DRDC Study Paper

on

Reparations, Compensation and Affirmative Action and their Role in Peace-making and Peace-building in Darfur
Darfur Relief and Documentation Centre

(DRDC)

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Forward

The Darfur Relief and Documentation Centre (DRDC) is pleased to present this study on Reparations, Compensation and Affirmative Action and their Role in Peace-making and Peace-building in Darfur. This study was prepared by DRDC’s Secretariat in Geneva as the first document in a series of other studies and research papers that DRDC intends to publish through its research programme on the armed conflict in Darfur.

DRDC believes that a viable resolution of the current armed conflict in Darfur as well as other potential conflicts in the region and Sudan at large require the involvement and contribution from the different social actors that have special concern about the situation in the country. Solution of Sudan’s chronic problems of instability, violent internal armed conflicts and social unrest that were manifested by its long history of protracted civil wars requires an in-depth analysis of the root causes that underpin these conflicts. It also requires analysis of the different aspects that organise the relationships between the different racial, ethnic and cultural components of the country. Scientific research and documentation in this regard are therefore essential elements to generate the necessary scientific solutions for some of the difficulties that currently face the country.

DRDC wishes to express its thanks and gratitude to all individuals that contributed to the realisation of this study. DRDC wishes to express its special thanks to Ms. Olivia Bueno and Ms. Deirdre Clancy of the International Refugee Rights Initiative and Darfur Consortium for their immeasurable contribution for the realisation of this work. DRDC also wishes to thank all those individuals who provided insight, support and encouragement throughout the process of the preparation of this study.

DRDC hopes that the study will be useful for groups and individuals that are working for an end of the armed conflict in Darfur.

Sincerely
Abdelbagi Jibril
Executive Director
Introduction

The principles of reparations for a damage done and compensation of persons, groups or entities who have suffered as a result of injurious acts or behaviour are rooted in fundamental justice and law. They are accepted principles in all legal traditions, cultures and religions including the faith of Islam. The concepts of reparations and compensation are applicable in all cases of damage or injury whether consensual or forceful and the defaulting party is required to accord atonement and relief to the victims of the damage without regard to their race, gender, creed or any other background. The concepts of reparations and compensation are valid both in situations of material as well as of moral damage or injury.

Reparations and compensation are inalienable rights for the victims of damage and injurious acts. They are increasingly recognized as an integral part of measures for the dispensation of equitable justice. Human rights law experts and political decision-makers alike in many parts of the world are placing more and more emphasis on reparations and compensation as important measures to deter violations of human rights and fundamental freedoms. They are also linked to efforts to combat the impunity with which international crimes such as genocide; war crimes and crimes against humanity are committed. In fact, the international community has repeatedly affirmed the duty of States to end the impunity with which such crimes are committed, prosecute individuals accused of committing such atrocities and to uphold the rights of the victims for satisfactory reparations and compensation. Two concrete steps undertaken by the world community in this regard were the adoption of the Rome Statute of the International Criminal Court on 17th July 1998 and its entry into force on 1st July 2002.

However, history teaches us that while reparations and compensation claims by individuals or entities who have fallen victims to damage or injury are common yet the majority of victims of unlawful damage, atrocities, and massive violations of human rights are, more often than not, left without any reparations or compensation for their human and material loss. Examples of such situations can be enumerated from different parts of the world both from the developed and developing countries. In some of these countries wholesale atrocities were committed and the victims’ claims for reparation were not heeded nationally and ignored internationally.

It is deplorable that some of the most serious international crimes such as war crimes, crimes against humanity and ethnic cleansing have been committed against countless individuals and groups of people despite the vast body of national legislation and laws defining and forbidding the commission of such egregious crimes. These crimes are also committed while there are numerous international treaties, conventions, covenants, protocols and codicils banning and incriminating their commission. This is because until 1st July 2002 – the date of the entry into force of the Rome Statue of the International Criminal Court – there had been no permanent international mechanism or organ for enforcing the existing legal norms, punishing this kind of international crimes, holding the perpetrators criminally responsible as well as repairing the damage done and compensating the victims for their loss and injury.

The multifaceted human rights and humanitarian crisis in the Darfur region of western Sudan is an important test case for the government of Sudan and the world community at large. It is a “moment of truth and conscience” for Sudan and the world community to
punish the perpetrators of these crimes and uphold the principles of reparations and compensation for the victims of the mass atrocities committed in Darfur. The armed conflict in Darfur has left behind millions of totally impoverished people purposefully robbed of all their belongings and left to the mercy of charity organisations. Survivors of the Darfur conflict currently face precarious conditions. They live in deprivation and humiliation. The death toll wrought by the fighting and attacks against civilian areas or because of war-induced disease and famine could reach half a million individual. The deliberate humiliation of certain groups of people in Darfur in particular through systematic use of rape, gang-rape and sexual violence against women and girls as well as the agony associated with the loss of loved ones, including parents, spouses, children, family members or other relatives which is suffered by the conflict survivors are immeasurable. The psychological damage and stigma caused by the humiliation and agony suffered by the victims of the conflict cannot be repaired or compensated.

Compensation for a damage done or an injury is a well-established concept in the tradition and customary law of Darfur. Compensation claims in Darfur are usually settled by traditional chieftains, sheikhs or mayors whose rulings are invariable honoured by the conflicting parties. As is the case in Darfur tradition, compensation within the context of the conflict in the region should be linked to deterrence of future commission of such atrocities especially the government’s use of disproportionate military force against civilian populations, including indiscriminate aerial bombardment, killing on ethnic or tribal grounds and the wanton destruction of lives and livelihoods. They should not be regarded as mere measures to compensate for, and make good, the damage done.

Reparations and compensation for survivors of the Darfur conflict need to be introduced within an overall Affirmative Action Plan to address current and past injustices inflicted upon the people of the region. It is to be recognized that discussion of issues of social justice, exclusion and historical grievances in Sudan is a necessary prelude for formulating and implementing an affirmative action programme for the victims of the Darfur conflict. This will be difficult task in a country, which is still considered by the United Nations as one of the least developed countries (LDCs) of the world. However, for the sake of social harmony, peace and security in Darfur, Sudan and Africa, issues of social justice, exclusion and structural imbalances in economic and political power relations in the Sudan should be addressed head on without intellectual diplomacy.

This paper contains a brief comparative study on the possible role of reparations, compensation and affirmative action as necessary measures to help mitigate the negative effects of the armed conflict in Darfur. It endeavours to explain the nature and possible role of these measures in a viable peace-making and peace-building process in Sudan. The paper was prepared as a civil society contribution by the Darfur Relief and Documentation Centre (DRDC) to the Inter-Sudanese Peace Talks on Darfur between the government of Sudan and the insurgent groups in Darfur, which is mediated by the African Union (AU) and the international community. The study intends to inject an independent civil society perspective on issues of reparation, compensation and affirmative action that need to be observed during the negotiations and be implemented in the post conflict phase. Our purpose is to provide some basic ideas to help the political negotiators to agree on the principle of according the victims of the Darfur tragedy due reparations and compensation for their losses. Modalities on the implementation of the scheme are not discussed in this paper and left to an agreement by a more competent body. It is our hope that this paper will assist the negotiating parties in their efforts to come to a speedy and successful conclusion of their work.
The Concepts of Reparations and Compensation

The word reparation means the act of making amends or indemnity or giving atonement and satisfaction or compensation for a wrongdoing, injury, etc. Compensation can be defined as an act which constitutes, or is regarded as, an equivalent to make good the lack or variation of something or that which compensates for loss or privation; amends and remunerates.

Issues of reparations for unlawful damage done and compensation for victims of tort are linked to the dispensation of fundamental justice to the victims of such acts. They are also linked to the questions of the accountability of the perpetrators of illegal acts or criminal behaviour. Numerous international legal instruments as well as customary law and cultural beliefs in many parts of the world have emphasized the importance of the concepts of reparations and compensation. International law recognizes that those who commit acts that are so reprehensible as to offend the human conscience such as war crimes, crimes against humanity, genocide or any other serious crimes must make reparations and compensation to their victims. Therefore, the obligation to make, and the right to seek and receive, adequate reparations and satisfactory compensation are well established and recognized in international law. It is also recognized in customary law in many parts of the world including Sudan. In fact, the right to, and concept of, reparations in international and customary law is firmly established and actively pursued by victims of injury or injustice. On some occasions, the right to reparations and compensation is sought by States on behalf of their affected citizens against other States or non-State actors and wrongdoers.

There are no time limitations or legal barriers to prevent individuals and groups of people who are victims of massive atrocities such as war crimes, crimes against humanity or genocide, and their descendants who still suffer the consequences of these atrocities, from claiming reparations and compensation for the damage done, even if the crimes were committed against their ancestors at a remote time. About 80 years ago the Permanent Court of International Justice made its landmark international legal definition of reparations as follows:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for losses sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

1 See the International Covenant on Civil and Political Rights, (Article 2 {3}), Convention on the Elimination of Racial Discrimination (Article 6), Convention Against Torture (Article 14), Convention on the Rights of the Child (Article 39), Rome Statute of the International Criminal Court (Articles 19 {3} and 68 {3}). See also the 1948 Universal Declaration of Human Rights (Article 8), the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Article 21), which was adopted by the UN General Assembly on 29th November 1985 by means of Resolution (A/40/34). See also the “Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” which are currently under consideration by the Commission on Human Rights upon proposal by Prof. Theo van Boven and Mr Charief Bassiouni.

2 The Permanent Court of International Justice (1920 – 1942) was the predecessor of the International Court of Justice. This judgement was reached in 1928 during the Chorzow Factory Case, Germany v Poland.
Affirmative Action and its History

By contrast to the mandatory legal nature of reparations and compensation, affirmative action programmes are usually optional measures dictated by political or economic and social necessity in certain societies. On some rare occasions the implementation of such programmes has been provoked by the good conscience of States towards disadvantaged groups within their society. Affirmative action usually refers to the laws, programmes, measures and actions undertaken by States to address current or past injustices, imbalances, inequalities and discriminatory practices and to give redress to their victims both individually and collectively. In practical terms, affirmative action attempts to redress situations of inequality or imbalance within society by reversing situations of disproportionate participation in political decision-making, making available decent and rewarding employment and professional development to disadvantaged groups both in the public and private sectors, creating opportunities for socio-economic empowerment, quality education and training, rehabilitation of infrastructure and provision of social services etc. to the disadvantaged groups. Experiences from three countries i.e. the USA, South Africa and Nigeria will be briefly referred to in the following paragraphs for the purpose of illustration.

Affirmative Action in the USA

The concept of “affirmative action” was introduced for the first time in the US in the wake of the civil rights movement of the 1960s. It has largely entered the US political discourse in fulfilment of the promise made by Democrats during the election campaign of President John F. Kennedy when he included the amelioration of the status of African-Americans and the need for change in their socio-economic status among the issues in his political agenda. He issued Executive Order No. 10925 on 6th March 1961 and established the President’s Committee on Equal Employment Opportunity. In fact in 1941, President Roosevelt established the Fair Employment Practice Committee (FEPC), which was formed to ensure compliance with Executive Order 88023 that prohibited employment discrimination on the basis of race, and mandated the use of affirmative action in employment. Executive Order 8802 was issued out of political necessity as it was largely meant to facilitate recruitment of African-Americans in the US military during World War II. Affirmative action received the necessary vigour and become a tool of change in the US after the adoption of the Civil Rights Act in 1964.

The term "affirmative action" was officially injected into the US national jargon by Executive Order 11246 on equal employment opportunity, issued by President Lyndon Baines Johnson in 1965. By this Executive Order he created the Office of Federal Contract Compliance in the Department of Labour, and authorized it to issue guidelines to federal contractors on the employment of people without regard to their racial background.4 Executive Order 11246 imposed on US employers, with significant federal contracts, an obligation to remedy the underemployment of women and minority employees in underrepresented employment fields. US employers with significant federal funding from government contracts were required to prepare plans that include numeric goals and timetables on the implementation of measures that they have undertaken or plan to undertake to give effect to the provisions of Executive Order 11246. Although there are mixed feelings about the achievement and the necessity of continuation of affirmative action in the USA but the fact of the matter is that it has benefited the country tremendously and many minority groups in the USA would have not been able to make spectacular contributions to the progress of that country in many fields if not because of the suitable opportunities provided by affirmative action.

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3 For the full text of Executive Order 8802 consult http://www.classbrain.com/artteenst/publish/article_71.shtml
4 For the full text of Executive Order 11246 consult http://www.dol.gov/esa/regs/statutes/ofccp/eleo11246.htm
Affirmative Action in South Africa

Early in the 1990s the apartheid system of racial segregation was dismantled in South Africa and a new democratic and multi-racial African nation was born. Since then the new State has enacted a number of affirmative action programmes to address the negative consequences of long years of racial discrimination and to eliminate the gross injustice suffered by the overwhelming majority of South Africans under the apartheid regime. It is of particular importance that affirmative action in South Africa is protected by the power of a revolutionary Constitution as well as people-centered laws and regulations that can be imitated in other regions of the world.

