

Reparation in periods of uncertain transition: Lessons from Sudan

Dr. Lutz Oette¹

1. Introduction

The right to reparation for victims of serious violations of human rights and gross violations of international humanitarian law is by now firmly established under international law.² It encompasses the right to an effective remedy, including access to courts and non-judicial mechanisms, and the right to substantive reparation, including individual and collective forms of reparation. This right applies equally in times of conflict or situations in which violations are ongoing and thereafter.³

The notion of transitional justice in a post-conflict context is based on the premise that the conflict in question has ended and that there is a period of transition in which measures need to be implemented to do justice for past violations and to implant the rule of law to prevent future violations.⁴ Many countries have experienced situations in which a conflict or dictatorship had run its course and where at least some measures were taken to achieve the goal of overcoming the adverse legacies left behind by conflict or dictatorship.⁵ Such measures often consist of criminal accountability mechanisms, reparation programmes and legislative and institutional reforms. Truth and reconciliation commissions (TRCs) have emerged as the institutional mechanism of choice for addressing a range of these issues arising in periods of transition.⁶ A pertinent example is Sierra Leone where a special tribunal for war criminals and a Truth and Reconciliation Commission tasked with recommending a series of measures, including reparation, were set up.⁷ As in many other countries, whilst the TRC was able to complete its work, the implementation of its recommendations has hit substantial delays, calling into question the validity of a process that is meant to fulfil the legitimate expectations of victims of violations and wider society in a timely manner.⁸

¹ Programme Advisor (National Implementation and Capacity Building) at REDRESS.

² See in particular the resolution adopted by the UN General Assembly: *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005.

³ Ibid.

⁴ ROHT-ARRIAZA, Naomi. *The new landscape of transitional justice*. in: Roth-Arriaza, Naomi and Mariezcurrena, Javier (eds). *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*. Cambridge: Cambridge University Press, 2006, pp.1 et seq.

⁵ South Africa, Peru and Timor-Leste are some of the well-known examples, see ROHT-ARRIAZA, *New landscape*, n.4 for further case studies.

⁶ HAYNER, Priscilla B. *Unspeakable Truth. Facing the challenge of truth commissions*. New York: Routledge, 2002.

⁷ See for relevant documentation the website of the TRC www.trcsierraleone.org.

⁸ SCHOTSMANS, Martien. *Sierra Leone: Reparation Delays Mean More Suffering*. THE REDRESS TRUST, THE REPARATION REPORT, May 2006, Issue 7, pp. 9-12.

In many situations, however, which may be called initial, partial or incomplete periods of transition depending on the circumstances, some of the key elements of the typical setting just sketched out are absent. Such situations add another layer to the debate about reparation in transitional-justice contexts: How can reparation be agreed upon and implemented in countries where some but not necessarily all conflicts and/or other violations have come to an end? What are the implications of a lack of a full transition and the uncertainties resulting from it? These situations are often characterised by the involvement of international actors, raising the additional question of how the stance and conduct of organisations or institutions such as the United Nations and/or the International Criminal Court impact on the prospect for reparation? These are some of the key questions that are bound to arise more frequently in various settings, in particular in unstable countries that experience recurring conflict or ongoing violations, such as Sri Lanka, Sudan and Uganda.

This chapter takes Sudan as a case study that illustrates the multiple challenges and pitfalls when seeking reparation for victims of serious violations of human rights and international humanitarian law. Sudan has experienced decades of violations, both in the context of conflict and political violence. Several developments are underway that have a bearing on how to address this legacy. This comprises in particular the implementation of the Comprehensive Peace Agreement (CPA) and accompanying constitutional and legislative changes in a process often referred to as democratic transformation. Another important development is the Darfur Peace Agreement (DPA) and related ongoing efforts to obtain reparation for the victims of serious violations in Darfur. The Chapter examines how the issue of reparation has been dealt with in various settings, how these developments have impacted on each other, and what role the regional and international actors, in particular the International Criminal Court's (ICC) investigation in Darfur, have played in shaping responses or providing alternative mechanisms. The objective of this inquiry is to identify some of the key issues that can be expected to arise in situations of "incomplete transitions" with multiple actors and to identify and discuss lessons that can be drawn both with regards to Sudan and other similar situations.

