)

The issue of reparations was brought to the forefront of peace negotiations through the inclusion of compensation provisions in the May 2006 Darfur Peace Agreement.³² It is likely to remain a key issue in view of the strong demand for compensation for the "war affected" by those rebel groups who refused to sign the DPA and the wider support this demand commands among the displaced population.

In fact, the importance of providing reparations to victims of the conflict was signaled even before the DPA, indicating the importance attached to this issue by Darfurians. The Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur of July 2005, stated in its Article 10: "Rehabilitation and reconstruction of Darfur is a priority; to that end, steps shall be taken to compensate the people of Darfur and address grievances for lives lost, assets destroyed or stolen, and suffering caused."³³

³¹ "Protection is at stake for the first Darfur victims," in Access, victims' rights before the International Criminal Court, Victims' Rights Working Group Bulletin, Issue 9, Summer/Autumn 2007, accessed at <http://www.vrwg.org/Publications/04/ENG09.pdf>.

³² See on this subject, Alex De Waal, "The Darfur Peace Agreement: Part 3, Compensation and Assistance to Victims," Justice Africa, 29/6/2006, available at: http://www.justiceafrica.org/wp-content/uploads/2006/07/DeWaal_Darfur_Peace_Agreement_3.pdf.

³³ "Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur," available at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EVIU-6E3J2W?OpenDocument>.

Under the DPA itself, it was agreed that three measures would be taken to provide compensation and assistance to those described as “war affected.” First, Property Claims Committees (PCC)³⁴ would be created to resolve individual claims and disputes over ownership of assets and lands and a Compensation Commission would be established to provide redress for other harms, including “physical or mental injury, emotional suffering or human and economic losses, in connection with the conflict.”³⁵ This Commission would be empowered to order the restitution of stolen, lost or destroyed objects; award monetary compensation; provide basic goods; facilitate rehabilitation, including medical and psychological care; provide legal assistance and social services; and acknowledge and accept responsibility for harms done and provide guarantees of non-repetition. It would also have the authority to invoke traditional forms of compensation.

Secondly, the DPA proposed to create a Compensation Fund that would allow the Compensation Commission to make interim awards within three months of the DPA’s entry into force, without proceeding to a full hearing on the claims, with “any such payment” required to be made within 60 days of its award. This interim payment would then be deducted from the final amount of monetary compensation to be awarded to the claimant once the Commission had completed its full hearing of the claim.”³⁶ In support of this, at the time of the DPA the Sudan government pledged an immediate contribution of US \$30 million to this Compensation Fund,³⁷ later reportedly increasing its pledge to US \$100 million. This, however, was considered inadequate by the rebel groups who rejected the DPA and other stakeholders.

Thirdly, focusing on a narrower, but still extensive, group of victims (IDPs and refugees), the DPA called for the establishment of a Darfur Rehabilitation and Resettlement Commission (DRRC).³⁸ This would be supported by a Darfur Reconstruction and Development Fund (DRDF)³⁹ to address the need for long-term post-conflict reconstruction. As envisaged, the DRDF would be

a much larger mechanism intended to support all the activities necessary for rebuilding Darfur, including packages for agricultural rehabilitation (seeds, tools, fertilizers, etc.), rebuilding Darfur’s livestock wealth (providing animals and veterinary services), rebuilding schools, health services, roads, and wells, providing micro-credit to people to rebuild their small businesses, and a host of other activities. Rehabilitation packages would be given to individual households, in the form of in-kind grants.⁴⁰

³⁴ DPA, para 197.

³⁵ DPA, para 200.

³⁶ DPA, paras 210-213.

³⁷ DPA, paras 210-213.

³⁸ DPA, para 182

³⁹ DPA, para 154.

⁴⁰ Alex de Waal, “The Darfur Peace Agreement: part 3, Compensation and Assistance to Victims,” Justice Africa, June 29, 2006, 2-3

The Sudanese government committed in the DPA to provide US \$300 million to the DRDF in the first year after the agreement took effect and thereafter US \$200 million for each of the following two years.⁴¹

In addition to mechanisms for compensation, land restitution, resettlement and basic services to IDPs, the parties to the DPA also agreed on enhancing security, the demobilization and reintegration of militias, and promoting development and reconstruction.

The DPA, of course, has not served as an effective peace agreement to date⁴² due to the limited number of signatory parties and other shortcomings, but its contents represent the mostly likely starting point for renewed negotiations and, consequently, merit close attention. The issue of compensation promises to be a key bargaining point in future negotiations. It has the potential, however, to continue to cause divisions between the various rebel factions.⁴³

4) Traditional Mechanisms of Redress and Other Precedents

In Darfur and throughout Sudan there exist traditional mechanisms for resolving grievances and disputes that are based on compensation. Thus, for example, if one person should be injured or killed by another, the offence can be assuaged through the payment of compensation – a “blood price” – to the victim or his family by the perpetrator of the offence, under a customary system that operates outside the framework of the national courts or government. This live and solid tradition of redress has generally functioned well as a means of resolving small-scale disputes in situations in which reconciliation is prized over other considerations. It may well help to inform the priorities and expectations of victims when it comes to the broader question of reparations for the harm caused by the conflict. It may also offer some insights as to how an effective reparations program could be implemented at the local level, building on the notions of collective responsibility and collective redress which infuse such traditional mechanisms and it may also be especially relevant when responding to abuses that targeted whole communities or groups.

Traditional mechanisms, however, are neither intended nor likely to be a suitable means through which to resolve claims against the government or to address harms of the scale, extent and intensity of those committed in Darfur. They are not sufficiently sensitive to specific harms, such as sexual violence and the needs of rape victims. Further, their

⁴¹ DPA, para 153.

⁴² According to the “DPA Monitor” report of UNMIS of March 2007, several political appointments have been made under power-sharing agreements; a land commissioner has been appointed but has no term of reference nor budget; disarmament of militia and security arrangements are stalled; and the chairperson of the Preparatory Committee for the Darfur-Darfur Dialogue and Consultation (DDDC) determined that no meaningful consultation could occur while the peace agreement fails to command popular support and acceptance.

⁴³ The group that did sign the accords, the SLA/MM, had other priorities, notably power sharing and disarmament, demobilization and reintegration (DDR), and is probably the rebel faction most identified as involved in perpetrating abuses.

emphasis on collective responsibility and collective redress inevitably tends to suppress or diminish recognition of the abusive nature of the harm done to the individual and of the individual culpability for committing that harm. Traditional mechanisms are also open to political manipulation and can be misused to serve factional interests or to play off communities against one another, sowing further division. One concern in the Sudanese context is that the government might seek to manipulate traditional inter-tribal forums in order to blur or divert attention from its own responsibility for the abuses that have been committed.

To date, President al-Bashir and his ruling National Congress Party have made only rhetorical pledges to conduct a “national reconciliation” process, without detailing precisely what this would entail. For example, in a January 2007 speech marking Sudan’s fifty-first Independence Day, President Bashir stated: “I call on all the children of Sudan to respond to the call of historical national reconciliation,” adding that this “would be inspired by the heritage of Africa and our traditions in the reconciliation councils and mediations led by elders.” He said that the process would “elevate generosity and reparations and uphold the principles of solidarity and mutual support,”⁴⁴ but gave no further details of what was being proposed.

In practice, the government’s record in Darfur with regard to reconciliation and reparation does not match this rhetoric. It has frequently staged “reconciliation” ceremonies among neighboring communities at which it has pledged to pay monetary compensation in the name of peace but it has rarely delivered on such promises. Consequently, local people tend to view these “traditional reconciliation” events as little more than a propaganda exercise intended to present the authorities in a good light. Genuine reparations and reconciliation agendas have yet to be met in Darfur.⁴⁵

The Sudanese court system is also ineffective as a means through which to address impunity and obtain redress for harms committed. The judiciary lacks independence and certain laws – such as those granting immunity to officials and inadequate rape laws⁴⁶ – actively undermine access to justice. At the same time, there is no functional practice of civil compensation for the kinds of crimes being committed in Darfur.⁴⁷

Despite this, the notion that the state has a responsibility to provide reparations for harm occasioned by the state is well-established in Sudan, even if it has been inadequately and selectively applied. In the past, various governments have undertaken to compensate

⁴⁴ “President of the republic calls in his Independence and Peace Day speech for national reconciliation,” *Akhbar al-Youm*, 8 January 2007, in Arabic, accessed on 1 August, 2007 at: <http://www.akhbaralyoumsd.net/modules.php?name=News&file=article&sid=5273>.

⁴⁵ See O’Fahey, R.S., “Law, Compensation, and Reconciliation in Darfur,” available at: http://www.darfurcentre.ch/studies_research_papers/Law__Compensation_and_Reconciliation_in_Darfur.html, accessed on 29 July, 2007.

⁴⁶ These laws can now be challenged before the recently established Constitutional Court but there is no jurisprudence yet to signal whether or when change might come.