The main concern of the South African affirmative action efforts was the timely transformation of the public sector to make it a service-oriented institution that would benefit all the people of the country without discrimination on any ground as to race, colour, gender, disability or any other grounds. The most fundamental objective of these measures was that employment in the public sector should no longer be constrained by the racial or colour barrier but be based on equal opportunity for all South Africans. Prof. Vincent Maphai has eloquently argued in relations to the public sector in South Africa. The current transition of South Africa from an authoritarian, racist state towards a non-racial democratic society puts under spotlight all institutions and symbols of power. The civil service is no exception. It is a powerful institution, which has gained notoriety in many circles. Within the business sector it is seen as a white elephant and bottomless pit. English-speaking South Africans perceive it as a citadel of Afrikaner power. Blacks regard it as the cornerstone of oppression. Put these views together, and the result is calls for a complete overhaul of this sector, as part of the dismantling of apartheid.

Affirmative action in South Africa also targeted the private business sector and, as a direct result, a thriving community of new South African entrepreneurs is forcefully emerging. This measure is particularly important as it opened up an additional window of hope for the victims of apartheid that change is accelerating with the vigour and force that the private sector could add to boosting an open market economy. It is interesting to note that despite the heavy legacy of inequality in the distribution of economic wealth and political power as well as the grinding poverty and social ills left behind by apartheid in South Africa, the change wrought by affirmative action in the socio-economic and political life in the country is profound and noticeable in all walks of life.

Some Sudanese scholars and intellectuals interviewed by DRDC on this subject expressed their concern that the situation of public service in Sudan is assimilating some similarities with the description of Prof. Maphai of civil service in apartheid South Africa. In recent years recruitment in the public sector in Sudan seems to be codified along ethnic lines. For the first time in the country’s history the authorities made the requirement that candidates for certain strategic public sector institutions, including the oil sector, fill application forms where they are obliged to clearly state their tribal allegiance. It is the general understanding that the information provided by potential public service candidates is being used for screening and eventually for eliminating persons from certain ethnic groups from employment in certain public sector institutions.

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5 It is to be noted that reference to the experiences of the US and South Africa concerning systems of racial segregation and racism was made by way of providing historical background information. This paper does not imply in any way that the situation in Sudan is identical to the past experiences of these two countries.
8 Vincent Maphai, Political Studies Department, University of the Western Cape, Cape Town, South Africa “Transition and Affirmative Action in South Africa” an unpublished paper.
Nigeria's Experience with Affirmative Action

The experience of Nigeria together with its policy and practice in the area of affirmative action, especially with regard to equal public employment opportunities for its citizens from all regions of the country, deserves special attention in this respect. This is because Nigeria and Sudan share some pertinent common features especially with regard to religious, ethnic, linguistic and cultural diversity. In addition, the three-tier structure of governance obtaining in Nigeria – federal, state and local governments – has been replicated in Sudan since 1998. However, the challenge facing Sudan is in the fair implementation of existing legislations and sincere efforts to see a real system in operation with the necessary Constitutional safeguards, institutions and mechanisms.

The Nigerian Constitution of 1999 prohibits all kinds of discrimination on any ground as to place of origin, sex, religion, status, ethnic or linguistic association or ties. Other subsequent federal measures meant to give effect to the anti-discrimination constitutional provisions included the Prohibition of Discrimination and Enforcement of Equity Act. Together, these measures made good efforts to address issues of equitable regional representation in the affairs of the State. In Section 14, 15 and 16, the Nigerian Constitution of 1999 provided for a "federal character" requirement in the filling of public positions and the disposing of public resources and wealth as well as access to public service and government institutions. These provisions were embodied in the Nigerian Constitution to ensure that no one part of the country is unduly represented at the expense of other parts in government institutions or positions. In practice, the "federal character" requirement is implemented in the form of a system of ethnic quotas that cover all the regions of the country. For the nation’s top post, since the 1998/1999 elections season, Nigeria has been observing the principle of rotation of the Presidency between the North and South.

It seems that all the Constitutions of Nigeria from 1979 to 1999 have made provisions for a quota system and the reflection of a federal character in appointment of public office holders, which makes good sense, in a diverse country and society as Nigeria. Diversity needs to be actively and purposefully encouraged and legally enforced. Various measures have been taken by the government of Nigeria both at the political and socio-economic levels to ensure equal access to education, employment and civil service by all ethnic groups of different geographical and cultural origins. For this purpose Nigeria established the Federal Character Commission and the Federal Civil Service Commission to ensure equitable employment of all Nigerians in the Federal Civil Service. These agencies oversee that the composition of government or any of its agencies as well as the conduct of its affairs is carried out in such a manner as to reflect the federal character of Nigeria, promote national unity, and de-emphasize and diffuse ethnic tension through ethnic integration and harmony. The Nigerian Constitution required that recruitment into the country’s security apparatus including the army and other agencies should be conducted on a federal basis and local governments are allocated quotas to fill in recruitment into these agencies. In order to satisfy the educational yearnings of all segments of the Nigerian society, the government of Nigeria (through the Federal Ministry of Education) has adopted the following criteria for admission to Unity Colleges and tertiary institutions:

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10 In section 14, Subsection 3, Chapter II, the Nigerian Constitution states that “The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.”  
11 See Paul ADUJIE in “Quota System or Federal Character In Nigeria And Affirmative Action Policy In America Compared” at http://www.nigerdeltacongress.com/particles/quota_system_or_federal_characte.htm  
12 Ibid.
Admission into Nigerian federal universities is based on the following percentages:

1. Merit 45 per cent
2. Catchment area 35 per cent
3. Educationally disadvantaged States 20 per cent

Admission into the Federal Government Unity Colleges are based on the following percentages:

1. State quota - 40 per cent (40 per cent of the admission is reserved for equal State quotas.)
2. Merit - 30 per cent (30 per cent of the admission is reserved for students who have performed excellently in the National Common Entrance Examination into the Unity Colleges.)
3. Environmental quota - 30 per cent (30 per cent of the admission is reserved for the indigenous of the locality where the institution is situated.)

Since the 1970s in the wake of the Biafra rebellion, Nigeria made consistent efforts for equitable sharing of economic resources and wealth especially those resources derived from the oil sector to all the constituent members of the federation. For this purpose, Nigeria established the Revenue Mobilization Allocation and Fiscal Commission, with membership drawn from all the 39 Nigerian States. This Commission is empowered by means of Constitutional provisions. It is mandated to formulate and approve modalities for mobilization and allocation of all revenues received by the federal government of Nigeria. In that way, a truly federal dimension is brought into the important issue of the allocation of economic resources and national wealth between the federal government on the one hand and the regional and local governments on the other.

It should be appreciated that Nigeria’s efforts for regional balance and adequate representation in the federal government service of all citizens from the different regions of the country as equals has played an important role in bringing together Nigerians from diverse backgrounds in a coherent structure in the service of their country. Nigeria’s policy for even share of national wealth among all regions of the country is an important socio-economic development tool as it attempts to cater to the needs of its people through a proportionate formula. These two measures have undoubtedly played an important role in fostering the sense of belonging to the nation among Nigerians, diffusing and preventing potential tensions and large-scale social unrest. They also served as a high incentive in keeping the country unified and reducing or eliminating separatist tendencies. Perhaps, the most important result of Nigeria’s policy of regional balance in running the affairs of the State and in wealth sharing was its ability to help maintain peace and security in a unified country that accommodates over 100 million inhabitants of diverse backgrounds. The strength and stability of Nigeria’s federal structure is also consolidated and guaranteed by the wider freedoms enjoyed by political parties and the media as well as the nature of politics and governance, which neither discriminates against nor elevates any race or religion above others.

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13 This information was provided in the 14th, 15th, 16th, 17th, 18th Periodic Reports of the government of Nigeria to the UN Committee on the Elimination of Racial Discrimination (CERD) as contained in UN Document CERD/C/476/Add.3 http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/22399e351c783d12c1256ea100386e36/$FILE/G0440972.doc. The document is dated 21st April 2004
Issues of Social Justice in Sudan

In order to introduce the subject of affirmative action into the Sudanese mainstream politics or as part of the peace-making and peace-building process in Darfur and the country, it is essential to shed light on issues of social justice in Sudan’s contemporary history. Reflecting on Sudan’s history and social set-up is necessary, as it represents the background and foundation upon which the call for affirmative action can be justified and argued. It is also a necessary foundation upon which the momentum around affirmative action for the victims of the ongoing crisis and the people of Darfur in general can be built in Sudan’s national psyche and future plans to realize it can be worked out. Discussion of this subject would be difficult and emotionally painful. It could even look odd to some Sudanese people and observers alike that the necessity for such a debate would arise in an African country, which is free from an official policy of racial discrimination. However, there is no ideal society and the root causes of the violent conflicts that have been engulfing Sudan since its independence in 1956 need to be thoroughly examined if a cure is to be found.

The Sudan is a country of continued migration and its people could roughly be classified as indigenous Africans and migrant Arabs or Arabised local tribes.\(^{14}\) Because of interracial marriages among the people of the country there is no genuine difference between the two broad categories of the Sudanese people as regard physical anthropology, complexion and other racial attributes. This is because the differences between the two broad groupings in Sudan are based more on self-identification and on cultural or linguistic heritage, rather than on genealogy and physical attributes. However, distinction between Arabs and Africans is very important for the Sudanese people. It is being used as a means to control economic and political power mostly by those from the riverian north who claim Arab ancestry. This raises the important point of discrimination based on regional origin in Sudan. Some tribal groups from the west i.e. Darfur and Kordofan, which could make a more authentic claim to Arab ancestry than many others from northern Sudan are despised and treated with suspicion by those in power from the riverian northern and central regions. They are collectively referred to by north as Gharaba – which is a thinly veiled discriminatory term used to describe someone who comes from Darfur and Kordofan.\(^{15}\) The word Sudan in Arabic means the Land of Black People. Sudan referring to the political entity of this African State with its geographic boundaries is relatively new. It was coined in the 19\(^{th}\) century during the Turko-Egyptian rule of the country hitherto referred to as the Egyptian Soudan.

Some aspects of Sudan’s contemporary experience with issues of social justice, alienation and exclusion of certain groups of its citizens from full participation in the economic and political life of the country are painful to digest even by people of good will within Sudan itself. This is especially true in the situation of the Sudanese masses that were consumed by ideological theories portraying Sudan’s ethno-cultural and religious diversity as a threat to its borderline Arab-Islamic identity. These theories do, of necessity, relegate Sudan’s African identity to a second place if not to dismiss it altogether. They are meant to mask the effects of social injustice, exploitation and discrimination as some of the main factors that underpin the protracted armed conflicts and social unrest in the country. The minds behind these theories overlook the imminent dangers, threats and complications that the country would face in its future course. It is time to address these issues with a view to work out strategies to avert any possible damage that they could do to the country and the African sub-region. The future of the Sudan and the African sub-region would be bleak to a greater degree if this pattern of \textit{laissez faire} continued unabated or challenged.

\(^{14}\) Groups that identify themselves as Arabs in Sudan are in reality include considerable numbers of assimilated or indigenous African groups that espoused the Arab culture and identity.

\(^{15}\) An example of this distrust and disdain was the racist rebellion of the riverian north against Khalifa Abdullahi (belongs to the Taisha Arabs of South Darfur) when he reigned over the Mahadist State during its rule of Sudan from 1885 – 1899.
When the Sudan broke its colonial shackles with Britain in 1956, the people from the riverian northern region – who identify themselves as Arabs – were the ones most directly exposed to the colonial rulers and thus the ones who had received some education and training necessary for running the affairs of a modern government. At that time modern educational institutions were concentrated around the capital city, Khartoum, and the central region while the people of South, West and East Sudan lagged behind in modern education and training. It was all too natural that those who had received training and modern education were the ones who inherited the rule of the country. Unfortunately politicians from the riverian north used the newly acquired government authority and actively pursued a strategy to entrench political power and economic wealth of the young nation in the hands of certain riverian northern groups, excluding all others in the West, South and the East from the political and economic life of the country. Most, if not all, northern politicians who have ruled the country since independence in 1956 pursued a policy of maintaining the status quo. They have persistently used all tactics to deprive citizens from what they considered as unfavoured regions including Darfur from a fair share in economic and political life.