2. LEGACY OF GROSS VIOLATIONS OF HUMAN RIGHTS AND SERIOUS VIOLATIONS OF HUMANITARIAN LAW IN SUDAN

Sudan has experienced recurring periods of serious human rights violations and conflict since becoming independent in 1956. This includes in particular violations committed to varying degrees by all parties in the North-South Conflict (1955-1972 and 1983-2005) and in the Darfur conflict (2003-ongoing) as well as in other conflicts, such as in the Nuba mountains and Eastern Sudan. Many of these violations were so

serious that they may have amounted to international crimes.⁹ As can be gathered from several inquiries and reports by various rapporteurs, the conflict in Darfur itself has resulted in an estimated 200,000 persons killed and over 2 million people displaced, often following brutal attacks that has been characterised by killings, rape, the destruction of villages and looting.¹⁰ At present, the International Criminal Court is investigating crimes in Darfur and the Court has issued arrest warrants against two Sudanese nationals.¹¹

Serious violations have also been committed in other contexts, in particular, during the Nimeri regime (1969-1985) and during the present regime (1989-), including extrajudicial killings, torture, arbitrary arrests, denial of fair trial rights, violations of political freedoms and other violations.¹² There are no reliable estimates about the number of individuals affected but given the scale and time span of violations it is likely that tens of thousands of persons have become victims.

The brief overview shows the defining features of the legacy of violations:

- Multiple layers of violations in different settings over a long period of time. This entails the application of several legal regimes (human rights law, humanitarian law); the need to address the particularities of the given context; and difficulties inherent in dealing with violations dating back a considerable time, such as evidentiary challenges and legal obstacles, for example statutes of limitations.
- A large number of victims who have suffered individual and/or collective violations. This has resulted in disparate groups of victims who may have suffered similar violations within a conflict or at the hands of government forces but have little or no connection with victims of other conflicts.
- A large number of perpetrators, belonging to the government apparatus in question, to the militia or to one of the rebel factions.
- Victims who may have also been perpetrators. Though largely anecdotal at this stage, it is highly likely that some of the victims, for example rebel fighters who

⁹ MEDANI, Amin Mekki Medani. *Crimes Against International Humanitarian Law in Sudan: 1989-2000*. Cairo, 2001.

¹⁰ See in particular UNITED NATIONS HIGH COMMISSIONER OF HUMAN RIGHTS. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*. Geneva: United Nations, 25 January 2005 and AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Report of the African Commission on Human and Peoples' Rights Fact Finding Mission to the Republic of Sudan in the Darfur Region, July 2004*. Twenty-Second Activity Report of the African Commission on Human and Peoples' Rights, 25-29 June 2007, Annex III.

¹¹ See the website of the Court www.icc-cpi.int for latest development and for further information, REDRESS. *Accountability and Justice for International Crimes in Sudan- A Guide on the Role of the International Criminal Court*. London: The Redress Trust, May 2007.

¹² See for example HUMAN RIGHTS WATCH/AFRICA. *Behind the Red Line. Political Repression in Sudan*. New York, Washington, London, Brussels: Human Rights Watch, May 1996; MEDANI, *Crimes Against International Humanitarian Law*, supra n.9; reports by the UN Special Rapporteur on Human Rights in Sudan, available at <http://www2.ohchr.org/english/countries/sd/mandate/index.htm> and UN HUMAN RIGHTS COMMITTEE. *Concluding observations: Sudan*, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007.

have been tortured by government forces, have also committed violations themselves.