⁴⁷ REDRESS and SOAT (Sudan Organisation Against Torture) have published a handbook for lawyers in Sudan, which discusses the limited effectiveness of reparations for torture under the law in Sudan, accessible at: <http://www.redress.org/publications/Sudan05.pdf>.

particular communities when it was decided that they should be relocated so that their traditional lands could be used for large development schemes, such as dams and the capital's new international airport.⁴⁸ President Al-Bashir's pledge, made at a public rally in Abri town on 1 August 2007, to compensate those affected by the construction of the Kajbar dam, is a recent example. He promised that those affected would receive five *feddans* of land for each *feddan* taken, plus free irrigation water for two years.⁴⁹ However, such compensation schemes have been selectively applied and have tended to benefit areas from which the government derives much of its support, indicating how compensation can be utilized for partisan political purposes. Rural peasant and pastoralist communities in more remote regions, such as the Nuba Mountains, Southern Blue Nile and Renk areas of Upper Nile region, have been subject to displacement since the 1970s and government expropriation of their lands for mechanized farming schemes but have not been compensated.

Despite the weaknesses of the traditional mechanisms for redressing grievances and the government's flawed approach to compensation, the positive aspects of both, when combined with certain of the elements envisaged in the DPA and the Cassese Commission, might provide a framework for developing an effective reparations strategy at local and national levels that would be capable of timely implementation. The strength of the traditional mechanisms is that they provide a trusted forum for addressing the issue of reparation at a collective and community level, while the DPA and Cassese models propose a more individualized and centralized approach which would need to be carefully redesigned and related to other mechanisms if it were to be able to deal with the large number of victims and potential claimants.

B. The Peace Agenda and Reparations

Even though the issue of victim reparations may be one of the matters on the table in future peace talks there can be no guarantee that it will receive adequate priority or attention. Nor is there any guarantee that any discussions that do take place will adequately reflect or take into account victims' needs and respect their rights, or that whatever may be agreed in relation to reparation will be appropriately complemented by, and will complement, what is decided in relation to other key issues such as the disarmament and demobilization of abusive military and militia forces.

⁴⁸ In the 1960s, the ancient town of Wadi Halfa, in the extreme north of Sudan, and surrounding villages had to be relocated due to flooding from Egypt's Aswan High Dam. The population resisted the move, but were forced to leave as the reservoir gradually flooded their ancestral land. At the resettlement site in central eastern Sudan, a New Wadi Halfa and new villages named after the abandoned ones were made available to the affected communities, as well as agricultural plots and irrigation facilities. All this did little to overcome their collective feeling of victimization. An international campaign salvaged a wealth of archeological artifacts from the region before it came under water, but unknown quantities of archeological treasures were lost. Currently, Nubian communities affected by the planned Kajbar Dam have been resisting plans to move them. In response, the government has used harsh measures to suppress peaceful protests, including waves of detentions of community leaders. On 13 June 2007, police opened fire on a crowd of protesters, killing four of them.

⁴⁹ See "The Committee to resist Kajbar rejects promises made by President al-Bashir," al-Miraya, in Arabic, at: http://www.mirayafm.org/arabic//index.php?option=com_frontpage&Itemid=1; accessed on 5 August 2007; *Feddan* is a unit of area used in Sudan, Egypt and Syria, equivalent to 1.038 acres.

Notably, in addition to concerns about compensation, questions of power-sharing, disarming the Janjaweed, and integration of rebel forces into the national army, caused a number of rebel groups to refuse to sign the DPA. There is a real danger, therefore, that the entitlement of victims to reparations could be at risk of losing its fundamental character as a right and a remedy in future peace negotiations if the question of compensation – and wider reparation – is held hostage to negotiations about the distribution of political power, security guarantees and regional claims.

1) Essential Objectives

The main priority in any future peace negotiations must be to achieve peace and security in Darfur, and an end to the violations of human rights and international humanitarian law which have already destroyed or devastated so many lives. At the same time, it is vital that the victims' right to reparation is also recognized as part of any agreement in order that, with the peace, measures can begin to be put in place to address the needs of victims and repair some of the damage and harm that has been done to them. If the right to reparation is recognized as a core element of any agreement, this should help to ensure that it is not overlooked or ignored due to political considerations or because greater importance is attached to other issues, such as the demobilization of armed forces and the reintegration of fighters into civilian life.

Any peace agreement, however, should not be overly prescriptive in formulating a framework for reparations. At this point, while the conflict continues, victims' groups may not be in a position to meaningfully contribute to or participate in discussions about reparations and the nature of the measures that should be taken. Yet, as we emphasize elsewhere in this paper, it is critical that victims' voices are heard when reparations programs are being devised; this helps to ensure that the measures identified are appropriate to the victims' needs. Participation also has its own reparative effect insofar that victims are acknowledged and understand that their views are considered important.

In fact, it can be expected that the demand for reparations will shift over time. Once victims' immediate priorities – such as security, land restitution and compensation for basic material losses – have been addressed, new needs related to the suffering caused by unlawful killings, torture and other grave abuses will increasingly surface. Consequently, negotiators and mediators must not only develop short-term reparations measures that respond to priority needs; they must also recognize the need for a longer-term framework for reparations that goes beyond the initial and most immediate demands. In general, reparations should be as immediate as other urgent projects, even though, like rebuilding, reparations usually are of long duration. Both the short and long term views are essential objectives.

There are also a number of other items on the peace agenda that are under discussion and that necessarily will be relevant to victims as part of the larger society. If these items are viewed with an eye toward preserving and enhancing victims' rights, they can be tailored to maximize their reparative value and ensure that reparation stays on the agenda as a

proper concern. For example, reconstruction assistance and aid for resettlement would provide additional help to victims of serious international human rights and humanitarian law abuses. Security and demobilization, if they provide adequate guarantees of non-repetition, could create the possibility for safe return and reconstruction of communities and lives. Reform of security institutions and absorption of militias could complement those guarantees, if adequate provision is made to identify and exclude the worst human rights violators from security institutions. By ensuring that some of the victims' basic needs and special circumstances are addressed through other measures as well, the essential objectives of a reparations program can be more focused on the specific crimes and harms that need to be specially recognized and redressed.

The long-term development and reconstruction agenda, however, should not be presumed to take care of the imperative for reparations, even if the resettlement household package is seen as one important contribution in responding to victims' urgent needs. While such a package can have reparative value for the broad class of "war-affected" in a way that unites that class of victims in solidarity, reparations also need to remain explicit and victim-focused in order to be effective. There are many classes of victims whose experiences are quite distinct from the general category of war-affected and who would not be adequately recognized by resettlement assistance alone. It is essential that the space for reparations for such victims is preserved and a framework agreed for further design and implementation.

2) International Lessons: Reparations Delayed

In other peace agreements, resettlement, security and demobilization have generally been prioritized over more direct forms of reparation for victims. In Guatemala, for example, separate accords were reached on these issues over a period of several years. Resettlement was one of the first initiatives to be implemented although one of the first agreements between the government and the guerrilla forces allied in the URNG – an agreement on human rights – stated:

The Parties recognize that it is a humanitarian duty to compensate and/or assist victims of human rights violations. Said compensation and/or assistance shall be effected by means of government measures and programs of a civilian and socio-economic nature addressed, as a matter of priority, to those whose need is greatest, given their economic and social position.

A later agreement on the demobilization of guerrilla forces also recognized explicitly victims' right to receive reparations from the state and provided for the creation of an official body to implement the policy. Despite this, reparations for victims experienced the longest delay and only now, more than 10 years later, are they slowly starting to be implemented.

Sierra Leone's peace agreement included provisions for a truth commission that was to recommend measures for the rehabilitation of victims, among other things. A "war victims fund" was to be set up as a result of the 1999 Lomé peace agreement, and was

recommended as well by the subsequent Truth and Reconciliation Commission (TRC) report. The fund was to cover the “rehabilitation” of victims as well as “symbolic” reparations packages. Both the peace agreement and the TRC proposed that funding be sourced principally from the national budget and from resource-extraction income, such as the proceeds of gold and diamond mining. This fund, however, has yet to be created, while former combatants – including some who perpetrated gross human rights abuses – have received financial and other assistance.

The Philippines provides another instructive example. There, peace talks in 1998 between the government and the Maoist-led National Democratic Front (NDF)-New People’s Army (NPA) led to an agreement to “respect and support the rights of the victims of human rights violations during the Marcos regime.” The NDF wanted the government to implement a U.S. court decision directing that the estate of the former dictator Ferdinand Marcos should pay US \$2 billion to victims of human rights abuses committed by his regime. However, the government accepted only to promote the enactment of a domestic law that would provide for reparations. Five years after it was first proposed, however, this had still not been enacted.

One of the lessons from these examples is that unless there is tireless pressure to ensure that reparations measures for victims continue to be accorded priority after political negotiations are concluded and peace is achieved, these can fall behind other priorities in implementation, even when explicitly agreed. These lessons may well justify a stronger and more concrete commitment at the outset. The Cassese Commission’s recommendation that the UN might hold Sudan’s funds for reparations in escrow is one example of a built-in guarantee of some kind.