The policy of systematic exclusion in Sudan has created two de facto classes of people in the country, a minority elite ruling class, which believes that it was born with the divine right to rule the nation and an oppressed class, which was purposefully sidelined in a bid to force it accept a marginal position in the country’s political and economic life. “Being Muslims and Arabic speaking and with direct contacts with neighbouring Arab countries the Northern ruling elites chose Arab-Islamic identity for the new Sudanese nation. The exclusive identification of the Sudan as an Arab and Islamic nation has been silently resented by the indigenous Africans and non-Muslim Sudanese, because it excluded them from the opportunity of acquiring political power or effectively sharing in it.” However, with the exception of South Sudan, the people in the rest of the country were patient with the existing formula and were able to accommodate it to the extent that the Arab-Islamic identity was not considered as a serious problem at independence time, “but with the subsequent rise of Arab nationalism in the 1950s, (Baathism and Nassirism) and the late development of Islamic fundamentalism, this exclusive national identification of Sudan as Arab and Islamic became one of the main causes of the civil wars and political discontent.” This was a point of departure for Sudan’s chronic problems of violent identity conflicts and civil unrest which are graphically manifested by the current armed conflict in Darfur where Sunni Muslims are victimizing and massacring fellow Muslims followers of the same school of Sunni Islam. The situation was complicated by the tendency of the ruling elite – for the purpose of consolidating its grip over power – to prefer a centralized system of government rather than decentralization and to opt to military and theocratic regimes instead of multi-party and liberal democracy.

On paper, Sudan’s previous and current Constitutions and laws do not overtly sanction exclusion of, or discrimination against, any group of citizens on racial or ethnic grounds especially in government employment policy. Because of the strong role played by governments in the affairs of the State, public service has always been one of the main focus points of policy in the country. The 1998 Constitution and its predecessors made provisions for an inclusive public service whose cadre is recruited on a fair and equitable basis. Article 2 of the 1998 Constitution stated that: “The government shall ensure participation, (consultation) shura and mobilization, respect for justice in the division of power and wealth.” In fact one of the common features of Sudan’s previous Constitutions as stated in the 1998 Constitution reads as follows:

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16 These groups include tribes such as the Ja’aliyin, Shaiqiya, Danaqla and some of the Nubians who originate from the far northern part of Sudan. The educated elites within these groups were the product of modern schools and colleges built by the colonial rulers in Khartoum such as Gordon Memorial College, which is currently known as the University of Khartoum.
17 Challenges Facing the Peace Process in the Sudan, Position Paper, Sudan Federal Democratic Alliance, 12th February 2003
18 Ibid.
1. The civil service consists of all government employees and is responsible for the administration for the country

2. The civil service shall be open to all based on qualifications relevant to the function, and based on proportionate national representation.

3. The rights and responsibilities of civil servants and their conditions of service shall be determined by law. ¹⁹

The 1998 Constitution also provided for the establishment of Civil Service Complaints Chambers to address the grievances of civil servants and look at issues of employment in government service at all levels of the Federal and State governments.²⁰ However, in practice social injustice, discrimination against, and exclusion of, large segments of Sudan’s citizens from political and economic and cultural life of the country persist. Social injustice and exclusion are most visibly demonstrated in the policies of recruitment for and employment in government service. This reality is hidden by official denial and intellectual indifference. In doing so they tend to overlook the devastating effects of social injustice and exclusion of the majority of the people of the country on the Sudanese society at large. All means are used to sustain exclusion including ethnic and tribal manipulation and the use of religion for political ends. The irony of these practices is that while the religion of Islam advocates high moral values such as justice, equality and non-discrimination, exclusion and marginalization in Sudan are nurtured and fostered by the organic association between the misinterpretation of religious teachings and their interconnections with ethnicity and race matters.²¹ This dilemma has created a taboo on political and intellectual discussion of issues of social injustice, exclusion, intolerance, racism, and discrimination in the country. The direct result of this state of mediocre indifference is that discrimination and prejudice are practiced in Sudan as if they are integral parts of everyday life.

Efforts for sustained exclusion of certain ethnic groups, including the people of Darfur, from public life in the Sudan started before the country gained independence in 1956. In 1954 the colonial administration established a Sudanisation Commission mandated to identify and appoint potential Sudanese citizens to fill public posts in the government service (previously occupied by British and Egyptian expatriate officials). The Commission was composed of Sudanese nationals assisted by an Egyptian and a British official. 913 posts of all categories in government service were available for Sudanisation in the central government and also in the nine Provincial Administrations of that time including the Darfur Province. When the Sudanisation process started, government civil servants from Darfur were hopeful that they would enter the mainstream government service and positions of power in their newly independent nation.

The result of the Sudanisation process was disappointing for the people of Darfur. Out of the 913 Sudanised posts, 905 (or over 99%) of the total posts were designated for candidates from the riverian northern region or persons originating from this area who were working in government service in other regions of the country.²² The Sudanisation Commission appointed no person from Darfur in any of the vacant positions. The reasons cited by the Commission for this unacceptable

¹⁹ Sudan Constitution of 1998, Articles 126 (1) and (2). At http://www.sudan.net/government/constitution/english.html
²⁰ Ibid. Article 127.
²¹ The religion of Islam is largely associated with the Arab race in Sudan. In fact Islamic teachings praise the Arab race for being its recipient and also for its role in spreading it all over the world. Consequently, Islam commands due respect from its followers to the Arab race, culture and heritages. Mohammedan’s Sunna asserts that those who speak the Arab language are Arabs. The teachings of Islam and Sunna clearly reject discrimination against any group of Muslims and call for the equality of all races.
²² In addition to the 905 persons from the riverian northern regions of Sudan, the Sudanisation Commission appointed 8 persons from other regions of the country including 6 persons from Southern Sudan and 2 from Kordofan. All of these additional 8 persons were appointed in junior administrative posts as Assistant District Commissioners and two junior police officers).
exclusion of people from other regions including Darfur from the first modern government of their country were “inexperience” and “inadequate educational background” of the aspirants for the posts. The work of the Sudanisation Commission was guided by the merit system of modern education and training. In the process they purposefully ignored the requirement of practical experience and knowledge of the local culture and customs as well as equity, fairness and representation of all the regions of Sudan in the infant public service. All the government senior administrative posts in Darfur were handed over to people from the riverian northern region. They have moved together with their families and settled in separate areas in the main towns of Darfur.

Most successive multi-party and military governments in post–independence Sudan performed no better than the Sudanisation Commission and the pattern of stark imbalance in the appointment to constitutional, legislative and high executive institutions of the State continued. It was only in 1966 – 11 years after Sudan’s independence – that the first person from Darfur was appointed as cabinet Minister. Stark imbalances in government employment are growing and observed in junior posts in public service where in certain government institutions it is hard to find people from Darfur at any level. The latest example is that in August 2005 the Attorney General’s Chamber appointed 213 new commissioners. Only seven individuals from Darfur were appointed to fill some of these posts and only after they proved to be among the staunch supporters of the government. Yet another type of exclusion is observed in the relatively hazardous jobs such as the army and the police force where the majority of the rank and file comes from the disadvantaged regions (Darfur and other parts of the country) while a disproportionate majority of the Officers Corps, which enjoys all the important privileges and benefits comes from the riverian northern region.

Control of the State apparatus and policies in the hands of few elite groups was the breeding ground for nepotism, corruption and mismanagement of national wealth and resources. The direct consequence of the control of the State machinery in Sudan was the accumulation of economic wealth in the hands of few elite groups. Sudan is among the worst examples in the world in terms of the gap between the rich and poor segments of society. Despite higher economic growth rates achieved during the 1990s, oil exports and increased government revenues, nevertheless, widespread poverty, highly skewed income distribution, and inadequate delivery of social services remain serious problems in Sudan. Consequently Sudan remains one of the poorest countries in the world, with a weak and uneven economic base and infrastructure. Furthermore, the unequal development policies pursued by successive central governments and the bias towards the northern and central riverian regions and metropolitan centres have created wide regional disparities in economic and social development and unprecedented levels of poverty in the peripheral areas including Darfur. These deliberate policies have compounded the misery of the rural population and created mounting grievances in those areas. The result was spiralling of violence, prolonged civil wars and ethnic polarisation, which have severely impacted on the country's prospects for peace and development.

23 In 1966 the Government of the Umma Party led by Mr. Sadig El Mahadi appointed the first Cabinet Minister from Darfur, Mr. Ahmed Ibrahim Diraige, Minister of Labour. His appointment was made possible only because of the bitter protest of the people of Darfur from inside Parliament that they should be represented in the government at ministerial level. So far the Democratic Unionist Party, which is the second major political party in the country has not appointed any person from Darfur in any cabinet portfolio in all the governments it has formed or the coalition governments in which it took part during democratic periods since Sudan’s independence in 1956.

24 According to the 2005 report of Transparency International, Sudan scored 2.1 of the International Corruption Perceptions Index which puts it at the bottom of the Arab States behind Iraq and makes it one of the worst examples of corruption and mismanagement in Africa only superseding Angola, Cote d’Ivoire, Equatorial Guinea, Nigeria and Chad. Transparency International’s 2005 report can be consulted at http://www.transparency.org/cpi/2005/dnld/cpi2005.highlights_africa.pdf

25 In 2005, Sudan’s Growth National Product is estimated at 80 billions Dollars.

26 Dr. El Tigani El Sesei, paper entitled “Balanced Development and Post-conflict Economic Challenges in the Sudan.”
Why the Victims of the Conflict in Darfur Deserve Reparations and Compensation

The current armed conflict in Darfur and the associated man-made humanitarian crisis represents a unique experience in our contemporary world history when a government purposefully targets millions of its own rightful citizens – including women, children, the elderly and other vulnerable groups – in a massive campaign of destruction, killing and forceful displacement. The pretext used was a counter-insurgency campaign. The heavy military means used including deliberate aerial bombardment of civilian locations and the disproportionate level of destruction caused by this campaign against certain ethnic groups in the region such as the Fur, Masalait, Zaghawa and a host of other African groups leave many questions unanswered about the real motives of the government of the Sudan in its war in Darfur. By all accounts, a counter-insurgency campaign would have not caused the damage that has been selectively inflicted upon civilian populations from certain ethnic groups of Darfur if the motive was merely to fight a counter-insurgency war and to restore peace and security in the country. Plausible reasoning suggests that what mattered to the government of Sudan in its scorched-earth military policy in Darfur is the geopolitical strategic and economic importance of the region rather than its people and their well-being.

The result of the government’s military policy in Darfur in terms of loss of lives and livelihoods is yet to be fully and accurately documented because of the vast area to be covered and also because of the situation of insecurity, which is prevalent in the region at present. However, more precise estimates of the destruction of lives and other collateral damage against the people of Darfur can be accessed when the situation returns to normal. Figures about causalities and identification of material loss should not be complicated and difficult as most of the IDPs can still identify their areas of origin, lives lost and the material damage incurred. Abundant circumstantial evidence of the level of destruction, which is substantiated by living facts and eyewitness accounts, does exist. The shift from a normal life in civilian habitations to a situation of internal displacement and across border exodus has been cruel and radical with a devastating social impact on the victims of the armed conflict in Darfur. They were uprooted from their homeland in a brutal manner. According to available estimates, the armed conflict in Darfur forced more than two million individuals to become internally displaced persons or cross international borders as refugees in Chad and other countries. This is estimated that over 3 million persons or about half the region’s population have been rendered as war affected people. No one knows the exact figures of the persons perished as a result of the armed conflict in Darfur but the death toll could reach 500,000 causalities.

Sudan’s bloody history as manifested by the more than two million causalities and the deliberate and forceful displacement of about 4 million IDPs and refugees during 20 years of armed conflict in the South and the Nuba Mountains, should be a vivid reminder of the level of destruction of lives and livelihoods that those historically controlled governments in Sudan were prepared to inflict on their citizens from what they consider as unfavoured regions of the country. All these horrendous atrocities were committed in cold blood, on racist grounds and for the sole purpose of maintaining political power and economic privileges in the hands of a few elite groups in the country.

According to the UNICEF report issued in November 2005 on the situation in Darfur it was estimated that 3.4 million people, or the equivalent of about 51% of the total population of Darfur have been affected by the armed conflict including about 1.3 million children under 18 years of age and more than 500,000 under five years of age. They currently live in about 200 settlements and IDP camps around Darfur and neighbouring parts of Chad. The mortality rate among these communities is very high because of insecurity, road blockades and inaccessibility and the resulting lack of food and other life-saving relief material. The report also estimated that 2.5 million people are not receiving any external help because they live in isolated and dangerous areas under the mercy of the Janjaweed and the government army. http://www.unicef.org/emerg/darfur/index_23629.html
If it is the legal obligation of a State to protect and ensure the safety and physical integrity of all individuals living within its geographic boundaries, then Sudan has dramatically failed to respect this fundamental legal obligation with regard to millions of its citizens in Darfur. More so, Sudan should be held criminally responsible as it currently stands accused of committing, abetting, condoning and supporting the commission of massive atrocities within its territory that amount to war crimes and crimes against humanity, which is the case of the conflict in Darfur. Indeed, the selective targeting of civilian populations and non-combatants by sophisticated military means in such a deliberate and large-scale manner and the atrocities committed by the Janjaweed in Darfur are among the most serious and heinous crimes under international law.