These factors pose considerable challenges in reaching an agreement on a reparation policy and may go some way towards explaining Sudan's response to the task of providing reparation for violations committed in the course of the last decades. The particular characteristics of violations and victimisation in the various conflicts and other settings may require different policy responses and reparation measures.¹³ However, care must be taken not to prioritise a group of victims, including in relation to particular violations and time periods, at the expense of other victims and any system put into place to provide justice for future victims. An adequate response must therefore rest on a principled and consistent approach so as to do, and to be seen to be doing justice to all victims.

The large number of victims may paradoxically be a reason for not taking any measures at all so as not to create expectations by other groups. The multitude of perpetrators is also detrimental as it raises the prospect of a (tacit) agreement not to take any action because this would serve their mutual interest to benefit from impunity. In addition, the time factor and the difficulty of proving violations and of determining who qualifies as a victim pose considerable practical challenges to devising procedures and reparation measures that benefit genuine victims of violations in an effective manner.

3. Reparation for violations committed in the civil war (North-South 1955-1972; 1983-2005)

The civil war ended with the CPA, signed between the Government of Sudan (GOS) and the Sudan People's Liberation Movement/Army (SPLM/A) on 9 January 2005,¹⁴ which addresses a range of issues to ensure peace, including in particular power-sharing, elections and self-determination for the South. As part of the process of democratic transformation, the CPA contains an unequivocal commitment by both parties to international human rights. The Interim National Constitution of 2005, drafted as a result of the CPA, includes a Bill of Rights incorporating international human rights standards¹⁵ and provides for the establishment of a Constitutional Court¹⁶ and a National Human Rights Commission.¹⁷ In addition, the CPA established a National Constitutional Review Commission and envisaged legislative and institutional

¹³ See INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE. *Reparation and the Darfur Peace Process: Ensuring Victims' Rights*. New York: ICTJ, November 2007, pp. 26 et seq.

¹⁴ See for the full text of the CPA, <http://www.unmis.org/English/documents/cpa-en.pdf>.

¹⁵ The Bill of Rights is contained in articles 27 to 48 of the Interim National Constitution of 2005 whose article 27 (3) provides that: "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of Sudan shall be an integral part of this Bill."

¹⁶ See articles 119-122 of the Interim National Constitution.

¹⁷ Article 142 *ibid*.

reforms.¹⁸ These measures constitute steps aimed at strengthening the human rights framework and at removing some of the underlying institutional factors contributing to violations. To this extent, they resemble transitional justice measures.

The parties to the CPA agreed on some sweeping principles, such as: “that the unity of the Sudan, based on the free will of its people democratic governance, accountability, equality, respect, and justice for all citizens of the Sudan is and shall be the priority of the parties and that it is possible to redress the grievances of the people of South Sudan and to meet their aspirations within such a framework.” The agreement is replete with references to human rights, resettlement, rehabilitation, reconstruction and development.¹⁹ However, strikingly, the CPA is silent on the question of accountability and reparation for victims. Such omission may reflect a conscious decision not to deal with the issues at all or to address them at a later stage of the peace process. The parties have not issued any official statements on the reasons for omitting these two key points from the CPA. From the rather limited research available, it appears that the parties discussed the question of accountability and decided to leave this point out altogether after having been told that the amnesty initially envisaged to cover all crimes committed during the war would not be acceptable as a matter of international law.²⁰ The question of truth and reconciliation and reparation seems to have been largely drowned out in talks about reconstruction,²¹ the only result being a rather general statement of intent to engage in reconciliation.²² There is nothing to suggest that the parties intended to address the question of accountability and reparation at a later stage of the implementation of the CPA. This makes the agreement curiously lopsided, in particular in light of the substantial provisions governing human rights protection and furtherance of the rule of law.