Another consideration is the value of separating out for prioritized attention urgent victim needs such as security, resettlement and return. Some programs that affect the broadest number of war-affected, such as land restitution and return, are examples of areas in which specialized or priority attention might be given to victims or communities that were most affected by serious human rights or international humanitarian law violations. Land restitution processes can be notoriously slow and complex and might be best initiated as soon as possible and handled separately from other programs, while return programs usually are required to be implemented urgently for humanitarian reasons. These are both processes that may receive greater international support if they are separate from an explicit reparations policy, but each should also strive to be victim-sensitive, reparative in effect, and complementary to other, eventual, reparations measures.

Finally, as we discuss in more detail below, these examples demonstrate that it may be important to prioritize some additional urgent reparations measures that can and should be instituted promptly, while other reparations are developed with greater participation and after institutional and security foundations are laid.

IV. THE CHALLENGES OF DESIGNING A REPARATIONS POLICY

Effective reparations programs require that criteria are established to define both the full array of victims and specific classes of victims within that universe, and to determine who should receive what benefit through reparative measures. Most programs do this by defining the types of violations or harms suffered that will give rise to reparations - for example, victims might be grouped together to be treated similarly according to whether they lost a family member, were detained, displaced, or became disabled after torture. It is vital that such criteria are established on principled grounds, having regard to fairness, justice and feasibility, and are not formulated on the basis of political favoritism or to effect the discriminatory exclusion of certain victims or categories of victims.

Many reparations programs define certain groups of victims as particularly vulnerable and in need of urgent attention. This may be due to their age, ill health resulting from the abuses to which they were subject, or disadvantages that they continue to face within society. It is important, therefore, to ensure the greatest possible victim participation in the design and implementation of reparations programs in order to ensure their suitability and effectiveness. At the same time, if they are to be effective it is important too that reparation programs are viewed as fair, legitimate and reasonable by the broader population. If the victim is generally perceived as a deserving recipient of reparation, this in itself can help to restore the victim's sense of human dignity.

A. Who Should Receive Reparations?

In developing any reparations program it is necessary to determine which victims should benefit from it. Given the many different ways in which people's rights may have been abused and the many and different consequences that flow from them, this can be a difficult question. This is particularly so in situations such as that in Darfur, where very large numbers of people can be considered war-affected and have suffered losses of one kind or another for which they will wish to receive some form of redress, and in which very many people too have been subjected to gross human rights abuses.

1) Refining the Notion of "Victim"

In Darfur, one of the key issues that may need to be revisited is the question of how the "victim" is to be defined. The DPA took a very broad view of victims when it referred to them using the term war-affected, defined as: "persons or groups of people who have suffered persecution during the conflict in Darfur as well as those whose life and livelihood have been adversely affected as a result of the conflict." Likewise, the range of victims who could make a claim before the DPA's Compensation Commission is extensive, encompassing, "people of Darfur who have suffered harm, including physical or mental injury, emotional suffering or human and economic losses, in connection with the conflict." These terms in the DPA could readily include not only those directly attacked but also host communities or others whose livelihoods have been negatively impacted, whether by the influx of large numbers of displaced people into their areas or by the collapse of traditional systems of interdependent livelihoods.

“War-affected” may be a useful term to apply when devising certain policies, such as those relating to return and to the beneficiaries of regional reforms and reconstruction. To an extent, the inclusiveness of this term could be a positive, unifying feature of a resettlement package that would aim to recognize and provide some benefit to all those whose lives and livelihoods have been affected by the conflict, emphasizing that all have a right to some relief. However, if this victim definition were to serve as the basis for all reparations, it would present significant problems. First, it would raise unrealistic expectations that all war-affected would receive timely, individualized and comprehensive compensation, along with other more specific reparations beyond basic resettlement assistance; this would present enormous resource and logistical problems. Secondly, such a broad categorization fails to acknowledge or recognize the different human rights violations experienced by particular victims, rendering invisible serious crimes and the suffering they caused and so diminishing recognition of the specific rights of victims.

In principle, and in order to serve the purpose of affirming respect for human rights, reparations programs should be limited to victims of gross human rights abuses and serious violations of international humanitarian law. Others who have needs arising from their involvement in the conflict, such as members of government military forces and other combatants, are more appropriately addressed using veterans’ pension schemes, demobilization programs, and similar mechanisms rather than being brought under the umbrella of reparations. People whose lives and livelihood were affected indirectly by the conflict, or whose rights were directly, but not severely, affected, would benefit from the broader agenda of reconstruction, reform, and development foreseen by a peace plan, but might realistically be considered to fall outside the realm of “victim” for the purposes of receiving reparations.

A further difficult issue concerns those who, though victims of a serious international human rights or humanitarian law violation, were also perpetrators at some time, including those who may have been abducted and forced to perpetrate abuses. It needs to be considered whether such perpetrator-victims should be included within a reparations policy or be treated differently from the wider generality of victims. According to human rights law, an individual who perpetrates human rights violations does not negate his own right to enjoy freedom from torture, unlawful imprisonment or other violations, including the right to fair trial. However, there is again a difficult balance to be struck. On the one hand, it can be politically problematic and sow further division if a reparations policy appears to create classes of “good” and “bad” victims; on the other, treating all victims alike also can be problematic and divisive, particularly if those who were not perpetrators perceive that they are being treated no differently from those who were responsible for abusing them.⁵⁰

⁵⁰ This issue arose previously in Guatemala, where it was decided that members of pro-government, mandatory civil patrols should be dealt with separately from others affected by the conflict, through a compensation program for their service. These patrols had been responsible for a significant number of abuses, so that there was reluctance to allow members to seek reparations along with other victims of human rights abuses even when they had also suffered a violation themselves.

Other measures, such as demobilization and reintegration of combatants, that generally include packages of compensation, training and housing, should recognize that the universe of ex-combatants may include perpetrators as well as victims. In general, because of this it may be helpful to maintain a separate identity between reinsertion and reparations programs and avoid cross-over in attention to these and victim groups. At the same time, because demobilization and reintegration programs can be resource intensive, they should be balanced by other policies that address civilian victim needs, including reparations. Otherwise, the message that may be sent is that, once again, victims are not seen as important by government or the society at large.

2) Differentiating Among Victims to Ensure Appropriate Redress

Once the boundaries of the general notion of “victim” are defined, the question arises as to whether all victims should be treated alike or whether there should be some calibration of reparations in order to address specific crimes and the harms they caused. To the extent that this can be achieved without rendering the reparations program too administratively complex, it is usually appropriate to devise a more nuanced range of victim categories to facilitate greater flexibility and to allow particular reparative measures to be directed towards those who suffered the most serious violations and/or harms, and to be tailored to the specific needs of that victim group. This might be achieved in Darfur, for example, by adopting one broad-based definition of victim for those who would be entitled to some form of reparation for having been displaced while adopting other, narrower definitions of victim groups who would have a further entitlement to reparations because they were subjected to torture, rape or other gross violations of their physical-integrity rights.

The question of how to differentiate among victims has arisen in other broadly similar situations where efforts have been made to define priorities, often in terms of urgency of harms, vulnerability of victims, and seriousness of the violations committed. These are not simple questions: in fact, efforts to “rank” violations have often tended to omit or overlook the full extent and nature of harms to women, in particular, because of social or cultural bias, or they have avoided dealing with the devastating consequences of forced displacement, due to the large numbers involved and the difficulties of addressing the plight of the displaced through a reparations policy.

Following years of internal conflict in Peru, where tens of thousands of people had been affected by violence, an effort was made to differentiate among classes of victims for the purpose of reparation. A classification was devised which included: family members of individuals killed or “disappeared,” torture victims, the forcibly displaced (whether in their original communities or organized in resettlements or urban areas), victims of rape, child abductees into militias, and children born of rape; it was agreed that all of the victims in these categories would be entitled to free healthcare but only certain victim groups considered to have suffered the most serious violations would receive compensation.

Specific categories of violations that might be defined for attention in the Darfur context include: forced displacement; unlawful killings; torture including rape and other sexual abuse; abduction and unlawful detention; destruction of villages and means of subsistence, such as poisoning of wells, loss of property and livestock. Discussion locally might identify these and other categories to be accorded particular importance and help to quantify the numbers of victims in each category. Consultations might also help to distinguish specific needs arising from these violations, what types of measures would be most appropriate and effective in providing reparation, and how such measures could best be delivered.

The question may also be raised whether there are there some violations committed in Darfur that should be addressed most immediately in a reparations program while others are delayed. The models proposed in the DPA and by the Cassese Commission both seem to assume that all claims would be addressed together but in practice this may not be realistic. More likely, there will be a need to have some ordering of reparations, even if only in terms of priority rather than exclusions. Some of the forcibly displaced will not have been subjected to torture, rape or other gross abuses which require long-term remedies, but their displacement may nevertheless have had an immediate and catastrophic outcome – leaving them and their families without means of subsistence. Very difficult assessments may need to be made, for example, as to whether a Darfurian civilian who was tortured or who had a close relative killed by combatants should be considered to be in more urgent or greater need of reparation than another whose farm animals were killed or whose water supply was contaminated. Such assessments can only be made locally but they should take account, nevertheless, of relevant international human rights law and standards.