In its reading of the events in Darfur DRDC like many other observers reached the conclusion that two criminal aspects underpin the human rights and humanitarian crisis in Darfur viz. 28

a). The premeditated mass killing and physical destruction – in whole or in part – of certain groups of people in the Darfur region because of their cultural, ethnic, racial and/or tribal backgrounds; 29 and

b). The illegal appropriation of their land, the confiscation and theft of their livestock, means of production and other material wealth and the extortion of money from the conflict victims for protection by the army and other government-sponsored militias in particular the Janjaweed. 30

These two aspects of the Darfur conflict alone provide, beyond any reasonable doubt, that all the victims of the crimes committed in Darfur deserve atonement, reparations and compensation for the indiscriminate damage inflicted upon them either individually or collectively. They also provide a solid ground for an immediate process of accountability of the perpetrators of these crimes before an independent judicial body. Reparations and compensation in this case are necessary measures to serve an example for combating the impunity that surrounded the commission of such egregious crimes in Darfur as well as addressing the grievances of the affected populations and render justice to them. These measures could ultimately help ensure that the commission of these crimes would not be repeated in the region in the future thus play an important preventive role, which is one of the essential components of the peace-making and peace-building phase in the aftermath of the current armed conflict in Darfur.

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28 Among the vast literature written on the atrocities committed in Darfur, the report of the UN Security Council established International Commission of Inquiry on Darfur (ICID) was the most authoritative and comprehensive document ever produced on the extent of this crisis. The International Commission of Inquiry on Darfur (ICID) was established by the UN Secretary General pursuant to Security Council Resolution 1564 of 18th September 2004 in order “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.” It has established that large-scale and systematic war crimes and crimes against humanity have been committed in the region. The ICID report to the UN Secretary General dated 25th January 2005 can be consulted at http://www.ohchr.org/english/docs/darfurreport.doc

29 Some but not all the ethnic groups that live in the Darfur region which are being targeted by the destruction campaign include the Bideyat, Bagirma (or Mabang), Beigo, Berta, Birgid, Borgo (or Wadai), Burno, Daju Erenga, Fur, Hawwara, Hausa, Fallata, Kara, Kinin, Kresh, Masalait, Meidob, Mileri/Misiriyia (Jabal Mun), Qimr, Tama, Tunjur and Zagawa etc. The Fur is the largest African tribe in the region followed by the Masalait and Zagawa. On 18th December 2003 the representatives of these tribes signed a document affirming their rights in the region in response to the document that the Arab Alliance signed on 15th November of the same year. Since then we observed an increasing tendency among some of the African tribes of Darfur to consider themselves as collective victims which may develop into the perception of one entity against another different group of people.

In its report of 21\textsuperscript{st} January 2005, the International Commission of Inquiry on Darfur (ICID) has recommended the establishment of an International Compensation Commission to address the grievances of the victims of the Darfur crisis and repair the immeasurable damage done to them. This is an important measure as it attempts to treat the consequences of the criminal aspects behind the crisis in Darfur which are centred around the perpetrators’ desire to kill and destroy the victims and strip them of their land, steal their livestock and other material wealth and destroy all means of their subsistence as well as their culture, identity and heritage including changing their genetic attributes. The campaign to change the genetic attributes of the victims of atrocities in Darfur is being carried out through systematic rape and sexual violence against women and girls.

The concept of reparations of damage done is well established in the culture and tradition of the people of Darfur. The right of victims of damage for compensation is recognized in the customary law and practice in Darfur. Traditional leaders were charged with resolving issues of reparations and compensation. They carry out this task expeditiously and in an effective manner and their rulings are usually acceptable to all parties to the conflict. The process is open, transparent and well rooted in the peoples’ culture, traditions and beliefs. Reparations culture in Darfur is sophisticated and includes both moral and monetary compensation. The process also involves open acknowledgement of guilt, acceptance of responsibility, commitment of non-repetition and finally repairation of the damage done in the form of monetary payment either in cash or in kind. Depending on the situation and the kind of damage inflicted, monetary compensation in Darfur is organised through blood money known as “Diyat al-Damm” and “Sadaqa” which are collectively gathered by the concerned community and paid to the victims and their families. Darfur’s rich culture of reparations and compensation as practiced by traditional leadership structures was mainly confined to low intensity conflicts that involve a limited number of individuals or groups of individuals. It has no previous experience or capacity to deal with reparations claims for victims of such massive crimes that currently affected millions of people in the region. The rich experience on reparations and compensation accumulated by traditional leadership in Darfur would, however, substantially contribute to consolidate and facilitate future reparation project in the aftermath of the current conflict in the region.

\textbf{Situation of Women and Children Victims of the Conflict}

The situation of women and children victims of the armed conflict in Darfur is so acute and so urgent that it deserves special attention and action. Women and children represent the overwhelming majority of the IDP and refugee communities. They live in precarious conditions in makeshift shelters of branches and grass that barely protect them from the day heat or the night cold. It can be argued that since the horrors of the World War II and the 1994 Rwanda genocide,\textsuperscript{31} Darfur has been the living experience of wholesale atrocities committed against a distinct group of people with the lion’s share of the burden borne by women. The long litany of atrocities committed against women in Darfur includes, but is not necessarily limited to, killing, forced displacement, torture and physical assault, mutilation, maiming, war trauma and agony, humiliation, deliberate deprivation of food and live-saving relief material, abduction for sexual slavery, rape and gang-rape of women and girls.\textsuperscript{32} Some girls who have fallen victim to rape, sexual violence and other atrocities in Darfur are as young as 8 and 10 years old. It was reported that the Janjaweed

\textsuperscript{31} See Linda Melvern, A People Betrayed, The Role of the West in Rwanda’s Genocide, Fourth Impression, 2004, New Africa Education Publishing, Claremont (South Africa)

\textsuperscript{32} For more on rape of women victims of the armed conflict in Darfur see the comprehensive study of Tara Gingerich and Jennifer Leaning entitled \textit{The Use of Rape as Weapon of War in the Conflict in Darfur, Sudan}, October 2004. The Study can be consulted at http://www.hsph.harvard.edu/fxbcenter/HSPH-PHR_Report__on_Rape_in_Darfur.pdf
militiamen\textsuperscript{33} have marked women and broken the legs and arms of rape victims – especially those held for sexual slavery – in order to prevent them from escaping.\textsuperscript{34} More than 2 million school age children are now affected by the conflict in Darfur and they live in camps or similar settlements. For the third successive year the overwhelming majority of these children were not allowed to attend normal schooling. Hundreds of children in IDP camps are dying from malnutrition and other preventable diseases on a daily basis.

Women and children victims of the Darfur conflict need special attention and treatment, most importantly, they need a sound future strategy to ensure that the injustice they suffered is satisfactorily addressed. This is essentially a long-term process that requires a multidisciplinary approach to address all the dimensions of the crisis and its particular impact on these vulnerable groups. Rehabilitating women victims of the Darfur tragedy cannot be effectively done unless introduced within an internationally supported special affirmative action plan to rebuild their shattered lives and help them start afresh. Plans to rehabilitate women in Darfur should – as stated by ICID in its report – involve an adequate and satisfactory reparations scheme that takes the form of \textit{restitutio in integrum} (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care as well as legal and social services, satisfaction including public apology, acknowledgment, acceptance of responsibility and guarantees of non-repetition.

Other Victims of the Darfur Crisis

The victims of the human rights and humanitarian crisis in Darfur are not only confined to individuals who currently live in the region. Many persons originating from Darfur who live in other parts of Sudan are affected by this conflict often for no reason other than their blood tie with the victims of the crisis in Darfur. Tens of thousands of such persons including community leaders, intellectuals and educated persons from Darfur are being targeted in a massive campaign of harassment, arrest and dismissal from public service. The list of such targeted persons is long. It includes politicians, businessmen, scholars, civil servants, students, army and security officers, human rights and pro-democracy activists. This campaign did not even spare members of the ruling party and elected members of the dissolved National Assembly or Parliament from Darfur. Individuals from Darfur that were harassed, illegally arrested or dismissed from government service were not compensated in any way or paid after-service benefits.

Human rights violations unleashed by the government of Sudan against the people of Darfur are also taking the form of an all-round economic war against individuals from the region in particular the business and merchant class.\textsuperscript{35} Aggressive administrative measures through excessive excise duties and taxation have impoverished thousands of businessmen and merchants originating from Darfur. The once thriving business community from Darfur that created and controlled \textit{Souk Libya}

\textsuperscript{33} The \textit{Janjaweed} is a coined Arabic word used by the local people in Darfur to refer to gangs of outlaws and robbers. These groups are composed of criminal elements from various nomad tribes of Darfur. Uneducated and barely civilised, the \textit{Janjaweed} are victims of the government Arab-centric cultural programme. They were manipulated and politicised around self-centered racist ideas of the Arab Congregation. The \textit{Janjaweed} exclusively identify themselves as Arabs. It can, therefore, be argued that all the \textit{Janjaweed} are Arabs, yet it should be noted that not all the Arabs of Darfur are \textit{Janjaweed}.

\textsuperscript{34} For more on the use of rape as weapon of war in Darfur see AL Index: AFR 54/097/2004 dated 9\textsuperscript{th} August 2004 entitled “Sudan: Surviving Rape in Darfur” at http://web.amnesty.org/library/index/ENGAFR540972004 and AL Index: AFR 54/076/2004 dated 19\textsuperscript{th} July 2004 entitled “Sudan, Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences.” at http://web.amnesty.org/library/index/ENGAFR540762004 respectively.

\textsuperscript{35} On 29\textsuperscript{th} May 2003 and the following days the government of Sudan started a 3,000 man-strong military operation targeting \textit{Souk Libya} and \textit{Souk Abu Zaid}, which are two market places in the suburbs of Omdurman the national capital twin city. The security forces arbitrarily closed down shops, confiscated merchandise and arrested merchants. It was reported that since June 2003 the security forces routinely confiscate private wagons and trucks owned by individuals from Darfur anywhere in the country.
market in Omdurman for many years was literally destroyed and expelled from this market place. Since May 2003 the government is conducting secret operations targeting the main market places in the suburbs of Khartoum and its twin cities Omdurman and Khartoum North where there is high concentration of merchants from Darfur. On 29th May 2003 and the following days, government launched a 3,000 man-strong military operation targeting Souk Libya and Souk Abu Zaid, which are two market places in the suburbs of Omdurman with high concentration of merchants from Darfur. The security forces arbitrarily closed down shops, confiscated merchandise and arrested merchants. In follow up of this campaign and since June 2003, the security forces routinely confiscate private wagons and trucks owned by individuals from Darfur anywhere in the country. They especially target four-wheel driven vehicles, which are widely used as means of transportation and interstate trade. This ban is especially harmful to the people of the region due to unavailability of asphalted roads or railways network as well as the vast area of desert or semi-desert that cannot be easily crossed with other types of vehicles. This measure was tremendously devastating on the lives of these merchants and their households. Most of these victims have lost their only source of income and means of existence. No compensation whatsoever has been paid to those individuals who have had their properties illegally confiscated.

Since the second half of 2003 until mid 2005, the government has routinely conducted demolition campaigns of houses in the poor residential areas in the environs of Khartoum and Omdurman, which are inhabited by an overwhelming majority of people from South and West Sudan including Darfur. These people were displaced from their home regions by the insecurity prevailing in their war-devastated areas. Some of these people lived in the targeted areas for over 10 years. Demolition is conducted at short notice and without financial compensation or alternative accommodation. By the end of October 2004, thousands of families were left without shelter in El Salama and Soba al-Arradi squatter areas (South Khartoum) as well as El-Salaam and Wad el-Bashier IDPs camps in (North Omdurman) where massive demolition activities have started earlier in the year. In October 2004 alone more than 5,000 households in el-Saliheen and el-Sareeha squatter areas were made homeless. Most of the affected individuals and families ended up by abandoning their claims for the land or moved to other harsh areas as they cannot afford to pay the extortionate and excessive amount of land fees asked from them by the government. The affected people believe that the whole plan is a security measure to expel them from Khartoum as they are considered potential supporters of Darfur rebellion.

The government campaign of dismissing people originating from Darfur from public service as well as its policy of deliberate and systematic impoverishment of businessmen and the merchant class originating from Darfur and the demolition of dwellings inhabited by people from the region amount to deliberate and systematic denial of the enjoyment of basic rights guaranteed by regional and international human rights treaties to which the Sudan is a State Party. They represent flagrant violations of the civil and political rights of their victims as well as their economic, social and cultural rights and their right to development. The government policies against people originating from Darfur have in effect deprived their victims of any opportunities for socio-economic benefit and advancement. The direct consequence of these illegal acts on their victims is that thousands of individuals from Darfur have had their lives shattered and the well being of their families endangered. They need special reparations schemes, financial compensation, and counselling as well as moral and psychological support. 