Agreed upon to settle one of the longest-running conflicts in Africa, the CPA failed to address the key question of reparation for a number of reasons. The agreement was essentially a political bargain between two conflict parties. It excluded other political parties and groups in Sudan and did not involve civil society, be it community groups, NGOs or the media, a factor that contributed to the limited public debate and the lack of accountability and willingness of the parties to address the question of justice for

¹⁸ Article 140 *ibid.*

¹⁹ The parties agreed to “find a comprehensive solution that addresses the economic and social deterioration of the Sudan and replaces war not just with peace, but also with social, political and economic justice which respects the fundamental human and political rights of all the Sudanese people” and to “formulate a repatriation, resettlement, rehabilitation, reconstruction and development plan to address the needs of those areas affected by the war and redress the historical imbalances of development and resource allocation.” Agreed Text on the Preamble, Principles, and the Transition Process between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army, Machakos, Kenya, July 2002.

²⁰ YOUNG, John. *Sudan IGAD Peace Process: An evaluation*. 30 May 2007, published online at: http://www.sudantribune.com/IMG/pdf/Igad_in_Sudan_Peace_Process.pdf, p. 24.

²¹ *Ibid.*

²² See Article 21 of the Interim National Constitution: “The State shall initiate a comprehensive process of national reconciliation and healing that shall promote national harmony and peaceful co-existence amongst all Sudanese.”

past violation.²³ The international mediators (Inter-Governmental Authority on Development-IGAD) took a pragmatic approach and did apparently not seek to engage with parties to secure the inclusion of accountability and/or reparation measures.²⁴ As a result, the issue of reparation was sacrificed for reasons of political expediency.

Calls for reparation seem to remain limited in the South, given the current focus on reconstruction and self-governance, if not self-determination. However, demands for reparation in the Darfur conflict and the prospect of renewed debates about transitional justice in the whole of Sudan may trigger a re-examination of the blank spots of the CPA. If backed up by civil society support, these realities may eventually force the parties to revisit the CPA. Given the fragile peace and the potential personal and financial repercussions for various actors, the parties will in all likelihood be opposed to such moves. However, depending on the political circumstances it is not out of the question that at least some elements, such as a Truth and Reconciliation Commission, or a compensation commission, may yet become the subject of serious discussions, be it between the parties to the CPA or in Southern Sudan itself.

4. Reparation for violations committed in the current Darfur conflict (2003-ongoing)

The main reference point for reparation in Darfur is the DPA, which was agreed upon by the GOS and the Minni Minawi faction of the Sudan Liberation Movement (SLM) in May 2006,²⁵ with the CPA serving as a template. While the DPA is silent on accountability mechanism, notably, the negotiating rebel groups insisted on the inclusion of provisions for reparation. The parties agreed on some broad principles but the specifics of the reparation measures remained controversial throughout. In the final agreement, the parties agreed on the following:

- The setting up of an independent and impartial Compensation Commission “to deal, without prejudice to the jurisdiction of courts, with claims for compensation by people of Darfur who have suffered harm, including physical or mental injury, emotional suffering or human and economic loss, in connection with the conflict.”²⁶ The Commission is empowered “to make binding awards for restitution or other compensation within its competence,”²⁷ which may also include rehabilitation, legal assistance and social services, acknowledgment and acceptance of responsibility, guarantees of non-repetition and traditional forms of compensation.²⁸ The DPA envisages the establishment of a compensation fund and the Government of Sudan pledged a total of \$30 later increased to \$100 million for this fund. The Commission was established

²³ YOUNG. *Sudan Peace Process*, supra n.20, pp. 22 et seq.

²⁴ Ibid. pp.36 et seq.

²⁵ The full text of the agreement is available at http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf.

²⁶ Ibid. para. 200.

²⁷ Ibid., para. 206.

²⁸ Ibid. para. 207.

on 26 September 2006 by Presidential Decree No 19 (though without being given the power to make binding awards) but has not become fully operational to date.