3) Documenting Victims and Harm Suffered

Identifying who should receive reparations also involves devising a process for documenting the numbers, location, and situation of victims, and the harms they have suffered. The processes of documenting abuses with a view to eventual reparation and estimating the numbers of victims who could be eligible to benefit can conceivably be advanced during resettlement or other early processes that are implemented when peace is achieved and security conditions allow. Effective documentation at this stage may serve to relieve victims from having to tell and re-tell their stories, and so reduce the risk of re-traumatization. However, victims may still be too fearful for this to be possible, and it may take time to build (and merit) their trust. To this end, any documentation process that is attempted must have clear and reliable standards of confidentiality and be sensitive to victims' needs. Initial steps intended to pave the way for future reparations programs must serve to build victims' confidence that they will not be re-victimized, particularly in circumstances in which victims will need to be convinced that the government whose policies caused their suffering or failed to prevent it is now committed to protecting them. Indeed, it may well be that no such trust can be established until long after resettlement and measures to restore security have been effected or other changes, such as a redistribution of power, have occurred. Victims' well-grounded fears of continued

violence, which may haunt them for a long period, must be taken into account in determining the right time and manner to document abuses.

One step that could be taken now by international agencies and non-governmental groups to assist future delivery of reparations is to retrieve and preserve whatever documentation of abuses already exists. This includes information compiled by a number of communities in Darfur at the time of the joint attacks on their villages by government forces and Janjaweed. Some drew up meticulous records identifying their attackers and the losses incurred by members of their community. Lists thus produced were handed to the government in Khartoum together with petitions in which the communities called for the attacks to be halted and for restitution. Some of these were deposited with the cabinets of the Sudanese President, Attorney General and Minister of Justice. Victims' advocates also attempted to engage legal proceedings on behalf of these communities. The government's lack of response and continuing attacks on the applicant communities indicated that they could not expect justice from the authorities, but the information that they submitted to the government at the time, if retrieved, could be useful for any future reparations program.

As yet, relatively few among the many thousands of victims' cases have been documented individually and it remains very difficult to compile such information due to the risks to the safety of both victims and those seeking to document the crimes. This includes cases of rape, sexual violence and other grave abuses. It is imperative, therefore, that what information has already been compiled should be carefully preserved and that further efforts to document abuses should be undertaken as soon as this is feasible in order to help define the universe of victims of various crimes and substantiate reparations claims. Initially, reparations will probably need to be designed based on general profiles of victims and harms, and estimated numbers of victims in the various categories, and will need to be adaptable to new information once it can safely be made available.

B. Determining Reparations that Fit the Crime and Harm

1) Types of Reparations Measures

The measures included in a reparations program tend to be arrayed along a continuum from those that are purely symbolic to those that are defined mostly by their material nature. Examples along that continuum might include a formal statement of apology by the government for the abuses formerly committed by or in the name of the state, the establishment of rehabilitation or community centers to assist victims, funding for community-based reparations projects, or payment of compensation or pensions to individual victims or classes of victims. An effective reparations policy should usually include several measures that combine both material and symbolic components, rather than rely on a single measure.

Reparations may be directed to individuals or to collectives such as communities or to regions of the country which were especially affected by abuses or are home to a large

proportion of victims. Individual measures of reparation, particularly, require resources and mechanisms to allow identification of the persons entitled to receive them and also mechanisms to deliver the benefits effectively to those individuals. They have the advantage, however, of emphasizing the importance of each human being and that individual's status as a rights-holder. Collective reparations, on the other hand, deliver benefits more broadly to groups that have suffered from human rights abuses. They may be used to target especially vulnerable categories of victims, such as women or members of minority ethnic groups whose collective identity may be important to highlight in some reparations measures, even when individual reparations are also contemplated. Collective reparations can also be used to address violations that were intended to terrorize the population as a whole, or when the primary need is to provide reparation through a simplified process due to practical limitations, a lack of resources or concerns about drawing too stark a line between different categories of victims or between victims and non-victim groups.

The demography of the full array of victims and the nature of traditionally accepted and meaningful forms of reparations are both factors to be taken into account in determining the design of reparations. Likewise, information about patterns of livelihood may indicate what are likely to be the most effective forms of reparation in particular circumstances – for example, farmers may prefer to receive assistance that enables them to restore their productive capacity while cattle herders may require monetary compensation to purchase livestock. Likewise, the different experiences of refugees and those who were internally displaced may also lead them to have different perspectives on reparations.

2) Reparations within the Larger Peace Agenda

As indicated above, the DPA's commitment to comprehensive reparations for all the war-affected of Darfur may be too ambitious and require review in order to ensure that greater weight and priority is accorded to some violations over others. In addition, it can be envisaged that once peace is achieved there will be a tension between providing reparations to victims and the broader nation-building agendas that are common features of post-conflict situations.

In Timor-Leste, for example, where a new state emerged from conflict and years of Indonesian occupation, the truth commission had to navigate this issue in devising reparations for victims amid the reconstruction of a devastated and newly independent country. Timor-Leste's Commission for Truth, Reception and Reconciliation (CAVR) suggested a number of guiding principles for a reparations program to fit these circumstances, including that it should be:

- feasible in the face of competing needs;
- accessible to victims isolated geographically or by their experience;
- empowering “for those who have suffered gross human rights violations to take control over their own lives and to free themselves of both the practical constraints and the psychological and emotional feelings of victimhood,” through a victim-centered and community-based approach; and

- sensitive to women’s disproportionate suffering during the conflict and barriers to mitigating the impact of the violations.⁵¹

The CAVR decided that reparations should be prioritized based upon need, given the other demands on the new government to improve the situation of the broader population. It noted: “It is not possible for a single reparations program to answer all the needs of all those who suffered during the conflict in Timor-Leste and the program is not intended to take the place of long-term national development, itself the major objective of the Timorese state.”⁵²

Once the distinct roles of reconstruction policies and reparation are clearly understood, and the development of reparations policy is given its appropriate place within and following a peace process, efforts should be made to ensure that reparations and other reconstruction programs mutually reinforce one another through sequential or complementary implementation. For example, a reparations measure such as the provision of healthcare for certain victims may act as a starting point for wider institutional development of healthcare capacity, while prioritizing specific victims or specific communities for initial attention may serve to recognize the special characteristics of the harms they suffered. Likewise, some development funds might be explicitly targeted to recognize the harms done to a particular community and include specific programs to address their consequences.

The conflict in Darfur reflects a divide between the center and the periphery, between herdsman and farmers over limited national resources, and the political, economic, and social marginalization of Darfur. Therefore, peace negotiations can play an important role in setting the stage for meaningful reparations if they address, through other agreements and policies, these underlying inequalities in access to resources and political power. The purpose of reparations should not be confused with broader reconstruction and development goals, but in light of the battle over resources in the region, reparations policies are unlikely to contribute to the overall goals of justice and reconciliation if these other needs are unattended. Likewise, once reparations policies are developed, they should contribute to overcoming these issues and avoid entrenching existing inequalities. Thus, for example, if agreements are made to decentralize power, reparations programs alone will not be adequate as a means of implementing change or overcoming regional power vacuums, though they can help to further that goal if other steps are taken. Similarly, reparations measures for women victims should recognize the larger social shifts in women’s role brought about by the conflict.

⁵¹ The Commission for Reception, Truth, and Reconciliation Timor-Leste (CAVR), 2005, *Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste: Executive Summary*, 204-205.

⁵² *Ibid.*

3) Consultation with Victims

Reparations are not effective if they are not considered to be so by the victims whose needs they are intended to address. Consequently, negotiators and mediators must make serious efforts to find out what victims consider to be the crimes and abuses that most warrant reparation, and what reparative measures would be most meaningful in addressing them. For some, other characteristics – such as gender, ethnicity, local traditions, means of livelihood, and approaches to justice – may play an important role in defining not only the priorities for reparations, but what measures would best assist them to restore their dignity and status as protected rights-holders.

C. Addressing the Challenge of Scale

Reparations proposals need to be realistic and feasible if they are to respond effectively to victims' needs and solidify civic trust; otherwise, in the context of peace negotiations, they may serve as little more than a tactical means to further divide the rebel groups and to frustrate victims' expectations. But designing realistic and feasible reparations is no simple matter in situations where, as in Darfur, it can be expected that huge numbers of people have some kind of a claim. Even if claims for reparations are addressed by household rather than individually – which could have the adverse effect of rendering some serious violations, such as those committed against women, relatively invisible – a claims commission could easily be overwhelmed with hundreds of thousands of cases to decide and be unable to deliver adequate and timely reparations in each case.

Even the most well-funded reparations programs, such as the various German reparations for the Holocaust, or the UN Claims Commission to resolve the damages wrought by Iraq's invasion of Kuwait, which both encompass large numbers of victims and billions of dollars in compensation, fall short when measured from the perspective of what reaches the individual victim, and when.

