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This is the third paper in a series of three ICTJ briefs corresponding to the recommendations proposed by the African Union High Level Panel on Darfur in *Darfur: The Quest for Peace, Justice and Reconciliation* (October 2009).

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Providing Meaningful Reparations to Victims

Introduction

International law is fairly clear in holding that when gross violations of human rights occur, victims are entitled to prompt, adequate, and effective reparation—a key component to the transitional justice process.¹ Reparations serve two goals. The first is to recognize the loss and pain victims have suffered and, in doing so, help them exercise their rights. The second goal is more problematic in situations of massive poverty: to provide victims with actual benefits, whether in symbolic or material forms or ideally a combination of both. The political will, technical capacity, and financial resources needed to design, implement, and sustain reparations programs are invariably absent in most developing countries emerging from or still going through armed conflict.

Of all the mechanisms used in pursuit of transitional justice, reparations focus most on victims, and therefore they are the most essential, particularly when accountability and peace are seen as equally important goals. Responding to victims' needs has intrinsic value, because it is a moral and legal imperative, as well as strategic political value, because it helps build sustainable peace.

However, providing meaningful reparations to victims in transitional societies poses a daunting challenge. The number of victims may be massive. The harm done may have been materially and morally devastating and often irreparable. The causes and consequences of systematic human rights violations are felt both individually and collectively, and will require significant political and material resources to repair and redress. Violations of human rights or humanitarian law committed during conflict may have become the norm, and institutional guarantors of those rights such as the courts or, in some communities, customary arbiters of redress—may have been overwhelmed by the magnitude of violations, destroyed in the course of the conflict, or corrupted by political interference. In a number of developing countries, armed conflict, repression, and large-scale violence re-emerge periodically because their underlying causes grow more complex even as their consequences become almost irreversible. Victims in these situations thus require reparations that do not simply call for the restoration of conditions that gave rise to the violations in the first place.

This is clearly the case in the Darfur region of Sudan. Broad policy measures are likely to be more effective in ensuring meaningful reparations than a case-by-case approach dependent on the courts, including the International Criminal Court. **The Sudanese government and other groups involved in the Darfur conflict have a responsibility to support the call for reparations and to consider how these may be best designed and delivered.** Because government forces and their proxies—notably the Janjaweed—have been the main perpetrators of abuses, the Sudanese government should bear the heaviest burden in providing reparations. Its

resources should be used to provide reparations, especially for the most vulnerable victims and those who have been displaced within Sudan.

During the upcoming peace negotiations, the government should pay particular attention to developing an effective reparations program for Darfur. The international community—notably the United Nations and the African Union—should use all possible influence to support the program. The ill-fated Darfur Peace Agreement (DPA) included provisions for reparations, and the UN Commission of Inquiry broadly acknowledged the need for them. But these precedents provide only limited reference points; the DPA's deficiencies in addressing reparations occurred mainly because victims were not included when the agreement was negotiated; those who were included represented the armed protagonists, while the mediators were too distant from victims to grasp how crucial reparations were to establishing peace.

Recommendations

Developing a comprehensive and effective reparations strategy for Sudan depends on giving more consideration for victims—including those who are displaced internally—and integrating them better into the process. To this end, we offer the following recommendations:

To the Parties in Conflict

- **The Sudanese government should formally acknowledge its responsibility for the human rights (HR) and international humanitarian law (IHL) violations committed by its forces in Darfur, including the Janjaweed and other allied militias, and take action to prevent further violations. Rebel groups in the region should also acknowledge responsibility for HR and IHL violations committed by their forces committed and take steps to ensure that such abuses cease.**

Based on ICTJ's work in other countries that have experienced internal conflict, it is usually not feasible to hold armed groups, whether pro or anti-government, directly accountable for reparations. In Colombia, for example, lands and other assets taken from paramilitary leaders have been used as reparations; this is exceptional, however, and some are concerned that it could dilute the government's responsibility for abuses and could affect some individuals' right to restitution. The approach taken in Peru is more helpful; although a truth commission found that Shining Path guerrilla fighters were responsible for more than half of the murders and "disappearances," along with a significant share of other abuses committed during the internal armed conflict, it was decided that the Peruvian government should assume full responsibility for reparations.

- **All parties should affirm that victims of serious international human rights and humanitarian law violations incurred during the Darfur conflict are entitled to prompt, adequate, and effective reparations from the Sudanese government. All parties should ensure that any peace agreement does not include measures that would unjustifiably restrict the right of victims to receive reparations.** While 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. Those involved should resist this.
- **Ensure that the serious human rights and international humanitarian law violations committed against victims are acknowledged. Make certain that the victims benefit from specific reparations measures above and beyond what may be provided through development, resettlement, and reconstruction programs aimed generally at people affected by war.** In Darfur these programs will need to distinguish among categories and

levels of harm and need among victims using clear and reasonable criteria that take the views of victims into account. Sudan may need to include a flexible menu of measures that work on several levels; it can address wrongs through collective or community-based measures and also attend to more specific needs of rape victims or victims of other torture who probably need medical or long-term psychosocial support.

- **Work closely with civil society organizations and representatives—particularly victims’ groups—to ensure they actively participate in discussions about appropriate reparations measures, priorities, and implementation strategies.** Even with good intentions and sufficient political will, a reparations program will only be effective if it has (a) taken into account the views of victims’ groups, (b) respects local practice including traditional mechanisms for providing redress, (c) meets the requirements of international law, and (d) shares in the post-conflict reparations experience of other countries and regions.