36 See Albayan Arabic Daily Newspaper, Khartoum, Sudan, dated 26th May 2003.
37 ICID Report, op. cit. note 25, Paragraph 599.
Precedents for Reparations Claims and Schemes

Most of the previous case law on reparations schemes concerns the compensation for specific losses usually suffered on an individual basis such as the loss of human life, injury and destruction of property, buildings, or other material wealth. Yet the principle of reparations and compensation is just as valid and, in fact, it is even more pertinent in the case of unlawful actions on a larger scale, which affected whole communities or groups of people such as the case of the conflict in Darfur. Indeed, there are direct precedents for the payment of reparations and compensation for collective damage done to individuals or specific groups of people. In this respect it would be useful, for the purpose of illustration only, to refer to the following precedents:

a. In August 2003 Libya paid US$ 2.7 billion in a compensation package for the relatives of the 270 people who died on Pan Am flight 103, which exploded over Lockerbie, Scotland, in December 1988. Under the deal, Libya paid the sum into an account at the International Bank of Settlements in Basel, Switzerland. Each family received an initial payment of US$ 4 million. A further US$ 4 million will be paid when the US lifts its sanctions on Libya and a final payment of US$ 2 million will be made if the US repeals its Iran-Libya Sanctions Act and removes Libya from its list of States sponsors of terrorism.

b. In 1999, all the major Swiss Banks agreed to publish lists of private accounts and other savings owned by the victims of the Holocaust and the heirs and relatives of these victims were invited to prove their inheritance rights and claims. The amount involved was US$1.25 billion. Furthermore, the Federal Government of Switzerland established a special fund of about US$ 70 million so as to provide relief to Jewish organizations and individuals in connection with the deposits made by the holocaust victims.

c. Earlier in the 1990s, the United Nations Security Council has passed a number of measures against Iraq under Chapter VII of the UN Charter, which were binding in international law. These measures required Iraq to make reparations payment for the damage caused by its August 1990 invasion of the State of Kuwait, including compensation payment to individuals victimized during that invasion.\(^38\)

d. So far the State of Israel has received more than US$ 65 billion in restitution and reparations for the damage done to the Jews and appropriation of the wealth of survivors and victims of the Nazi Holocaust during World War II.

e. Under the British Foreign Compensation Act of 1950 a number of reparations agreements have been made. Financial settlements were made by Bulgaria, Poland, Hungary, Egypt and Romania for the confiscation of property owned by Britons in these countries. A Tribunal was set up to make awards from the sums made available and ensure that justice was carried out in favour of the claimants whose property had been expropriated in these countries.

From this differential set of international precedents that are largely based on legal and political arrangements for reparations and compensation schemes, it is, therefore, clear that the concepts of reparations and compensation are firmly established in international law and actively pursued by States, on behalf of their affected citizens against other wrongdoing States.

The second category of international precedents of reparations and compensation schemes which is of great relevance to the demand for reparations and compensation for the victims of the massive destruction in Darfur is deduced from situations where a State willingly accepts it moral and legal responsibility to make reparations and atonement, not to foreign entities or nationals of other States, but to individuals and groups of people within its own geographic boundaries. This situation concerns individuals and groups whose rights had been violated by forceful or unlawful acts wittingly committed by the government of their own country. Examples from the United States of America, Sierra Leone, South Africa and Malawi, Chile, Argentina and other Latin American States are relevant to the situation under consideration. It is to be emphasized that the relevance of these situations to the conflict in Darfur is in principle only and not in scale and magnitude.

In 1988 and based on the report of the Commission on Wartime Relocation and Internment of Civilians, the US Congress passed the Civil Liberties Act,\(^39\) which was designed to make restitution to US citizens and permanent residents of Japanese ancestry who were entered during WWII. The courageous language used by this act to describe the US treatment of this segment of its society largely fits the reaction of the government of Sudan towards the indigenous people of Darfur in the aftermath of the rebellion in the region and the government selective targeting of civilian populations from certain ethnic groups on suspicion of real or imaginary role that they have played in the rebellion. The US Civil Liberties Act was enacted because of the grave injustice done to US citizens and permanent residents of Japanese ancestry and that action of the US government against this group of persons:

> “... were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”\(^40\)

An independent Commission was set up to investigate claims from concerned victims and their families. A total amount of US$ 1.2 billion, or about US$ 20,000 for each surviving claimant was paid.\(^41\) The US Government also made similar provisions for restitution to the indigenous Aleut residents of Alaska “... in settlement of US obligations in equity and at law, for injustices suffered and unreasonable hardship endured while those Aleut residents were under US control.” In the same token some steps have been taken to recognize the right to restitution to indigenous peoples whose land was plundered and occupied, and whose people were decimated, especially in the United States, Canada, and Australia. Each one of these countries has at least made land rights settlements and/or financial payments to the affected indigenous peoples. These measures represent some recognition that the surviving generations of the indigenous people in these countries have the right to a measure of reparations for the unlawful acts committed against their ancestors even when the acts were committed hundreds of years ago.

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40 Ibid.

41 The US Congressional Civil Liberties Act of 1988, began by stating the basis for reparation in clear terms which could be applied with the greatest relevance to the situation of the victims of the tragedy in Darfur. It declared that: “The purposes of this Act are: 1.) Acknowledge the fundamental injustice of the evacuation, relocation and internment of US citizens and permanent resident aliens of Japanese ancestry during World War II; 2.) Apologise on behalf of the people of the US. Make restitution to those individuals of Japanese ancestry who were interned; and 3.) Make more credible and sincere any declaration of concern by the US over violations of human rights committed by other nations.”
On the continent of Africa reparations schemes for victims of massive violations of human rights and international humanitarian law were introduced in Sierra Leone, South Africa and Malawi. In Latin America, Chile, Argentina, El Salvador and Guatemala have all implemented reparations and compensation schemes for the victims of political violence and wars in these countries during the 1980s and 1990s. The nature and magnitude of the crimes addressed by these schemes is different from the situation in Darfur, yet the principle of recognizing the damage done and accepting responsibility to make atonement and relief to the victims of illegal acts remains the same. In these cases persons that were affected by the reparations projects included actual victims who are still alive or the direct relatives of the dead and forcibly disappeared persons. They also include the surviving victims of torture and mutilation, political prisoners and persons forced into exile. (For more details on these reparations projects see Annexe One and Two to this Study)

The Legal Basis for Reparations and Compensation

It is desirable that issues of reparations for the damage done in Darfur and compensation for the victims of atrocities for their losses are to be among the subjects of political negotiations between the government of Sudan and the Darfur insurgents. However, it is essential to address these subjects within a framework of law and justice. This is because political arrangements are more likely to be influenced by ulterior motives and may not generate the necessary response to the immediate needs of the victims of atrocities in Darfur especially of those individuals who can only be saved by direct intervention to make good the damage they suffered. However, experience also shows that the results of enactment of the provisions of law alone to address massive crimes and achieve social justice are at best patchy. In this regard political will is an indispensable factor in giving effect to agreements based on law and justice. Therefore, there is basic necessity for an interdisciplinary approach that combines the necessary political dispensation, legal and legislative provisions and independent judicial process. There is also basic necessity for civil society efforts to secure the necessary political will, and most importantly to mobilize and involve the influential social actors in the country including religious and community leaders in a serious and sustained process with a sincere quest for justice, reconciliation and rehabilitation of the victims. Yet for the reparations scheme in Darfur to succeed a contingent of jurists as well as a multi-disciplinary body of experts is needed to pave the way for political negotiators. Negotiations shall be comprehensive, sincere and victims-oriented to ensure that a formula capable of addressing the multifaceted crisis and in the meantime acceptable to all parties were reached at the end.

Reparations and compensation under international law are based on the legal obligations and the responsibility of a State. These obligations are considered to be consistent with the secondary rules that determine the legal consequences of State actions or inactions that fail to meet or fulfil substantive legal obligations. These substantive legal obligations are considered the primary rules and in most cases such obligations cannot be derogated from under any circumstances. Primary rules include things like the obligation of States not to use military means including aerial bombardment against civilian populations in particular in situations of internal armed conflicts. Primary rules oblige States not to allow massive killing of unarmed civilians and the destruction of their livelihoods. States are obliged not to forcibly dispossess people of their land and material wealth or force them to become internally displaced persons or cross international borders as refugees. States are also obliged not to allow the commission of systematic and large-scale rape and sexual violence against women and girls in their territories. States cannot resort to the practice of torture and other cruel, inhuman or degrading treatment or punishment. The Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (November 2001) stated that every act by a State, which
Internationally wrongful acts occur when the damage under question was caused by conduct consisting of an action or omission which: a). Is attributable to the State under international law; and b). Constitutes a breach of an international obligation of the State.

By way of reminder, Sudan is a State party or signatory to a number of regional and international human rights instruments, which are legally and morally binding upon it. For example, Sudan is a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child. The Sudan is a State signatory to the Rome Statute of the International Criminal Court (ICC) and as such it is obliged to refrain from any acts, which defeat the object and purpose of the Rome Statute.

States are usually required to incorporate regional or international human rights treaties and humanitarian law to which they have voluntarily subscribed into their national legislation. This obligation in effect carries a degree of prominence for regional and international human rights covenants, conventions and charters over national legislation. One of the primary consequences of adherence of States to regional and international treaties is the obligation of the concerned State to bring its laws in conformity with the regional or international text in question. In doing so, the State explicitly accepts that the concerned regional or international treaty governs the characterization of its acts as internationally wrongful or not. Such characterization would not be affected by the provision of the same act as lawful by internal legislation enacted by the concerned State within its territory. This simply means that it does not matter whether the international obligation of the concerned State is found in customary law or treaty or whether the same action is considered lawful by the defaulting State in its own internal laws and legislation.

All the warring factions in Darfur – especially the government of Sudan – are bound to respect their obligations under International Humanitarian Law in particular the provisions of Article 3, which is common to the Four Geneva Conventions and which applies in the situation of armed conflict not of international nature. Military action of the government of Sudan against its own civilian populations in Darfur, and to that extent inaction in ending the orgy of violence and atrocities committed by its army and paramilitary militia groups in particular the Janjaweed, represents a massive and flagrant breach of the country’s obligations under the afore-mentioned human rights instruments. At best the government of Sudan should be held accountable of negligence or omission in meeting its international obligations and assuming State responsibility regarding the protection of its civilian populations from wanton killing and destruction in Darfur.

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43 Ibid, Article 2
44 Op cit, Note 42
45 Article 3 which is Common to the Four Geneva Conventions on the rules of war covers internal armed conflicts that are not of an international character. This Article aims at providing protection to the civilian population which were described in the rest of the documents as protected persons. It requires that all persons taking no active part in the hostilities, including prisoners of war (POWs); shall in all circumstances be treated humanely. It also lays out some basic rules for the treatment of all people combatants and non-combatants alike. Article 3 also states that parties to the internal conflict should endeavour to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions.
Possible Involvement of the ICC in Darfur Reparations Scheme

History teaches us that victims of massive violations of human rights more often than not have little or no voice in conflict settlement or the post conflict political arrangements that follow and as a result their needs and concerns are not satisfactorily addressed. Consequently, thousands of victims of genocide, war crimes, crimes against humanity and other massive crimes under international law have been left alone in their efforts to seek redress usually in a hostile environment in domestic courts. Such domestic courts are not necessarily equipped or competent to deal with crimes of such vast magnitude or to provide the victims with adequate redress and atonement. To the victims of the conflict in Darfur where the government of Sudan is obviously involved in the design and implementation of a scorched-earth policy, war crimes and crimes against humanity, there is no way that they can seek and receive justice at domestic courts. Recent experience with Sudan's judiciary showed us that national courts are government controlled and cannot deliver justice to the victims or address the role of government officials, armed forces and security agents in the whole tragedy in Darfur.

As rightly stated by the ICID in its report, it has now become clear that the government of Sudan and its state apparatus including the judiciary and the law enforcement agencies lack the necessary structures, authority and creditability, and are not capable or willing to try individuals and/or groups accused of the commission of atrocities in Darfur. This is because the conflict in Darfur continues unabated despite the fact that about a year has passed since the ICID presented its final report to the government of Sudan and to the international community in January 2005 including a list of persons suspected of committing, organizing or supporting the commission of atrocities in Darfur. So far the government of Sudan has not initiated any judicial investigation against any person accused of playing a leading role in the crisis in Darfur. Under the circumstances the government of Sudan should not be expected to implement any meaningful programme to repair the damage done in Darfur and compensate its countless victims for their suffering and losses.

However, a new window of hope for victims of violations of international criminal law has opened with the adoption of the Rome Statute of the International Criminal Court (ICC), which provided that the victims of the crimes enumerated in the Rome Statute are entitled to seek and obtain redress through the ICC. The victims were also provided with the possibility to influence the process by voicing their concerns and needs through the support of the Victims and Witnesses Unit at the ICC Prosecutor's office. Victims are also entitled to benefit from the Trust Fund established for the particular purpose of assisting the victims and members of their families. However, it is our belief that involvement of the ICC alone would not be sufficient to address the question of reparations and compensation for the victims of the massive violations of international criminal law that were committed in Darfur. This is because the ICC has a limited capacity and may not be able to address the thousands of cases for compensation that may arise. As it is the first time for the ICC to address such a multi-faceted crisis could it possibly have the experience and competent organs for this gigantic task?