- A Property Claims Commission “to deal with all property disputes that arise from the return process.”²⁹ The Commission may order restitution and award compensation where restitution is impossible.³⁰
- A Darfur Rehabilitation and Resettlement Commission, to be financed by the Darfur Reconstruction and Development Fund.³¹

The DPA thus envisaged some (post-conflict) measures to provide reparation. It is also notable in as much as the Government of Sudan has for the first time agreed to the provision of restitution and compensation in a conflict, albeit without openly acknowledging responsibility. However, the agreement was limited as other negotiating parties refused to sign the DPA, not least because it fell short of their demands for reparation. A particular bone of contention was the amount of money pledged by the Government of Sudan for compensation purposes which was deemed insufficient.³² The limited agreement also meant that the DPA failed to end the conflict.

The reparation provisions of the DPA raise a series of concerns:

(i): Compensation is due to persons in Darfur who suffered harm in connection with the war. While this broad definition has the advantage of being inclusive, it is not in line with the notion of victims under international law who suffered harm because of a violation of their rights.³³ The definition potentially masks the nature of violations, such as rape, and denies the acknowledgment that comes with the recognition of being a victim.

(ii): The provisions are silent on the responsibility of parties for any violations. The Compensation Commission is empowered to rule on accountability as part of its awards but the DPA provisions are quite general in this regard and it is not clear how they will be interpreted. Whilst the Government of Sudan pledged to finance these measures, thus arguably implicitly accepting its responsibility, the said omission deprives the reparation provisions of the important element of acknowledgment.

(iii): The reparation measures envisaged are not confined to restitution and compensation as they also encompass other forms of reparation. However, the measures make no express provision on how to acknowledge the collective suffering of Darfurians and the collective victimhood this entails.

²⁹ Ibid. para. 197.

³⁰ Ibid. para. 194-196.

³¹ Ibid. para. 154 and paras.181 et seq.

³² DE WAAL, Alex. *The Darfur Peace Agreement, Part 3. Compensation and Assistance to Victims*. London: Justice Africa, 29 June 2006.

³³ ICTJ. *Reparation and the Darfur Peace Process*, supra n. 13, pp. 26,27 and INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. *Negotiating justice? Human rights and peace agreements*. Geneva: ICHRP, 2006, p.94.

(iv): The amount of compensation pledged by the Government of Sudan to date is patently insufficient in light of the magnitude of harm and losses suffered.³⁴

(v): The provisions for implementation of reparation measures are inadequate. They do not provide a sufficiently detailed timetable of specific measures to be taken and a mechanism for monitoring implementation. It is thus not surprising that there has been extremely limited progress to date.

As a result, victims of violations have not benefited from the envisaged measures and the DPA is widely seen as a failure in this regard although it has provided a starting point for further discussions on the issue of reparation in Darfur. The lack of consensus among the parties, the absence of a principled and informed approach to the question of reparation and the limited participation of civil society and public debate on the matter can be seen as key reasons for this outcome. These factors meant that the reparation provisions reflect political expediency rather than an attempt to bring justice to the many victims of the conflict. These shortcomings have been aggravated by the failure of the peace process that has adversely impacted on implementation.

In light of these developments, there is a renewed debate about reparation for the victims of violations in the Darfur conflict, be it in the context of peace negotiations or separately.³⁵ The debate has gathered limited momentum given that the peace process has stalled and that the focus of most actors is on how to end the conflict and on protection rather than on reparation. This may be due to the perception that the question of reparation should be dealt with once a settlement is reached. Significantly, Darfurian human rights activists have intensely discussed the question of timing, particularly whether reparation should be advocated for while the conflict is ongoing. Many argue that agreement on reparation is a key issue that should not be postponed. Many victims have lost their livelihood and urgently need the means to rebuild their lives. Reparation also serves other important functions, such as public acknowledgment of wrongdoing, recognition of victims suffering, and as potential deterrent for future violations.³⁶

The involvement of various regional and international actors adds another dimension to the reparation debate in Darfur. The UN Commission of Inquiry, mandated by the UN Security Council, recommended in 2005 that the UN Security Council set up a Compensation Commission for Darfur to provide reparation for victims of international crimes committed in Darfur.³⁷ The recommendation was not discussed any further and has remained a dead letter since.