Some traditional mechanisms, however, may neither be intended nor suitable for resolving claims against the government or to address the scale and intensity of the violations committed in Darfur. For example, they are not sufficiently sensitive to sexual violence and the needs of rape victims. Further, their emphasis on collective responsibility and collective redress tends to suppress or diminish recognition of the harm done to the individual and of individual culpability for committing that harm.

Traditional mechanisms are also open to political manipulation. They can be misused to serve factional interests or to pit communities against one another. One particular concern in Sudan is that the government might seek to manipulate traditional inter-tribal forums in order to divert attention from its own responsibility for the abuses that have been committed.

- **Give urgent attention to immediate victims’ priorities, such as security, resettlement, voluntary return, land rights, while establishing the framework for a more comprehensive, longer-term reparations program once a peace agreement is reached and the security situation improves.** Demand for reparations shifts over time. Once victims’ immediate priorities have been addressed, new needs related to the suffering caused by unlawful killings, torture, and other grave abuses surface. Consequently, negotiators and mediators must not only develop short-term reparations measures that respond to immediate priorities, but they must also recognize the need for a longer-term framework for reparations. In general, reparations should be addressed immediately even though carrying them out can take a long time. Both the short- and long-term views are essential objectives.
- **Ensure that any measures of reparation are feasible and supported by adequate mechanisms, including sufficient numbers of credible decision makers and a simple registration process based on easily applicable categories of harm that minimize the need for extensive fact-finding.** One immediate priority is to protect victims from becoming traumatized again as they pursuing reparations. Developing a process of documentation requires great care and sensitivity. Post-conflict reparation commissions in Peru and Guatemala struggled with this issue. Similarly, registration processes in Nepal and Iraq have been marred by partisan political goals.
- **Guarantee that reparations are sensitive to women’s disproportionate suffering and that they recognize women’s voices and roles, rather than entrench inequalities or injustices.** In Timor-Leste, the Commission for Truth, Reception, and Reconciliation (CAVR) created an urgent reparations program (URP) that prioritized victims according to the severity and continuing nature of their suffering. This program sought to give priority to the most

severely disadvantaged and vulnerable victims in these categories, including widows, women with disabilities, and women still affected by severe trauma. Reparations measures for female victims should recognize the larger social shifts in women's role brought about by the conflict.

- **Carry out other transitional justice and peacebuilding measures on the agenda but distinguish these from reparations for victims.** Victims may derive considerable satisfaction from the successful prosecution and vetting of those responsible for human rights abuses. These steps can have an important reparative effect. However, such mechanisms cannot substitute for reparations. Indeed a reparations program can be more effective when combined with a complementary package of other transitional justice mechanisms such as truth-seeking and criminal prosecution as well as with reconstruction and resettlement assistance for displaced communities, disarmament, demobilization and reintegration (DDR) programs for combatants and reform measures in state security institutions.

DDR programs that provide benefits to former combatants, including those who may be responsible for violations, must not be implemented at the cost of providing reparation to victims or in ways that reward the commission of violence while disregarding the needs of those who were harmed by it.

To the African Union-United Nations Mediation Team

- Ensure that the negotiating parties and foreign governments do not marginalize the need to provide reparations for victims and ensure that other measures agreed to during the negotiations do not limit the effectiveness or feasibility of future reparations programs.
- Include an expert on design and implementation of reparations in the mediation team to assist in discussions.
- Establish a process to solicit and channel victims' proposals regarding 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, help victims' groups and advocates participate in discussions regarding reparations measures in Darfur.
- Make certain that negotiations about peace and pending criminal justice initiatives respond to the social and economic issues underlying the conflict in Darfur, and that any reparations measures do not entrench existing inequalities or exacerbate the competition for resources in the region.
- 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 the negotiations.
- Encourage international partners to provide technical assistance that can ensure reparations measures in Darfur are designed in ways that consider their feasibility. This could include support in identifying and locating victims, projecting the costs of reparations over time, and understanding the infrastructure and other requirements needed to deliver reparations in an effective and timely fashion.
- Nations should insist on the importance of Sudan's obligation to provide reparations, but they should offer to provide financial or other resources that can directly help the Sudanese government fulfill this obligation. In the same spirit, foreign governments and international

aid groups assisting victims of conflict should evaluate the potential for identifying long-term reparation measures for victims in Darfur.

To the international community, both foreign governments and civil society outside of Sudan

- Recognize that accountability for violations and responsibility for reparations goes beyond those who ordered and carried out abuses in the course of the current armed conflict. The role that certain States have played in supporting repressive regimes in Sudan and its neighboring states must be taken into account in formulating a strategy for reparations.
- Intensify advocacy for victims of the conflict in Darfur by addressing the root causes of the region's cycles of violence, including the history of land and resources competition and reparations measures that address these causes and not just focus on the violence.
- Balance the criminal law—focused approach to accountability by taking initiatives that prioritize victims and their need for reparations—regardless of progress in pending ICC cases—and that involve communities of victims and Sudanese actors in ways that recognize the value and primacy of their perspectives.

Endnotes

1. See the United Nations' 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, adopted Dec. 16, 2005 (www2.ohchr.org/english/law/remedy.htm).