In any case the ICC involvement in the reparations and compensation scheme for the victims of the crisis in Darfur would be an important contribution. Reparations and compensation as necessary measure to be considered in addressing the crisis in Darfur were also proposed by the report of the ICID, which is one of the main documents upon which the ICC would conduct its investigation and work. In reality the ICID provided considerable space in its report to this subject and has devoted Paragraphs 501 – 603 to the questions of compensation to the victims of the

Darfur crisis. In Paragraph 599 of its report, the ICID stated that “Depending on the specific circumstances of each case, reparation may take the form of restitutio in integrum (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care as well as legal and social services, satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility, or guarantees of non-repetition. As rightly stressed by the U.N. Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation."

Efforts of the ICC to address the situation in Darfur, and indeed the whole reparations and compensation efforts for the victims of the Darfur conflict would be greatly consolidated and enhanced by the establishment of an International Compensation Commission on Darfur. Such a Commission should be established under the terms of UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was adopted by the UN General Assembly on 29th November 1995. Indeed, the UN Security Council has set an international precedent in this regard with the establishment – by means of resolutions 687 (1991) of 3rd April 1991 and 692 (1991) of 20th May 1991 – of the United Nations Compensation Commission as a subsidiary organ of the Security Council. It was mandated to make reparations payments to foreign governments and to process all kinds of claims and pay compensation to all other victims of the Iraqi war against Kuwait in 1990-1991 including individual victims and legal entities such as corporations and business houses.

**Affirmative Action as a Tool to Address Exclusion of the People of Darfur from Proportionate Share in Political and Economic Power in Sudan**

Historically Sudan was divided into two geographic regions i.e. the north and the south. The north encompasses the northern, eastern, western and central parts of the country. Division of Sudan into north and south in this manner was arbitrary and could have created more difficulties and complications than solutions to the perceived problems. It was provoked by the quest of the colonial rulers for administrative efficiency and the need for implementing separate sets of cultural, economic, and developmental priorities for each one of the two regions. Darfur, which is the westernmost part of the country is considered and treated as part of north Sudan. With the exception of some parts of the Nuba Mountains, it seems that division of Sudan between north and south was largely linked to religious practices and beliefs. This is because the people who live in the northern regions of Sudan are ethnically and culturally heterogeneous. These people are different although the overwhelming majority of them practice Sunni Islam and that a version of the Arabic language is used as *lingua franca* in many parts of the northern regions of Sudan.

47 The various forms of compensation and their respective advantages were aptly set out by the UN Secretary-General in his Report to the SC of 23 August 2004 on “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies”. There the Secretary-General stated the following: “reparations sometimes include non-monetary elements, such as restitution of victims’ legal rights, programmes of rehabilitation for victims and symbolic measures, such as official apologies, monuments and commemorative ceremonies. The restoration of property rights, or just compensation where this cannot be done, is another common aspect of reparations in post-conflict countries. Material forms of reparation present perhaps the greatest challenges, especially when administered through mass government programmes. Difficult questions include who is included among the victims to be compensated, how much compensation is to be rewarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed.” (UN Document S/2004/616, at P. 18-9, § 54).

48 “No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims. Indeed, the judges of the tribunals for Yugoslavia and Rwanda have themselves recognized this and have suggested that the United Nations consider creating a special mechanism for reparations that would function alongside the tribunals.” *Ibid* p. 19, § 55).
including some areas of Darfur. The treatment meted out by successive governments against their civilian populations in southern Blue Nile and the Nuba Mountains during Sudan’s 20 years of civil war in the south as well as the current military campaign in Darfur, and the violence in the Beja areas of eastern Sudan – which are all considered parts of north Sudan – is the best testimony to the important difference with which the ruling elite groups in Sudan regard their fellow citizens in these parts of the country.

Affirmative action in its classical form could be politically and socially sensitive an issue to address within the context of the Sudanese society, which is, in theory, free from the ills of racial discrimination and socio-economic exclusion as per existing legislation and laws. Constitutional provisions in Sudan guarantee the equality of all the Sudanese citizens in running the affairs of the country and to equally reap socio-economic benefits. However, daily manifestations of *de facto* discrimination, exploitation, exclusion, marginalization and social injustice persist in the country. Discrimination against, and exploitation of, the people of Darfur are linked to historical prejudices linked to Sudan’s past experience with slavery. They are also the result of interaction between the invaders and settlers and their exploitation of the indigenous people.49 These phenomena are observed in the disproportionate representation of the people of Darfur in government structures at all levels as well as in the business and economic sectors and in universities and the high educational institutions. They are being consolidated further by the government’s ongoing campaign to undo any previous achievements made by the indigenous people of Darfur in all fields of life in the country both in the public and private sectors.

According to a Sudanese social-anthropologist:

> “Since its Independence in 1956, Sudan has been dominated by three ethnic groups from the Northern Region of Sudan which constitutes no more than 5% of the population of the state. Using the state machinery, a tripartite coalition of these ethnic groups has promoted a policy of Arab Islamism that ensures a near-total control over wealth and power in the country. The minority power is further enhanced by monopoly over modernity and modernization that was once a preserve of the colonial elite. This monopoly has been maintained at a huge cost, resulting in poverty, disease, famine and regional uprisings including the current one in Darfur.”

As stated above, imbalance in power relations is observed in every walk of life in Sudan but particularly within government institutions including the legislative, executive and the judiciary. Analysis of existing Sudanese political literature on the regional origin of the occupants of the constitutional posts for the first five post-independence national governments from 1956 to 1964 indicates that the Northern Region has maintained a representation in power positions of more than 50% and occasionally exceeded 70%.51 Since the independence of the country in 1956 and until today, all the Presidents of the Republic, both military and civilians, originated from the riverian north and from among three particular tribes from this region. During the peak period of the present government’s exclusionist policy against the people of Darfur from 1999 to mid-2005, the northern region alone which is inhabited by about 5% of the total population of the country provided about 79.5% of the total number of members of the dissolved National Assembly or

49 A picturesque and colourful description of Sudan and the historical exploitive relationship between its indigenous people and the settlers is contained in the 1902 Edition of The River War of Sir Winston S. Churchill.
50 See Dr. Abdullahi Osman El-Tom “Darfur People: Too Black for the Arab-Islamic Project of Sudan” at http://www.sudanjem.com/english/english.html
51 Detailed information about the participation of the five regions of Sudan (North, East, Central, West and South) in the political life of the country including ministerial portfolio and other top government posts was eloquently presented in The Black Book which was issued in 2002. For more analysis on the Black Book see Cobham, Alex: "Causes of Conflict in Sudan: Testing the Black Book", Queen Elisabeth House, University of Oxford at http://www.qeh.ox.ac.uk/pdf/qehwp/qehwps121.pdf
Parliament. These disproportionate percentages illustrate a clear strategy to maintain inequitable distribution of regional representation and the political dominance of the legislative branch of government by the riverian northern region.

In the executive branch of government the situation of regional imbalance and inequitable employment in public service is even more alarming. By the end of 2004, there were 31 Executive Ministries and 4 Coordinating Ministries at the federal level. Altogether they employ about 930 top government public servants at the rank of Under Secretary, Deputy Under Secretary, Assistant Under Secretary and Head of Department. All these posts were occupied by officials from Sudan’s riverian north or persons originating from this area who live in other regions of the country.

Some Ministries – which are considered as strategic institutions for implementation of the government’s Arabisation and Islamisation projects – were historically run and manned by persons originating from the riverian north. All the important positions within these institutions were almost exclusively reserved for them leaving only junior and menial positions for Sudanese citizens from other regions of the country. The government of Marshal Omar El Bashier has consolidated and further affirmed this tendency by its Arab-centric policy and practices in a multi-ethnic, multi-cultural, multi-lingual and multi-religious country. It should be noted that since this government ascended onto power in June 1989 and until September 2005, with some minor exceptions, no Sudanese national from any region other than the riverian northern region has headed any of the following six Ministries.

1. Ministry of Social Planning, Welfare and Social Development,
2. Ministry of Interior,
3. Ministry of Foreign Affairs,
5. Ministry of Higher Education and Scientific Research, Science and Technology,
6. Ministry of Justice

In addition to the exclusion of the people of Darfur from adequate participation in power sharing and high executive organs of the State, Darfur as a region is characterised by crippling socio-economic marginalization which is manifested by the systematic under-investment in infrastructure including things as simple as schools, hospitals and other community service centres. During the period 1958 – 2003, Sudan received US$ 13.4 billion in the form of international development assistance, loans, donations and grants. This amount of funding was provided by donor agencies and foreign governments for the implementation of about 632 development projects and programmes all over the country. Darfur’s share from this amount was US$ 275 million or about 2% only. Because of such deliberate deprivation policy at present there are no major industrial or agricultural projects in the Darfur region despite its potential economic wealth and natural resources. Marginalization of Darfur is also manifested in the absence of sustainable development projects to mitigate the negative impact of natural phenomena such as drought and desertification, which started rearing their heads in the region since the 1970s. This happens despite the general awareness among the people of Darfur and the regional and national governments of the serious threat posed by these phenomena to the relationship between the sedentary and nomad tribes of the region and to the state of peace and tranquillity in the country in general.

52 After the entry into force of the Comprehensive Peace Agreement between the North and South the new government of “National Unity” was formed and Dr. Lam Akol (SPLM) was appointed as Minister of Foreign Affairs and Mr. Peter Niyot Kok was appointed Minister of Higher Education and Scientific Research, Science and Technology,

53 With the exception of a period of 6 months 1989 when the government employed a technocrat, Dr. Sayed Ali Zaki to run the affairs of the Ministry of Finance and Economic Planning.
A stark example that illustrates the corrupt dimension of the relationship between Darfur and the current government was the mismanagement by the central government of funds donated by the people of Darfur and Kordofan for the construction of an all season road to link their remote regions with the rest of the country. The road is known as Tarig Al-Ingaz Al-Garabi or “The Salvation Western Road” and was intended to link Al Obied in Kordofan with Al Ginena in Western Darfur covering about 1100 km. The government has collected billions of Sudanese Dinars from the people of Darfur and Kordofan for this purpose amounting to 95% of the total cost of the project and the government committed to meet the remaining 5%. The government appointed an executive secretariat dominated by officials from the riverian north to supervise the construction of the road. When the time for construction approached, it was disclosed that the government refused to pay its share of the cost. It was also disclosed that high-ranking government officials have embezzled the funds collected from the people of Darfur for the construction of the road. The government made no efforts to retrieve the illegally stolen funds and construct the road. The government finally decided to cancel this project and the material that was imported and delivered to the site of work including steel bridges etc. is now abandoned in the environs of El Ginena. It was obvious that the government decision not to build an asphalt road to link Darfur to the rest of the country was motivated by the perceived socio-economic advantage of such a project to an unfavoured group of people. In sharp contrast to Darfur’s experience, an asphalt road known as Sherian Al Shamal (the Northern Vein) was built, mainly with government money. It links the northern provinces and their privileged people with Khartoum and the rest of the country.

Elements of social injustice listed in this paper provide a clear background and justification for the necessity to embarking on an immediate affirmative action plan to redress the severe injustice suffered by the people of Darfur and which underpins the current armed conflict in the region. An important political recognition of the structural power imbalance in the relationship between the people of Darfur and other parts of Sudan’s riverian northern regions was pronounced in the Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur (DoP). In Preamble Paragraph 4, the DoP addressed the essence of the crisis in Darfur when the warring parties declared that they were: “Convinced that the core of the current conflict in Darfur is political and socio-economic which can only be resolved through peaceful means and within the framework of a comprehensive settlement that addresses its various causes and aspects;” In Operative Paragraphs 5, 6 and 7 they accepted that political, economic and cultural power relations in Sudan were characterised by imbalance and inequality when they agreed on the following principles:

“5. Effective representation in all government institutions at the national level, including the Legislative, Judicial and Executive branches, as well as economic and cultural institutions shall be ensured for effective participation by the citizens of the Sudan, including those from Darfur.

6. National wealth shall be distributed equitably. This is essential to ensure the effectiveness of the devolution of power in Darfur, within the framework of a federal system of government, and to ensure that due consideration is given to the socio-economic needs of Darfur.