³⁴ See for example the specific case study conducted by: PHYSICIANS FOR HUMAN RIGHTS. *Darfur - Assault on Survival: A Call for Security, Justice and Restitution*. Cambridge, MA: PHR, January 2006.

³⁵ Several meetings of Darfurians, Sudanese and international activists and experts have taken place over the last two years to discuss the issues, with several points of debate reflected in ICTJ. *Reparation and the Darfur Peace Process*, supra n. 13.

³⁶ See for example DAFUR RELIEF AND DOCUMENTATION CENTRE. *Reinvigorating the Peace Process. Preliminary Ideas to Ponder*. Geneva: DRDC, 20 January 2007, p.4.
UNHCHR. *Report of the International Commission of Inquiry on Darfur*, supra n.10, pp. 149 et seq.

The ICC potentially also has a significant role with regards to reparation in Darfur. The UN Security Council referred the situation in Darfur to the Prosecutor of the ICC in 2005 and, at the time of writing, investigations were ongoing.³⁸ One of the key features of the Rome Statute of the ICC is complementarity, namely that the ICC will only prosecute cases where the national system is unable or unwilling to do so itself.³⁹ The hope that Sudan would put mechanisms in place that provide for criminal accountability and possibly also for reparation has not been fulfilled to date. The Special Tribunals that were established are widely seen as falling short of these requirements, and the Prosecutor of the ICC has stated that Sudan has not been willing and able to prosecute the cases that his office is prosecuting.⁴⁰

Whilst the ICC investigations have failed to act as catalyst for national reparation mechanisms in Darfur, the Court may yet provide some reparation. This may either be in form of awards in individual cases or as part of the broader mandate of the Victims' Trust Fund.⁴¹ The latter may provide victims with assistance out of its fund but available means are limited. The Victims' Trust Fund will not be in a position to provide adequate let alone full reparation. However, it may be able to devise meaningful reparation that can set a positive example on how to acknowledge the suffering and violation of victims, and may in turn trigger national debates.

5. REPARATION FOR SERIOUS VIOLATIONS OF HUMAN RIGHTS COMMITTED OUTSIDE CONFLICT

In spite of the scale of violations against a range of groups and individuals over the years, both between 1969-1985 and between 1989 and the present, there has been limited debate on reparation for this category of victims, many of whom have fled the country or have died. The question of addressing the legacy of these violations and providing justice, including reparation, has been taken up and discussed in some circles but there is no broader public debate. This is not least due to the lack of concerted advocacy by victims groups, political parties and civil society at large and the limited political space to operate in.⁴²

Judicial remedies are the only resort for victims of violations in the absence of any reparation programmes. Such remedies have been largely ineffective to date, due to a combination of factors such as an apparent lack of independence of the judiciary, (until recently) inadequate fundamental rights protection, immunities, statutes of limitation

³⁸ See for latest developments the website of the ICC www.icc-cpi.int.

³⁹ Article 17 of the Rome Statute of the International Criminal Court.

⁴⁰ Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSC 1593 (2005), 5 June 2008, paras.20-26.

⁴¹ Article 75 and 79 of the Rome Statute of the International Criminal Court. See also REDRESS.

Accountability and Justice for International Crimes in Sudan, supra n.11, pp. 62 et seq.

⁴² This assessment is based on participation of the author in a series of workshops and discussions with human rights lawyers and others on the issue.

and emergency legislation.⁴³ This may change following the adoption of the Bill of Rights as part of the Interim National Constitution and the establishment of a Constitutional Court with substantial powers.⁴⁴ These changes, being part of the implementation of the CPA, may pave the way for reparation awards and broader reforms, including legislative changes such as the repeal of immunity laws. Experiences in other countries, such as in Malawi, show that a series of adverse rulings can prompt a government to set up a reparation programme, and illustrate the important role that an independent judiciary can play.⁴⁵ Whilst there must be reservations as to whether Sudanese courts will fulfil a similar role given their recent record, there can be little doubt that they have the potential to act as catalyst for reparation measures. This would be a remarkable means of closing the reparation gap in the CPA, as any such judicial practice would have only been made possible by the CPA.