Canada provides another pertinent example. Despite substantial resources and a high level of efficiency, administrative panels hearing individual reparations cases (arising from serious psychological and physical harms to aboriginal students in government and church-run schools) estimate that they can process no more than 2500 cases per year. In Turkey, likewise, more than 90 local compensation boards charged with compensating persons for material damages suffered during conflict received 180,000 claims in the course of two years but by the end of the period had resolved only 16,000, including only 6000 that were resolved favorably.⁵³ International and domestic organizations estimate the number of IDPs in Turkey to be between 1 and 4 million, suggesting that the 180,000 claims represent only a relatively small percentage of the potential number of cases.⁵⁴

⁵³ “Overcoming a legacy of Mistrust: Towards Reconciliation between the State and the Displaced,” Norwegian Refugee Council and TESEV (Turkish Economic and Social Studies Foundation), May 2006, 34.

⁵⁴ Ibid, 13.

Land claims are also a complex and time-consuming matter: in South Africa, the Land Claims Act was passed in 1994, with an eye towards having all claims for compensation, substitution or restitution of lands lodged within three years, finalizing claims within five years, and securing implementation within a 10-year period. According to one analyst, the process has actually been fairly good at processing claims quickly. Even so, between 1996 and March 2003 only around 36,000 out of almost 80,000 claims were resolved, even though processing capacity increased dramatically during the period. The 36,000 resolved claims benefited nearly 90,000 households, comprising some 450,000 individuals.⁵⁵

In order for compensation and land restitution claims to be addressed on an individual household basis, given the numbers involved in the Darfur case, aside from other technical considerations, there would need to be:

- an extensive number of credible and trusted decision-makers available throughout the region whose actions could be reasonably held to equitable standards across the board;
- easily applied categories of harm and presumptions based on easily demonstrated facts that would minimize fact-finding and limit the process to the simplest forms of registering victim households and providing relief; and/or
- a decision to provide across-the-board packages of compensation to all households and to limit individualized hearings to special victim groups (such as those who have been exposed to unlawful killings, rape or other torture, or other crimes deemed especially serious).

The potential to create an enormous backlog is not the only problem if, as is suggested by the war-affected definition, a reparations program is cast so wide as to compensate all forms of damage. Such an approach carries the risk that serious crimes will be relegated, ignored or swept aside while priority is given to “softer” issues such as compensating for property losses, which may be more readily proven and openly discussed than sexual violence or torture.

In Chile, to give another illustrative example, some former detainees and torture victims received reparations initially because they had been unfairly dismissed from public service; only years later, after explicit recognition of the human rights crimes committed by the state, did they and others receive reparation for the torture and other gross abuses they had suffered. In this case, their right to reparation for torture was delayed but, although complicated to prove and socially difficult to accept that such abuses had occurred, the issue was one the state eventually had to confront.

⁵⁵ Warren Freedman, “The Restitution of Land Rights in South Africa as Reparation for Past Injustices,” in 22 Windsor Y.B. Access Just. at 157, 174 (2003).

V. DELIVERING REPARATIONS

However well devised, a reparations policy will only be effective if it can be delivered in practice. This involves questions of political will, of course, but also administrative capacity, logistics and resources. Consequently, even as efforts are made to shape the content and reach of a reparations policy, it needs to be considered how it will be implemented and what mechanisms need to be created for the purpose. This is especially important in situations where the state infrastructure is weak or has been severely damaged or undermined in the course of conflict. Who will oversee implementation and how, and through what mechanisms they will achieve it, are crucial questions to be considered, and answered, taking into account particularly the needs of the victims that the policy is intended to benefit.

The challenge to deliver reparations is also defined by the size of the reconstruction and reform agenda ahead. Few states emerging from conflict have a ready-made capacity to ensure that reparations effectively reach the individual, group, or community to whom they refer. This is where many reparations programs fail: in the transition from concept to effective reality. In the case of Darfur, where the promises so far – those contained in the DPA or suggested in the Cassese Commission report, for example – appear wildly ambitious and where the devastation of the conflict has been so complete, the obstacles are enormous and solutions must be anticipated even while setting out the most basic commitments in this arena.

A. Institutional Challenges and Models

In Darfur, it will be important to analyze the degree to which the conflict has weakened existing institutions and what mix of entities – existing ones or mechanisms newly created as a result of a peace agreement – will be best placed to fairly and justly ensure prompt and efficient implementation of a reparations policy. Usually, this involves three components: policy development (refining the programs and rules for implementation), determinations of eligibility (creating a registry of victims or authorizing who is to receive reparations), and coordination of delivery (through specialized providers, governmental and/or non-governmental).

1) International Examples

Experience elsewhere can be informative. New institutions with a specific mandate to implement reparations may inspire confidence because they are not contaminated by corruption or complicity in past abuses but they also, at least initially, are likely to be institutionally weak. Even drawing on existing institutional structures, care needs to be taken to ensure that decision-making entities also have the necessary political weight to get things done. In Peru, a specific body composed of officials from various government ministries but including some minority participation of civil society representatives, was created to oversee the development and implementation of reparations. It continues to struggle, however, to obtain the effective cooperation of a range of government ministries

and to have them readjust their priorities in order to accommodate the question of reparations. A separate body was created with the sole purpose of determining eligibility, whether of collectives or of individuals who should receive reparations, but this too has struggled to find a common understanding of criteria for eligibility within the bounds of the reparations law. The diversity of views among its members, who include victim and human rights representatives as well as a representative of the military, has made it difficult to find consensus. In Turkey, local compensation boards have been ineffective, in part, because they had too little civil society participation and were affected by political bias.

The United Nations Compensation Commission (UNCC) that was set up to address claims against Iraq related to its invasion and occupation of Kuwait, divided into three functional bodies to attend to policy questions, legal determinations, and implementation aspects.⁵⁶ The Governing Council sets policy guidelines, while as many as 56 commissioners evaluate claims. Both entities are serviced by a secretariat that manages a database of claims, provides legal and technical assistance and at one time had as many as 250 employees. It has been suggested that separating the legal determinations of claims from the actual implementation of redress (in this case, payments) allowed for speedier determinations that were independent of the uncertainties relating to availability of funds.⁵⁷

In Timor-Leste, the Commission for Truth, Reception, and Reconciliation (CAVR) created an urgent reparations program (URP) because of the pressing need to respond to victims who came before the CAVR as it documented abuses. Although this was a short-term and relatively small program (investing a total of only US \$160,000), it may provide some guidance to what could be done in Darfur on a wider scale.

The URP was implemented from December 2003-2004 through a Victims Support Division within the CAVR. The URP prioritized victims according to the severity and continuing nature of the suffering caused to them and sought to give primacy to the most severely disadvantaged and vulnerable victims in these categories, including widows, women with disabilities, and women still affected by severe trauma. Forced displacement and destruction of property were not included because they had affected such a large percentage of the population.

Beneficiaries of the URP were identified from among those who gave statements to the Commission. District teams identified 10-15 persons from each sub-district who best met the criteria as beneficiaries and these received home visits from staff of the Commission's Victim Support unit, and were then referred for priority attention. The criteria to be met included:

- degree of need is severe
- the person is clearly vulnerable

⁵⁶ For a thorough description of this structure, see Hans Van Houtte, Hans Das, and Bart Demartino, "United Nations Compensation Commission," in Pablo De Greiff, ed., *The Handbook of Reparations* (Oxford University Press: 2006), 321-389.

⁵⁷ Van Houtte, Das and Delmartino, at 331.

- other referral sources do not exist or cannot be accessed easily
- need is related to a particular human rights violation
- urgency of the need is obvious and
- if possible, assistance sought will assist the person in a sustainable way

At the CAVR's national office its Victim Support staff gathered together the names and other details of potential beneficiaries, conducted an assessment and supervised the delivery of monetary compensation and services to these individual victims. Most cases that were referred by the CAVR's local District Teams were accepted. Ultimately, some 712 victims received compensation payments of US \$200 each, were assisted with other urgent needs, and were included in healing workshops and public hearings organized by the CAVR. The CAVR, in partnership with local non-governmental organizations, also developed a number of pilot projects through which collective measures of reparations were made available to some of the most severely affected communities.

The CAVR provided the same level of monetary compensation to all beneficiaries without regard to the severity of the harm done to them or the number of their dependents. Most beneficiaries used this compensation to meet the costs of medical treatment, including the purchase of medicine and transport costs. Others used the compensation to pay school fees for their children or to cover start-up costs for income-generating activities, or to repair their homes or to purchase food and other basic necessities.

2) Proposed Models for Darfur

Up to now, discussion of reparations in the Darfur context has focused mostly on vague or impractical models for determination of eligibility and promises of full reparation through a variety of measures. However, little attention has been given to considering how reparations might realistically be delivered to their intended beneficiaries.

The Compensation Commission proposed to the UN Security Council by the Cassese Commission, if implemented, would operate over three years and be based in Darfur. It would have 15 members, including both international and Sudanese appointees, who would contribute expertise from a range of relevant fields such as the criminal law, accounting and loss adjustment, and environmental damage assessment, but it is difficult to see how such a relatively small body, even though it might be serviced by a substantial support staff, could reasonably expect to process expeditiously the potentially enormous volume of claims that it would receive, or how the reparations that it should recommend would be delivered in practice.