7. Power sharing and wealth sharing shall be addressed in accordance with a fair criteria to be agreed by the Parties.”

54 The Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur (DoP) was adopted by the Government of Sudan on the one hand, and the Sudan Liberation Movement/Army and the Justice and Equality Movement in Abuja (Nigeria) on 5th July 2005 at the conclusion of the 6th Round of the Inter-Sudanese Peace Talks on Darfur.
Unjust participation in public life, imbalance in political power sharing and uneven distribution of national economic wealth, which reflect the situation in Darfur and other parts of the country, were also admitted by the government of Sudan during its negotiations of the Comprehensive Peace Agreement with the former rebel Sudan People’s Liberation Movement and Army (SPLM/A). Both the Protocols on Power Sharing and Wealth Sharing, which were agreed upon by the government of Sudan and the SPLM/A in Nairobi in January 2005 have now been incorporated into Sudan’s current Interim Constitution. They have clearly addressed the questions of imbalance in political power sharing and uneven distribution of national wealth. The Agreement on Wealth Sharing stated that “The sharing and allocation of wealth emanating from the resources of the Sudan shall ensure that the quality of life, dignity and living conditions of all the citizens are promoted without discrimination on grounds of gender, race, religion, political affiliation, ethnicity, language, or region. The sharing and allocation of this wealth shall be based on the premise that all parts of Sudan are entitled to development.”

The Protocol on Power Sharing stated that the Government of National Unity should ensure that National Civil Service, notably at senior and middle levels, is representative of the people of Sudan. In so doing it should be guided by the following principles:

- Imbalances and disadvantages which exist must be redressed;
- Merit is important and training is necessary;
- There must be fair competition for jobs in the National Civil Service.
- No government department shall discriminate against any qualified Sudanese citizen on the basis of religion, ethnicity, religion, gender, or political beliefs;

It was fortunate that the Protocol on Power Sharing stipulated that “civil service” should fairly represent all the people of the Sudan and utilize “affirmative action” and “on the job training” to achieve equitable targets for representation within an agreed time frame. It also touched on the important point that additional educational opportunities should exist for war-affected people. With respect to the distribution of civil service posts and targets and in order to create a “sense of national belonging” and address imbalance in the National Civil Service, a National Civil Service Commission was agreed upon with the specific task of overseeing compliance of implementation with the provision of the agreement and that it should formulate policies for recruitment into the civil service, targeting between (25% to 35%) of the positions for people of the South who qualify within a specific time frame. Such figures shall be confirmed upon the outcome of the national census to be conducted in the first half of the Interim Period with a view to ensure that no less than (20%) of the middle and upper level positions in the National Civil Service including the positions of Under-Secretaries were filled with qualified persons from the South. Similar provisions for equitable representation were made with respect to the composition of the Legislature including the National Assembly or Parliament and the Council of States.

The Way Forward with Affirmative Action for Darfur

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55 Article 1.4. Agreement on Wealth Sharing during the Pre-Interim and Interim Period signed on Saturday January 10th, 2004.
56 Article 2.6 Civil Service, Protocol on Power Sharing signed by Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Army in Naivasha (Kenya) on Wednesday, May 26, 2004
57 Ibid, Article 2.6.1.5
Economists and political analysts alike agree that redressing stark regional disparities in some vital areas such as education, health, public service, employment, social welfare and infrastructure development is indeed a basic foundation for socio-economic development. Equality in providing such services is a prerequisite for fostering a sense of belonging to the nation and ultimately for national cohesion. These elements are essential requirements for peace and harmony in society. They are necessary components for diffusing social tension, contentions, discontent and conflicts in Darfur as well as other parts of Sudan. In addition to distributive justice, empowerment and growth and development opportunities for Darfur’s vast human and material wealth, which will be offered by affirmative action programmes are needed for the overall economic health of the country. They would play an important role in raising the standard of living through fulfilment of the human potentials not only in Darfur but also in other parts of the country.

The ruling elite in Sudan prefers to dismiss the calls for an end of the underdevelopment and marginalization of Darfur and other peripheral areas. They argue that the whole country is poor, underdeveloped and marginalized. This is not far from reality, but, however, it is true that some significant variations in wealth sharing, service provision and social welfare are also observed among geographic or administrative subdivisions of the country. It is observed, however, that average measures of underdevelopment and wealth distribution for a State or a region within Sudan do not represent a sufficient basis for policy formulation. This is because inequality of opportunity within the region or State needs, in principle, be taken into consideration in light of the clearly noticeable disparities among the different ethnic components of each region in Sudan. The fact of the matter remains that the ruling elite is marginalizing others in all regions of the country. Impartial analysis of the situation in Sudan would only conclude that while some parts of the riverian north are facing relative difficulties in the area of development, social service and poverty eradication, the ruling elite which originates from this specific area, and which claims to represent the interests of its people, controls and misuses political decision-making process all over Sudan. Therefore they cannot claim to be marginalized themselves in the same token as people from other parts of Sudan. In conclusion an affirmative action programme for Darfur should not be hindered by reluctance of political decision-makers or any other reasoning or consideration.

Components of a Possible Affirmative Action Programme for Darfur

It is to be re-emphasised that reparations and compensation programmes for the victims of the Darfur crisis can better achieve the intended results when combined with an overall Affirmative Action Plan to rebuild the region and put an end to the social injustice inflicted on the people originating from Darfur in any part of the country. It is also to be reminded that affirmative action has been defined in various ways. However, law experts agree that affirmative action is the poll of laws, programmes, measures and actions undertaken by States to address current or past injustice, inequalities and discriminatory practices and to redress their victims both individually and collectively. The first component of an affirmative action programme for Darfur should be a well-calculated political agreement on this matter. It should be followed by the promulgation of specific legislation and measures to safeguard such an agreement from any possible future retreat. The second step should be the establishment of independent and competent organs to implement the agreement and set out priorities for the accomplishment of its objectives within a specific period of time. The challenge now is in securing the parties sincere efforts to implement the agreements and fulfil their provisions.

In many cases the most immediate, direct and easiest method to give effect to an affirmative action programme is in the area of preferential treatment for employment of the disadvantaged groups into government agencies. Another essential component of an affirmative action project is a policy for admission of the targeted groups into universities and higher education institutions to
uplift their standards of performance and increase their capacities for production. It is to be emphasized that preferential treatment for employment in government agencies should include all levels and not only in junior posts or manual labour although this category would represent the major employment sector because of the modest level of education in Darfur.

Any affirmative action plan for Darfur should promote a global ambitious policy that takes into consideration the following aspects:

1. Actively combat, dismantle, eliminate and reverse all and any kind of institutional or informal discriminatory practices.

2. Actively address cultural norms, beliefs, attitudes, practices, behaviour and systems that ascribe or condone regional or otherwise group-based disadvantage, and the inequalities historically inherited therein.

3. Promote an inclusive society in Sudan governed by the ideals of good governance, democratic rule, transparency, accountability and respect for the rule of law.

4. Consolidate a spirit of integration, inclusiveness, pluralism, multiculturalism and participation of all the racial and ethnic groups of Sudan in running the affairs of the State as equal citizens with the same rights and responsibilities.

As far as the situation in Darfur and Sudan is concerned and in order to pursue effective implementation of the above policy guidelines, the following measures need to be undertaken to give effect to a meaningful affirmative action programme:

5. Policy advocacy through short, medium and long-term educational programmes to change public opinion and to promote attitudinal change towards the people of Darfur in all domains of public life.

6. Policy review and evaluation of public service as well as public and private economic projects and official government infrastructure investment in the Darfur region since the country's independence in 1956.

7. Enactment of public reform policy to review procedures for the recruitment in civil service at all levels of the State including the selection and promotion of civil servants.

8. Introduce an immediate special affirmative action programme to reinstate all persons originating from Darfur who were dismissed from public service in recent years and also to recruit additional qualified persons from Darfur in the public sector agencies and other government institutions.

9. Take immediate action to repair the damage done and compensate the merchant and business class from Darfur.
that have lost their equipment or sources of income because of confiscation or other action and measures carried out by the government of Sudan since February 2003 whether these measures were directly or indirectly linked to the rebellion in Darfur.

10. A specific period of time (e.g. 20 years) for implementation of the affirmative action programme with clearly determined time frame for the commencement and the conclusion of the programme.

11. Numeric goals and timetables to serve as indicators of the thrust towards equality of result and positive change in the lives of the people of Darfur and not only equality of opportunity.

**Beneficiaries of the Affirmative Action Programme for Darfur**

The beneficiaries of any affirmative action programme for Darfur should be the people of the whole region with their different ethnic groupings. The beneficiaries should also include people originating from Darfur who currently live in other parts of Sudan who lost their public employment, education or any other benefits such as training and promotion. They should also include all those people who have had their business or properties confiscated or those affected by measures undertaken by the government as a by-product of the conflict in the region or those affected by such measures in anyway for no reason other than their blood tie with the Darfur region. Technicalities such as the lack of detailed data and information about the beneficiary groups should not prevent the necessary preparation to give effect to affirmative action programme for Darfur. Efforts should start immediately after the conclusion of the necessary political agreement where priority should be accorded to securing funding for public services and investment in infrastructure as well as the reinstitution of unlawfully dismissed public servants and recruitment of the qualified personnel into government service. The second package should be admission of eligible persons from Darfur in universities and institutions of high education. Perhaps the most successful experiences of affirmative action programmes can be brought about through quota systems to be accorded to the people of Darfur based on their percentage to the total population of Sudan. This is an important measure to be undertaken within the context of a lasting resolution of the Darfur conflict, and it should cover all spheres of life especially that of the unskilled labour.

One of the issues that needs to be urgently addressed – preferably on its own merits and not as part of an overall affirmative action programme for Darfur – is the systematic dismissal and exclusion of people originating from Darfur from public service since the present government ascended onto power in June 1989. This campaign of dismissal has reached its peak since February 2003 in the wake of the rebellion in Darfur. While these individuals were dismissed under different pretexts, the common denominator for their suffering and loss of means of subsistence is that they originated from Darfur. All these people were dismissed without compensation or after-service benefits despite the fact that some of them spent more than twenty years of their life in government service. The direct effect of the dismissal campaign is that the ranks of the unemployed from Darfur have increased manifold further aggravating the precarious socio-economic conditions in which they live. This situation reaffirms the need for a clear combination of reparations, compensation and affirmative action in government employment opportunities to fill the widening gab caused by the ongoing dismissal campaign against the people of Darfur from the government service.
Conclusion

Reparations and compensation are important components in a peace-making and peace-building process in post conflict situations. This is especially necessary when millions of innocent civilians were targeted by government authorities in their own country in a systematic and deliberate campaign of destruction, displacement, looting and impoverishment. To effectively address the root causes of the armed conflict in Darfur and ensure that peace and tranquillity will revisit the region, such measures should be accorded due attention and political support. They should be introduced within a broader affirmative action programme for Darfur. In addition to the recognition that reparations and compensation are inalienable rights for the victims of damage and injustice they are – together with affirmative action – some of the pillars of social cohesion and harmony which cannot be sustained in any human society that lacks economic and social justice, equality of status and opportunity for all. These are largely believed to be the factors that underpin the ongoing armed conflict in Darfur.

International human rights law and also customary law provide that victims of criminal acts receive satisfactory redress and rehabilitation yet history lessons teach us that our human society still faces a serious paradox in this respect. Precedents in reparations and compensation claims both at the domestic and international levels demonstrate that most victims including those successfully proceeded with their claims often get no compensation in practice. While in some cases victims of individual criminal offensives obtained redress and compensation from the perpetrators or from the State concerned within reasonable period of time, on countless other occasions the victims of large-scale crimes and violations of human rights and international humanitarian law, including war crimes and crimes against humanity, have been left without reparations of the damage done or compensation for the harm inflicted upon them. This is because of the lack of political will in the part of States to enforce the judgement or because of legal and practical hurdles encountered in the enforcement process.

This vicious cycle of people victimized by illegal government action and left alone in their struggle for justice and relief should come to an end if the conflict in Darfur is to come to an end and peace is to revisit the region once again. An injustice without a remedy is abhorrent to the spirit of justice and good conscience like a vacuum is abhorrent to nature. Once the principle is well founded in legal principles and recognized by the concerned parties, appropriate mechanisms and modalities for remedies will be worked out. Even so, given the unique, massive and multi-faceted nature of the manmade human rights and humanitarian crisis in Darfur, a multi-disciplinary body of experts is needed who can show corresponding creativity. Perhaps one of the most important yardsticks by which commitment of the warring factions in Darfur, especially the government of Sudan, to maintaining the unity of the country and preserving peace and security in Darfur can be measured by their clear acceptance of the concept of reparations for the collective damage done in Darfur. It should also accept the principle to provide adequate and satisfactory compensation for the innocent victims of the armed conflict in Darfur for the immeasurable human and material loss they have incurred.
One important feature of affirmative action programmes is their ability to play a preventive role for potential disputes and armed conflicts. The deep feelings of the people of Darfur – especially the victims of the current armed conflict – about their marginalization and exclusion from the decision-making process as well as the government’s indifference to their plight during the last three decades have provoked the current rebellion in the region. Solution of the crisis in Darfur cannot, therefore, be reached without tackling these issues in a genuine and transparent process. In this respect affirmative action can play an important role in managing and resolving conflicts when it succeeds in addressing conflicts motivational factors and treating their root causes. Against this background, issues of reparations, compensation and affirmative action for the victims of the Darfur conflict should be taken as seriously as possible during the political negotiations at the Inter-Sudanese Peace Talks on Darfur. They should ultimately be agreed upon, determined and executed with the assistance of a special international body recognized by the world community. Such a body should be empowered to come up with inventive ideas to affect adequate and satisfactory reparations scheme to be introduced within an overall programme protected by the power of the UN Security Council.