6. LESSONS LEARNED

Many of the elements for a successful reparation policy in post-conflict situations apply equally in “mixed situations” of post-conflict, conflict and political violations. This includes a shared understanding of the need to repair violations, a participatory process, sustained engagement, planning for implementation and continuous political commitment, if necessary backed up by international support. “Mixed situations” characterised by multiple conflicts and ongoing violations are potentially more complex as measures taken in relation to one conflict may impact on the resolution of others.

As the experience of Sudan shows, it is critical that key actors, including parties, mediators, civil society and international actors, take or insist that others take a principled approach to reparations from the outset. In the absence of such an approach, the issue of reparation is prone to become a bargaining chip in peace agreements and political deals during implementation processes, in particular where there is a lack of civil society participation and monitoring. Such an approach is bound to lead to fragmentation and piecemeal implementation, in particular where the precedent, namely the CPA, is silent on reparation. Even in the absence of such a consensus on the principles of reparation, unexpected opportunities may open up in the context of political transitions, such as the use of fundamental rights petitions before the Constitutional Court, which may be used to further reparation agendas. However, there is no such practice in Sudan to date.

⁴³ REDRESS & SOAT. *National and International Remedies for Torture. A Handbook for Sudanese Lawyers*. London: The Redress Trust and Sudan Organisation against Torture, March 2005.

⁴⁴ See the Sudanese Constitutional Court Act of 2005.

⁴⁵ CAMMACK, Diana. *Reparations in Malawi*. DE GREIFF, Pablo: *The Handbook of Reparations*. Oxford: Oxford University Press, 2006, pp. 215-256.

In light of these considerations, some of the key lessons that can be drawn at this stage include:

- It is important for all actors to develop, as early as possible, a clear understanding of what reparation means and what the legal responsibilities of those responsible for violations are as this would enhance the likelihood that reparation measures are taken in line with international standards (and in view of best practices elsewhere);
- The prospect for implementation is greatly enhanced if there is a general agreement on the notion of reparation and the need for a reparation policy, backed up by international support;
- While the issue of reparation may be dealt with at a later stage in times of transition, there are several factors why it should form part of any peace negotiations or processes related to political transitions from the very beginning. Reparation is a right of victims and an obligation of the state, which arises at the time of the violation. Victims have a keen awareness of the symbolic and practical significance of effective reparation measures, even where violations continue, and reparation has an important symbolic function of commitment to upholding human rights. Postponing reparation may also serve as a bad precedent that undermines victims' right to reparation in future debates and processes;⁴⁶
- In case of multiple violations and processes, it is vital to ensure a principled and consistent approach so as to set the right tone for subsequent deliberations on the issue;
- Victims must be able to participate effectively from the beginning in the framing and development of reparation policies and programmes. This should not be done in a mechanical manner but has to keep in mind the complexity and sensitivities of ensuring that all victims can have a genuine voice in the process;
- Civil society participation is crucial to ensure that broader perspectives are reflected and that there is critical monitoring of decision-making processes on, and implementation of reparation measures. Civil society organisations must for their part be prepared to build their capacity and to devise appropriate strategies with a view to playing a meaningful advocacy role in these processes;
- The judicial system can serve as an alternative remedy in relation to ongoing as well as past violations. It is important that human rights lawyers strategically test the capacity of the judiciary and complement their case work with advocacy with a view to setting precedents and possibly triggering the establishment of reparation programmes;
- International actors such as the UN and the ICC can play an important role in furthering reparation and supporting reparation programmes in countries such as Sudan but need to develop a principled approach. This is difficult given the multiple and potentially contradictory functions that such bodies may have to

⁴⁶ See ICTJ, *Reparation and the Darfur Peace Process*, supra n. 13, pp. 24, 25 for a discussion of this point in light of international experiences.

fulfil, for example imposing sanctions or seeking criminal accountability on the one hand and engaging with the Government to bring about reforms and establish effective mechanisms to provide justice for victims of violations on the other.