The DPA, on the other hand, is only slightly more specific about how these questions would be resolved. The Property Claims Committees and the Compensation Commission contemplated in that agreement could devolve responsibility for initial decisions to the local level. The former would be established "in both rural and urban areas," and resolve disputes "locally and rapidly," drawing on "mediation and traditional dispute resolution

mechanisms.”⁵⁸ The latter could likewise “establish local branches as well as specialized chambers.”⁵⁹ Both stress accessible and timely processes, and according to the provisions for interim resolution of claims through a Compensation Fund, would make payments “within 60 days after the award is made.”⁶⁰

At this writing, the proposed Compensation Commission is yet to become operational. The government established the Commission in September 2006, together with the overarching Transitional Darfur Regional Authority (TDRA), the Darfur Rehabilitation and Resettlement Commission, and the Technical Ad Hoc Border Commission.⁶¹ The TDRA would become operational only in February 2007, but since then, little has been heard of the plans and activities of the Compensation Commission beyond general references to it in official statements and speeches. For instance, both Senior Presidential Assistant Minni Arkou Minnawi and Adam al-Nour al-Amin, then Secretary-General of the Commission, stated in July 2007 that the government’s US \$30 million commitment was intended as no more than a seed grant and that the Compensation Fund would seek to raise additional monies. Minawi pledged that the Commission would function for 10 years “until the last victim had been compensated.”⁶² According to al-Amin, it will have committees for the Recording and Classification of Harms and others for Investigation and Verification of Claims, alongside a unit for Hearing and Sorting of Victims’ Claims. Judges, legal experts, tribal leaders and representatives of the victims will oversee the activities of these bodies. However, no government funding for awards to claimants appear to have been released to the Commission, months after its establishment.

In mid-2007 the government appointed Abu el-Gasim Ahmed Abu el-Gasim chairman of the Compensation Commission. According to sources, the Commissioner designate initially rejected the offer, in part because it was announced without prior consultation with him. However, after coming under intense pressure from influential Darfurian constituencies, he agreed to condition his acceptance on the government’s approval of a work plan that he produced for implementing the Commission’s mandate. The plan would most notably have the Compensation Commission operate independently from the TDRA. Its first task, according to the plan, should be the compilation of data from the field on the types of violations that had occurred in the course of the conflict in order to

⁵⁸ This summary relies on *Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation CAVR*; on Galuh Wandita, Karen Campbell Nelson and Manuela Leong Pereira, “Gender and Reparations in East Timor,” in Rubio, Ed., *What Happened to the Women, supra*, and on the annual reports of the CAVR Secretariat.

⁵⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Geneva, January 25, 2005, 152, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

⁶⁰ DPA, paras 210-211.

⁶¹ The DPA Monitor – July-August 2007, Monthly Report on the Implementation of the Darfur Peace Agreement, United Nations Mission in Sudan, available at: <http://www.unmis.org/English/documents/DPAmonitor/DPAmonitor-Jul-Aug07Issue.pdf>.

⁶² “In first visit by Minawi to el-Geneina: earmarking of \$35 million for development in West Darfur,” *al-Shari al-Siasi*, in Arabic, accessed on 5 August, 2007, at: <http://www.sharisiasi.com/details.php?rsnType=1&id=3836>. See also, “Compensation Commission finishes preparations to launch its office in West Darfur,” Sudanese Media Center, in Arabic, accessed in Arabic on 3 August, 2007 at: <http://www.smc.sd/ar/artopic.asp?artID=16694&aCK=AA>.

establish solid factual grounds for determining the validity of future claims. The Commission would develop the design of implementation mechanisms in close consultations with the internally displaced, members of the native administration, and prominent Darfurian professionals, UN experts, and other expert national and international advice.⁶³

The potentially overwhelming number of claims in the Darfur case suggests that a widely decentralized system of receiving claims is likely to be necessary in order to attend to the numbers of individuals and families who would be entitled to reparations. However, this would pose a further challenge: local bodies would need not only to be trusted, but to operate according to centralized guidelines that ensure fair and equal attention to all victims while retaining sufficient flexibility to respond to local needs and custom. Local bodies must not be put in the position, either, of decision-making without any assurance of delivery. These are questions that must be addressed for the region as a whole in order to make delivery efficient and timely.

The roles of the central government in Khartoum and regional authorities should be carefully considered so that the former does not evade its obligation to ensure that reparations are made available, even though the processes and mechanisms adopted towards this end are reflective of regional practices and values. Reparations policy, particularly as one competing priority in a post-conflict setting, requires very considerable inter-institutional cooperation and commitment to the objectives of recognizing and restoring individual rights and acknowledging the harms done. The task ahead is a momentous one, in which the inherent weakness and lack of capacity of post-conflict institutions to address needs in almost every aspect of life, will need to be taken into account in considering how to make reparations deliverable. Progress on such a comprehensive agenda will necessarily be incremental, but reparations should move forward alongside the other important priorities in a way that demonstrates to victims that they are no less important than other actors in the post-conflict context.

B. Claims and Decision-Making

Another crucial step that can be taken towards streamlining delivery of reparations is the simplification of categories of victims and types of reparations so that these may be speedily determined and delivered without too much delay.

1) Resolving Some Needs through Other Programs

In the Darfur context, there is a need for more clarity about victims' expectations and negotiating parties' commitments and whether these are realistic in terms of what can be decided and delivered. One example is the extent to which a program can realistically aim to tailor reparations to the extent of losses and the impact on individual families. In Guatemala, for example, victims had often documented their losses, detailing the numbers of chickens, cattle and sacks of feed that were destroyed when their villages were razed by the army. Yet the extent of harm across the country was so great that it

⁶³ ICTJ Interviews, September 2007.

would be impossible financially and administratively fully to compensate victims or replace their losses.

In Darfur, one question to be considered is whether a standardized package of goods, services and funds that would allow families to renew their livelihoods could constitute a useful and viable form of reparation. If such a package were to be developed as part of the resettlement process, and only minimal information were to be required for potential beneficiaries to access this package, it could alleviate at a stroke much of the pressure that might otherwise fall on reparations commissions to address the basic human needs of many thousands of people, and leave them free to focus on more specific claims and needs.

Likewise, reconstruction work undertaken as part of peace-building, should proceed outside of a detailed reparations claims and decision process, as long as it is not skewed to benefit perpetrator groups. If such reconstruction and development projects can take into consideration at least an early mapping of the most devastated victim communities, these groups should not have to await lengthy reparations claims processes in order to benefit from reconstruction efforts.

2) Urgent Interim Reparations

Reparations programs, if they are to be effective, must be devised on the basis of an early and realistic assessment of the universe of victims and clarity regarding the means by which victims' access to reparation is to be achieved in practice. This can be a time-consuming process, however, and an appropriate balance may need to be struck between developing a comprehensive reparations package and the mechanisms to deliver it, and addressing victims' urgent needs.

As noted in the example from Timor-Leste, this latter can be done through the provision of interim reparations to those who can be immediately identified, though this should not substitute for their inclusion in a subsequent, more complete program. If interim measures are taken, they should be designed so as to maximize their reparative effect in order to build trust among victims that future measures, when they are implemented, will both acknowledge and respond to the harm that was done to them.

3) Facilitating Access to Long-Term Reparations

Reparations that go beyond urgent interim measures, the question of displacement, and the need to resettle with possibilities of a livelihood, require more refinement in order to be appropriately decided and delivered. Clearly, where victims have lost everything in a conflict, a demand that they prove their losses will be both impossible to meet and out of place. Human rights reports that document patterns of violations, where they are occurring and what groups or communities are being targeted can be a source of valuable corroborative information but they rarely identify many individual victims. In some cases, therefore, it may be unrealistic to expect more than that a claimant be identified as belonging to a particular household or village or as having been in a particular IDP camp,

or as someone who was detained by the government or its militia forces, in order to consider the claim well-founded.

In other cases – for example, when a person identifies as a victim of rape or other torture – it will be important to take their testimony in case this needs to be used to support a subsequent application for additional reparations. The documentation of such individual cases is also useful, of course, in helping build the larger picture of abuses, when and where they occurred and by whom they were committed. The reconstruction of patterns relating to context and the commission of specific types violations can help define where presumptions about torture or rape or other violations might be appropriate, making it easier to determine victims' eligibility and helping reduce the risk of re-traumatization of victims who seek reparations.

C. Financing Reparations

No discussion about how to ensure delivery of reparations can be complete without tackling the question of resources. Invariably, in countries emerging from conflict or other extreme violence there are important political and other constraints and competing priorities for usually scarce state resources. This may cause reparations programs to be limited or overlooked. However, if the state authorities have sufficient political will, are committed to reparations, and are competent in planning and prioritizing, mobilization of sufficient resources can occur to enable some form of meaningful reparations.

Social sensitization, strategic alliances, and insistence on the part of the international community, can all be of critical importance in helping to ensure that there is broad political support for reparations and that the abuses of the past, and their ongoing consequences for the victims, are not ignored. Governments should be urged to adopt comprehensive reparations programs that are tailored to the needs of the specific situation rather than fall back only on measures such as social development projects which, while important, may have little or no reparative effect for victims. Furthermore, government financing of reparations programs is likely to be much more effective when it is undertaken as an integral part of the national budget rather than through a special fund which relies on voluntary donations.⁶⁴

1) The State's Role

The government of Sudan's pledge to the Compensation Fund agreed in the DPA,⁶⁵ even if increased to US \$100 million, would be insufficient to provide effective reparations given the scale of destruction and numbers of people involved. This is likely to be the case even if certain basic victim needs were to be addressed as part of reconstruction and resettlement efforts funded through the Darfur Reconstruction and Development Fund rather than using reparations funding. The DPA, in fact, appears to recognize this, noting

⁶⁴ See generally on this topic, Alex Segovia, "*Financing Reparations Programs: Reflections from International Experience*," in *The Handbook of Reparations*, 650-675.

⁶⁵ DPA, paragraphs 210-213.

that “Restitution and compensation for damages and losses shall necessitate massive mobilization of resources.”⁶⁶

Careful thinking and planning will be needed to devise the most effective means to utilize the funds eventually committed by the Sudanese government in any new agreement, in order to ensure both the long-term viability of reparations while also addressing the other priorities of any peace accord. This is not a question that relates only to Darfur, but one that will need to consider the demands on state resources made from other parts of Sudan. Some potential solutions, such as drawing on Sudan’s burgeoning oil revenues to help meet the costs of both reparations and reconstruction in Darfur, however, may be complicated by existing commitments made by the government as part of its accommodation with the population in the South of Sudan, and, internationally, should be informed by lessons arising out of the troubled “oil for food” program of the UN in Iraq.⁶⁷

2) The International Community’s Role

While countries emerging from conflict often turn to international donors for assistance, we must underscore the fact that international donors are unlikely to, and generally should not, assume the cost of reparations. There is a reasonable reluctance among third parties – whether states or other entities – to finance reparations. Rather, these should be concrete expressions of an individual state’s responsibility and an important form of acknowledgment; they would lose much of their reparative effect if other governments should take on the burden in lieu of the individual state.⁶⁸ International assistance may be more appropriate to other peace-building measures that, if adequately funded, may free up state resources to fund reparations. However, while other governments and international actors should not agree to assume the principal burden of financial costs of reparations, they should *not* be silent on this issue. On the contrary, they should take all possible steps to ensure that the issue of reparation is not allowed to slip off the agenda and that the government fulfills its obligations to the victims.

The Cassese Commission report urged the UN to create a voluntary fund for reparations, (specifically aimed at redressing violations by rebel groups) but international aid in this area, if forthcoming at all, will most probably be directed to supporting social service programs or infrastructure to facilitate state-resourced reparations measures, as has been the case in other contexts. For example, the United States contributed through its aid agency to the startup of Chile’s health program for victims of political violence. More recently, the European Union announced a contribution of 3 million Euros to support healthcare for victims of political detention in Morocco. In what has been to date an apparently unique departure, the World Bank provided assistance to Timor-Leste for

⁶⁶ DPA, paragraph 199.

⁶⁷ See Independent Inquiry into the Oil-for-Food Program, “Manipulation of the Oil-for-Food Programme by the Iraqi Regime,” accessed at <http://www.iic-offp.org/story27oct05.htm>, and earlier reports from the same body (available at <http://www.iic-offp.org/documents.htm>).

⁶⁸ See, Alexander Segovia, “Financing Reparations Programs,” in Pablo De Greiff, ed., *The Handbook of Reparations* (Oxford University Press: 2006), 659.

urgent interim reparations during the operations of the CAVR. In Colombia, the same international financial institution has been involved in studying the feasibility of reparations focused on certain vulnerable victim groups, funding for which, however, would come primarily from government.

With regard to Darfur, there may also be opportunities to obtain support from international donors for setting up the system by which reparations are designed and distributed, perhaps following the example of Peru, where there has been international interest in supporting the Victims Registry process. Likewise, the international community could conceivably look to fund victim advocacy and mutual support initiatives that could help to ensure that victims' advocates have a louder voice in determining the nature, content and remit of a reparations program. All international assistance, however, should be predicated on the clear understanding that the principal responsibility for reparations lies with the individual state.

D. Process that Models New Relations and Ensures Effectiveness

Reparations that are not perceived by victims as reparative will fail. Communication about reparations, clarity regarding expectations and definition of the victims' role are critical, therefore, to the success of a reparations program. To date in the Darfur context, victims' voices have been neither directly nor adequately represented at the negotiating table, although informally there have been consultations between rebel delegates and constituencies on the ground. Some sources close to the current process indicate that greater sensitivity to this issue exists since the failure of the DPA. If so, this is welcome but if it is not yet evident to the victim population, further efforts must be devoted to opening up channels of communication.

This was an important, if not entirely adequate, feature of the Peruvian process of designing and passing into law a comprehensive reparations plan. Victim groups and human rights advocates began at an early stage to consider what reparations meant to them and what they should look like in the Peruvian context. They held assemblies to discuss this and then produced documents that set out basic definitions, principles and parameters for reparations. They found common ground and unity in the push for reparations, even though they represented groups with different experiences of the violence, from forced displacement, to unlawful imprisonment and torture, to cases of killings and "disappearance" of family members. Peru's Truth and Reconciliation Commission listened to these observations, meeting with representatives of victims groups and human rights organizations to discuss policy as it was being developed. Victim groups struggled with the very difficult questions posed by the overwhelming numbers and limited resources, while the Commission came to understand better the priorities and needs of the victims. This process, though flawed in some ways, helped enable victims' groups to engage more directly with the policy issues and was an important step towards recognizing them as rights-holders, simply by demonstrating that their voice mattered. Today, as reparations are just beginning to be implemented in Peru, this process has meant that victim groups have a greater ownership of the policy that was passed into law and have more realistic expectations of what can be accomplished.

If reparations are to be affirming of victims' rights and to serve as an acknowledgment of the violations committed, the process should also affirm their status as rights-holders. As already noted, peace negotiations are notoriously deficient in this, unless the warring parties genuinely represent the victims; even then, the rights of victims are often traded away in the face of other needs. Yet, victims' organizations, and human rights groups who advocate on their behalf, may have concrete and useful suggestions to make concerning the formulation and implementation of effective reparations programs over both the short and long-term.

Political support for reparations, based on a common understanding of their purpose and the obligation to provide them, also needs to be built across the wider population. This can be done through awareness-raising and education about victim rights and the nature of the violations committed and their impact on the victims. Such wider support may often be difficult to achieve in situations in which there are competing priorities and insufficient resources or other means to address them, as is normally the case in post-conflict situations, but there are often overlaps of interest that, once identified, can be exploited to engage larger constituencies in civil society, and sensitize them to the needs of victims.

One mechanism in the DPA that is not mentioned specifically in relation to reparations but which could serve as a platform for greater participation at a later stage, at least in providing a local dimension to reparations, is the Darfur-Darfur Dialogue and Consultation (DDDC)⁶⁹. As stated in the DPA, the DDDC:

...shall be a conference in which representatives of all Darfurian stakeholders can meet to discuss the challenges of restoring peace to their land, overcoming the division between communities, and resolving the existing problems to build a common future. ...In light of the fact that a just and durable solution to the conflict in Darfur requires communal reconciliation above and beyond what is possible at the Inter-Sudanese Talks on the Darfur Conflict convened in Abuja, and the resulting Agreement, the DDDC provides a mechanism to connect this Agreement to social and political issues in Darfur so that social mechanisms traditionally established to resolve conflicts can play their role in creating and sustaining social peace. The DDDC is an opportunity for the Movements to present their political agenda to the people of Darfur and thereby make an investment in peaceful political processes. Furthermore, the DDDC broadens the insufficient representation of Darfurians in Abuja, providing an opportunity for other parties to become involved in the process of the implementation of this Agreement.⁷⁰

Although some "consultations" have been undertaken by the government, these are unlikely forums for real input and exchange given the lack of a viable peace agreement between it and the Darfur rebel groups that is respectful of victims' rights to justice and fair reparation. Without this step, the DDDC cannot serve its intended purpose. To the

⁶⁹ Darfur Peace Agreement, paras 458-503.

⁷⁰ Darfur Peace Agreement, paras 458-459.

extent that formal consultation does take place in a more positive way later in the process, it may be important to ensure that there is some space for such consultation to develop complementary policies and practices that will make any agreement more complete and practical.

In this sense, once a peace agreement is reached, it would be useful to evaluate the possibility of using the DDDC as a platform to foster a dialogue that could flesh out the local contents of a commitment to reparations and just mechanisms of implementation at the local level, with participation by victims, civil society groups, and other stakeholders. The DPA calls for the DDDC to reach out to groups that were excluded from the DPA negotiation process and to focus on traditional mechanisms of resolving conflict. In the meantime, it will be important to ensure some channel of communication between victims and negotiators on the question of reparation.