7. CONCLUSION

The case study of Sudan illustrates the difficulty of agreeing on and implementing effective reparation programmes in situations characterised by a large number of victims and perpetrators and multiple violations that take place in an environment of uncertain political transition. A successful agreement on, and implementation of reparation measures becomes difficult under such circumstances as reparation serve multiple functions. In addition to the goal of addressing past violations and preventing recurrence, the issue of reparation may become an element of the peace dividends and political bargaining. How key actors deal with the question of reparation in these circumstances can be seen as a test of their commitment to human rights and their sincerity to deal with the legacy of violations. These factors pose unique challenges for victims, civil society and international actors that may find it difficult to develop a coherent reparation agenda given other potentially conflicting priorities. The main lesson must be not to sideline or compromise on the question of reparation in such situations. This would be bound to set a bad precedent and to create difficulties for any later efforts to agree on and implement a reparation programme that reflects victims' needs and priorities as well as international standards.

Bibliography:

CAMMACK, Diana. *Reparations in Malawi*. DE GREIFF, Pablo: The Handbook of Reparations. Oxford: Oxford University Press, 2006, pp. 215-256

DARFUR RELIEF AND DOCUMENTATION CENTRE. *Reinvigorating the Peace Process. Preliminary Ideas to Ponder*. Geneva: Darfur Relief and Documentation Centre, 20 January 2007

DE WAAL, Alex. *The Darfur Peace Agreement, Part 3. Compensation and Assistance to Victims*. London: Justice Africa, 29 June 2006

HAYNER, Priscilla B. *Unspeakable Truth. Facing the challenge of truth commissions*. New York: Routledge, 2002

HUMAN RIGHTS WATCH/AFRICA. *Behind the Red Line. Political Repression in Sudan*. New York, Washington, London, Brussels: Human Rights Watch, May 1996

INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE. *Reparation and the Darfur Peace Process: Ensuring Victims' Rights*. International Centre for Transitional Justice: New York, November 2007

INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. *Negotiating justice? Human rights and peace agreements*. Geneva: International Council on Human Rights Policy, 2006

International Criminal Court, Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSC 1593 (2005), 5 June 2008

MEDANI, Amin Mekki Medani. *Crimes Against International Humanitarian Law in Sudan: 1989-2000*. Cairo, 2001

PHYSICIANS FOR HUMAN RIGHTS. *Darfur - Assault on Survival: A Call for Security, Justice and Restitution*. Cambridge, MA: Physicians for Human Rights, January 2006

REDRESS. *Accountability and Justice for International Crimes in Sudan- A Guide on the Role of the International Criminal Court*. London: The Redress Trust, May 2007

REDRESS & SOAT. *National and International Remedies for Torture. A Handbook for Sudanese Lawyers*. London: The Redress Trust and Sudan Organisation against Torture, March 2005

ROHT-ARRIAZA, Naomi. *The new landscape of transitional justice*. in: Roth-Arriaza, Naomi and Mariezcurrena, Javier. *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*. Cambridge: Cambridge University Press, 2006, pp.1-16

SCHOTSMANS, Martien. Sierra Leone: Reparation Delays Mean More Suffering. REDRESS, THE REPARATION REPORT, May 2006, Issue 7, pp. 9-12

UNITED NATIONS GENERAL ASSEMBLY, *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005

UNITED NATIONS HIGH COMMISSIONER OF HUMAN RIGHTS. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*. Geneva: United Nations, 25 January 2005

YOUNG, John. *Sudan IGAD Peace Process: An evaluation*. 30 May 2007, published online at http://www.sudantribune.com/IMG/pdf/Igad_in_Sudan_Peace_Process.pdf