VI. GENERAL CONCLUSIONS AND RECOMMENDATIONS

The challenges of staking out the space for reparations in the negotiations for peace in Darfur, and of designing a policy that is both effective and feasible, are daunting. While there are precedents and proposals that are relevant to this debate, none of them are sufficient by themselves to resolve the strategic questions posed in this paper. The greatest challenge lies in finding appropriate ways to acknowledge and respond appropriately to the scale and gravity of abuses, even while the country undertakes many other important steps to resolve the conflict and ensure peace.

Ordering of priorities in the peace agenda and affording attention to how other measures impact on victims, to positive or negative effect, are areas that cannot be ignored if reparations and victim rights are ultimately to be respected. Victims' right to reparations can easily fall prey to other interests as parties to the conflict negotiate a solution. Well-informed policy proposals, sustained advocacy efforts, and victim participation in the process can hold the space for reparations open, secure essential objectives, and ensure that agreements on this topic will truly serve victims' interests and foster new respect for human rights in Sudan. Reparations are an important element of justice, not only for victims, but for a nation that seeks to promote reconciliation on equitable grounds. They must not be overlooked if there is to be any durable peace and resolution of the conflict in Sudan.

The Sudanese government and other parties to the conflict in Darfur have a particular responsibility to support the call for reparations and to consider how these may best be devised and delivered so as to acknowledge and redress the wrongs that have been committed against the inhabitants of Darfur. They should give particular attention to this issue in the course of peace negotiations and the international community, notably the UN and the AU, should use all possible influence in support of this objective and to facilitate the development of an effective reparations program for Darfur. To this end, and with particular attention to the renewal of the negotiation process, we offer the following recommendations:

To the Parties in Conflict

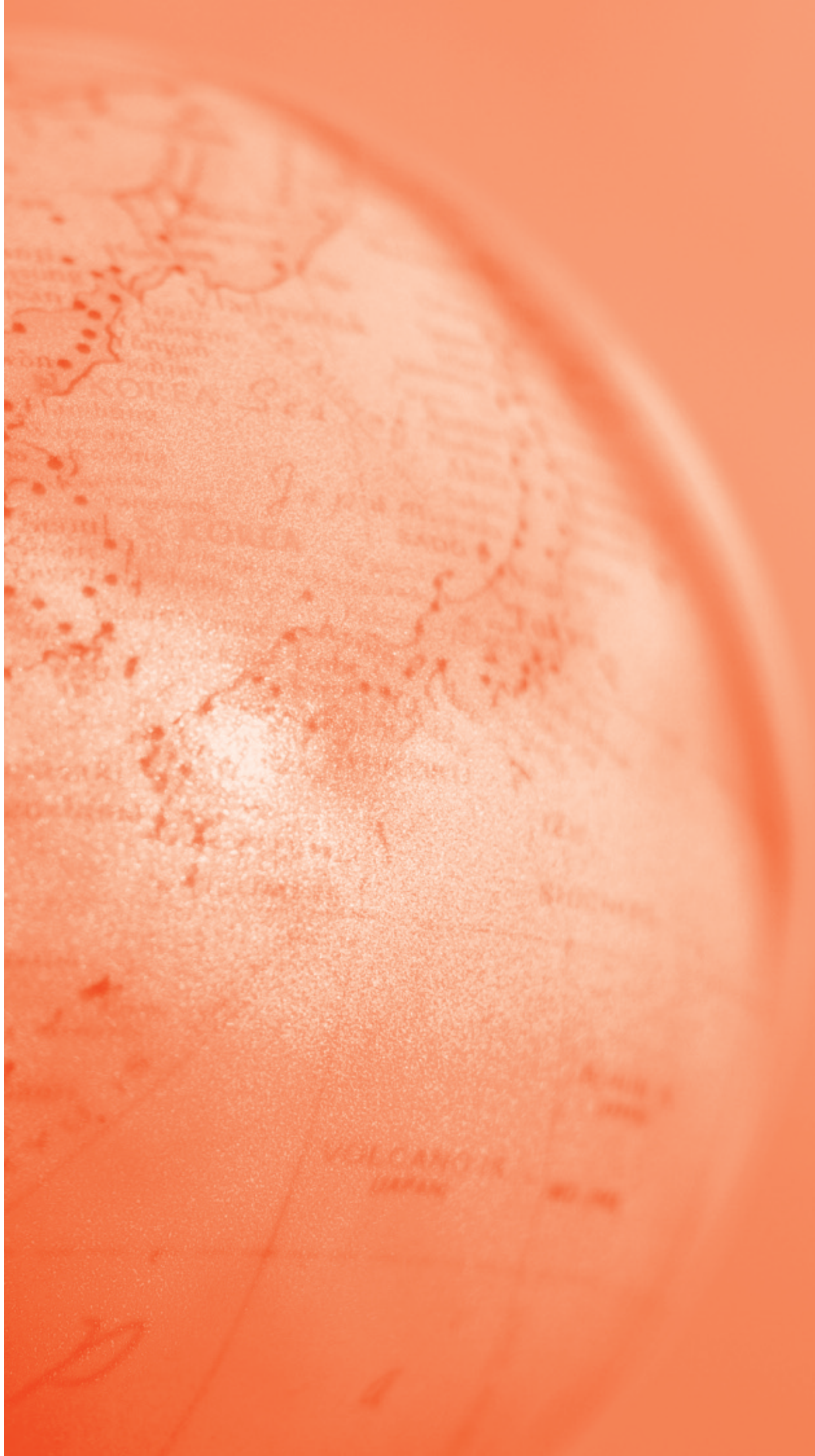
- The Sudan government should formally acknowledge its responsibility for the violations of human rights and international humanitarian law committed by its forces, including the Janjaweed, in Darfur, and take action to prevent further such violations. Likewise, the Darfur rebel groups should acknowledge responsibility for human rights abuses committed by their forces and take steps to ensure that such abuses cease.
- All parties should affirm the status of victims of serious violations of international human rights and humanitarian law in the course of the Darfur conflict as rights-holders, entitled to prompt, adequate and effective reparations from the Sudan government, and ensure that any peace agreement does not include measures that would unjustifiably restrict the right of victims to receive reparations.
- Ensure that, within the broad universe of war-affected persons, the serious human rights violations and violations of international humanitarian law committed against victims are acknowledged, and specific reparations measures are provided for those victims above and beyond what may be provided through development, resettlement, and reconstruction programs aimed generally at the war-affected.
- Collaborate with, facilitate and protect channels of communication with civil society organizations and representatives, and particularly with victims' groups, to ensure their active participation in discussions about appropriate reparations measures, priorities, and implementation strategies.
- Give urgent attention to immediate victim priorities, such as security, resettlement and return, while establishing, at a minimum, the framework for a more comprehensive, longer-term reparations program through a participatory process, once a peace agreement is reached and the security situation improves.
- Ensure that any agreed measures of reparation are feasible and supported by adequate mechanisms, including sufficient numbers of credible decision-makers and a simple registration process based on easy to apply categories of harm that minimize the need for extensive fact-finding.
- Guarantee that reparations are sensitive to women's disproportionate suffering and that in process and content they recognize women's voice and role, rather than entrench inequalities or injustices.
- Distinguish reparations from, and ensure reparations are reinforced by, other issues on the negotiation agenda, including the provision of adequate reconstruction and resettlement assistance, enforceable disarmament, demobilization and reintegration (DDR) measures and security arrangements, and concrete requirements for reform of state security institutions, including the exclusion of perpetrators of serious human rights abuses from those institutions.

To the African Union-United Nations Mediation Team

- Include an expert on design and implementation of reparations in the Mediation Team to assist with discussions of this item with the parties to the conflict in Darfur.
- Establish a process to acquire and channel victims' proposals relating to the design, delivery, and supervision of reparations mechanisms in Darfur; ensure that this process affirms the status of victims as rights-holders; and as soon as security

conditions permit, facilitate the direct participation of victims' groups and advocates in discussions regarding reparations measures for victims in Darfur.

- Ensure that the negotiating parties do not, in the course of negotiations, discount from the post-conflict agenda the need to provide reparations to the victims of serious violations of international human rights and humanitarian law in the course of the conflict, and ensure that other measures agreed to during the negotiations do not limit the effectiveness or feasibility of future reparations measures.
- Ensure that negotiations adequately address the inequalities underlying the conflict in Darfur, and that any agreed reparations measures do not entrench existing inequalities.
- Encourage regional and international partners to recognize the place of victims' rights generally, and reparations specifically, within the range of matters to be considered in relation to peace negotiations and in a post-conflict setting, and to urge the Sudan government to assume its responsibility for reparations.
- Encourage international partners to provide necessary technical assistance to ensure that reparations measures in Darfur are designed taking into account their feasibility, including by providing support and expertise to assess information about the potential universe of victims and projected costs over time, and the infrastructure and other needs to support adequate delivery of reparations.



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