In this age of our global village, which is characterised by increasing interdependence between nations and States, larger economies in the wake of commercial and financial globalisation, no single region alone stands a better chance for development than as an integral component of a dynamic country-wide economy. Affirmative action is therefore necessary for all the regions of Sudan, but especially for Darfur, which is disadvantaged politically, economically, socially and educationally. All the people of Sudan will be the beneficiaries of a nationwide policy that encourages equality of opportunity and even development for every group or region in the country. To achieve this goal there is a need for the inclusion of socio-economic development plans and poverty eradication policies in any future arrangement for a solution of the armed conflict in Darfur. In addition to direct economic empowerment projects, the people of Darfur need special provisions and protection in the admission process in the educational system including higher education institutions and professional development. Indeed, winning the battle against poverty and underdevelopment would require decades of sustained efforts by the Sudanese people and the international community. However these efforts should be carried out in a way to ensure that the process is inclusive and does not leave anyone behind. This is for the sake of making peace and harmony a pillar of development and stability in Sudan and preserving its national interests and territorial integrity.

Finally it needs to be stated that the Sudanese people Africans and Arabs alike do not, in reality, have profoundly unbridgeable differences that separate them from each other. They should accept the fact that they are the same people and essentially come from one human stock. They are a unique people of special features where Africans and Arabs melted as a result of interracial marriages and peaceful coexistence. Any attempt to elevate one culture or religion above others or to make distinctions between the people of the country on ethnic and racial lines proved to be futile, problematic and dangerously fatal. Sudan’s ten-year experience of peace and tranquillity after the signing of the Addis Ababa Accord of 1973 proved that the main two groupings of the people of the country are indeed capable of living in one country in peace and harmony. What is needed is a democratic set up, pluralistic and decentralised system of government inclusive of all the people of the country. The problems resurfaced in the country when dictatorship and tyranny prevailed again and unilaterally reverted to the old strategy of political oppression, manipulation of religious feelings and accentuation of tribalism and racist ideologies in a bid to maintain absolute control of political and economic power in the hands of few elite groups over a multi-ethnic, multi-racial, multi-religious and multi-cultural nation.
An important component in the rebuilding process would be the establishment of strong, independent and effective native civil society organs to help the international community as well as national social actors, including the government of Sudan and the Darfur insurgents, in their efforts to end the conflict and assist the people of Darfur in restoring their shattered lives. The ultimate objective should be empowering the victims of atrocities in Darfur and further mobilize regional and international public opinion to help these beleaguered people rebuild their lives.

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Annex One

Comparative Examples and Analytical Review of Major Reparations Projects Undertaken by some African and Latin American Countries in Recent Years

This part was prepared by Ms. Olivia Bueno of the International Refugee Rights Initiative. The major points of these projects were discussed in the form of questions (Q) and answers (A)

Argentina

Compensation to: Family members of the disappeared or killed; Those imprisoned for political reasons; Those forced into exile (specifically, the legal category of those who were held in administrative detention under the state of siege and allowed at some point to go into exile rather than remain in prison; those who were released from prison and later went into exile or went into exile to avoid prison, death or disappearance are not included)

Payment Method: State bonds

Amount: $220,000 for family members of disappeared or killed; Up to $220,000 for political prisoners; Up to $220,000 for persons forced into exile

Duration of Compensation: One-time payment

Number of Recipients: Families of approximately 15,000 dead/disappeared; 10,000 political prisoners; 1,000 persons forced into exile

Notable Rehabilitation Information: Up to age 21, children of the disappeared also receive $140/month in pension payments, housing credits and a waiver of military service

Q. How were victims identified?
A. Family members of 8,960 disappeared were identified by the National Commission on the Disappeared (conducted 1983-1984, covering 1976-1983; henceforth “Commission”). These cases comprised the initial list utilized by the government’s Human Rights Office (henceforth “Office”) in charge of determining and distributing reparations.
In contrast to the Chilean Commission, which investigated claims in depth, the Argentine Commission based its findings on testimony from family members, friends, witnesses, and survivors of “temporary disappearance.” Individual cases were not generally investigated unless the Office was attempting to find someone who might still be alive. Approximately 1/3 of the claims were based on information from families given to NGOs but not subsequently corroborated. There was initially little expectation that findings would lead to compensation, so false claims were of little concern.

After cases were brought before the Inter-American Commission on Human Rights by former political prisoners and settled in 1991, the state drew criticism that settlements had been made with political prisoners but not with family members of the disappeared. In 1994, facing national court decisions awarding sums of $250,000 to $3 million to families of the disappeared, the state passed reparation laws. In 1998, the state announced it would spend up to $3 billion total for reparation programs.

Families of the disappeared or killed not listed in the Commission report were subsequently able to bring their claims to the Office. New cases had to be corroborated by press mentions, a report made to a national or international human rights body at the time of the disappearance, or a habeas corpus petition submitted to the courts at the time of the disappearance.

Q. **Who paid compensation?**
A. The state. Total compensation and rehabilitation reparations were predicted to cost between $2.5 and $3.5 billion.

Q. **How was the amount that each individual received determined?**
A. For families of the killed or disappeared: $220,000, equivalent to 100 months at the salary level of the highest-paid civil servant.

If a person died while in prison: his/her family received a daily pay rate up to the day of the victim’s death, plus an equivalent of 5 years at the same rate, for a total of up to $220,000.

If a person was seriously wounded while in prison: they were paid the daily rate plus the equivalent of 3.5 years at that rate, up to $220,000.

Related legislation: A new legal category, termed “forcibly disappeared,” was created. It holds the legal equivalent of death for purposes of the processing wills and closing estates, but preserves the possibility of a person’s reappearance.

Q. **How were these schemes funded?**
A. State monies; i.e. taxes. No special tax was enacted to pay for these funds.

Q. **What particular difficulties were encountered?**
A. The Argentine program relied primarily on Commission findings to generate its list of victims. The Commission, however, only documented a small portion of the total number of victims, resulting in a reparations program that provided compensation to a limited number of victims.
Reparations are more politically controversial in Argentina than in Chile and have been renounced by groups representing victims’ families as “blood money.”


**Chile**

**Compensation to:** Families of the disappeared or killed under the military dictatorship

**Payment Method:** Monthly pension by check

**Amount:**
- $345/month if there is a sole survivor;
- $482/month distributed among immediate family members if they total more than one survivor

**Distribution Details:**
- 40% to spouses of the disappeared or killed;
- 30% to parents “;
- 15% to each child “;
- 15% to surviving parent of the person's children

**Duration of Compensation:** Lifetime

**Number of Recipients:** 4,886 as of 1997

**Notable Rehabilitation Information:**
- For all family members of the disappeared or killed;
- Medical benefits: monthly medical allowance of 7% of pension;
- Educational benefits: full coverage of tuition at university up to age 35 plus additional monthly stipend to cover living costs and school supplies;
- Waiver of mandatory military service

Q. **How were victims identified?**


A follow-up body, the National Corporation for Reparation and Reconciliation (henceforth “Corporation”), was established to investigate the cases the Commission was not able to close. It implemented the Commission’s findings and recommendations on reparations. Victims listed in the Commission’s final report were considered the official beneficiaries.

Additionally, further claims were determined through investigations by the Corporation. Note: amnesty law prohibited victims or their families from taking court action to determine individual responsibility for crimes and death.
Q. Who paid compensation?
A. The state. The total cost for all reparation programs during the period when the greatest number of survivors was still alive and eligible was approximately $16 million/annum.

Q. How was the amount that each individual received determined?
A. The payments are slightly higher than the monthly minimum wage in Chile. For the poor, this may represent their main source of income; for the wealthy, the checks are of symbolic value.

Q. How were these schemes funded?
A. State monies; i.e. taxes. No special tax was enacted to pay for these funds.

Q. What particular difficulties were encountered?
A. The Chilean Corporation relied directly on Commission findings to generate its list of victims. The Commission, however, only documented a small portion of the total number of victims, meaning that reparations were provided to a limited number of victims.

The Chilean Corporation was also constrained by definitional boundaries assigned to the Commission, i.e. survivors of torture or illegal imprisonment, who constitute the bulk of victims, were not eligible for reparations. The only established benefit for these persons was access to state medical assistance, social services, and psychological counselling. The programs have received mixed quality reviews by these victims.

The Corporation staff was reportedly distraught by claimants who suffered torture or severe handicap as a result of violence, torture or imprisonment, but were not eligible to receive full assistance.


**El Salvador (in short)**

The Commission on the Truth for El Salvador (conducted 1992-1993, covering January 1980-July 1991; henceforth “Commission”) called for a special fund to be set up for reparations for war victims. They recommended that the fund be administered by “an autonomous body with the necessary legal and administrative powers to award appropriate material compensation to the victims of violence in the shortest time possible.” They recommended that one percent of all international assistance to El Salvador be set aside for a reparation fund. Neither the Salvadoran government nor the international community supported the creation of a reparations fund.


**Guatemala (in short)**

The Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer (short form: Commission for Historical Clarification; conducted August 1997-February 1999, covering 1962-1996), recommended that the state should establish through national legislation a reparations program to be overseen by a broadly representative board. They recommended that the program should provide moral and material reparations, psychosocial rehabilitation and other benefits.
Malawi:

Compensation to: Malawians who “on political grounds between 6th July 1964 and 17th of May 1994, were wrongly imprisoned, forced into exile, personally inured, lost property or business, lost education opportunities lost employment benefits and those who were born in exile or detention” (SARP Malawi Case Study: The National Compensation Tribunal, CHRR, Lilongwe, p. 4, quoted in CSVR report.)

Payment Method: Unknown

Amount: K10,000-20,000 for “forced exile claims,” K500-50,000 for “loss of property claims,” K10,000-20,000 for “wrongful imprisonment” and K20,000 to a dependent for “loss of life.” (At today’s exchange rate K50=US $4.06, K 20,000 = US $162.28, and K 50,000 = US $405.70)

Distribution details: There is supposed to be an initial payment made two weeks after the applicant has provided “proof of victimization” and final payment was to be dispensed several months later once the Tribunal had fully examined the case. However thousands of claimants have yet to receive funds.

Duration of Compensation: Two payments

Number of Recipients: As of 2004, 23,000 claims had been made, but only 7,000 had been paid interim payments, and only 500 final payments.

Notable Rehabilitation Information: None available

In Malawi, the National Compensation Tribunal was set up to provide reparations to victims of repression at the hands of the Banda regime, during which 250,000-500,000 people were victimized, some unjustly imprisoned and others disappeared or forced into exile.

One particularly interesting aspect of the Malawian case is that the first compensation cases were civil cases brought by victims in the civil courts. For example, in a landmark judgment in 1993 Machipisa Munthali was awarded K 4.5 million (about US $36,500 at today’s rate). The 1995 Constitution, however, awarded sole jurisdiction over such cases to the National Compensation Tribunal. This was justified by the need to create a more uniform and accessible system, but it was also criticized as a means to cut off access to the courts.

Victims have complained that acquiring the necessary documentation to receive compensation can be extremely difficult, sometimes impossible, and that police and prison authorities are
generally unhelpful. They also claimed that the sums offered seemed to bear no relation to the suffering they went through and that process was excruciatingly slow. The NCT is scheduled to end its work this year and, in 2004, seemed unlikely to be extended, even though the majority of claims had not been paid and thousands more likely remained to be processed.


**Sierra Leone:**

**Compensation to:**
(1) Amputees,  
(2) Other war wounded-temporarily or permanently, partial or total disabled,  
(3) Children,  
(4) Victims of sexual violence, and  
(5) War widows. (TRC Recommendation)

**Payment method:** Health care (physical and mental), education, skills training, pensions for victims who lost 50% or more of their earning capacity), as well as symbolic and community reparations (including by encouraging public apologies and memorials). The Commission also recommended free education until senior secondary level for specific groups including children who are amputees, other war wounded, and victims of sexual violence; children who were abducted or conscripted; orphans of the war; and children of amputees, other war wounded who experienced a 50% reduction in earning capacity as a result of their injuries, and victims of sexual violence. (TRC Recommendation).

**Amount:** TRC recommended not less than Le 60,000 ($20.50 at today’s rate) but victims groups have asked for up to $3,000 per month.

**Distribution details:** No distributions made yet.

**Duration of compensation:** Not limited in recommendations

**Number of recipients:** None

**Notable rehabilitation info:** None available

Sierra Leone’s Truth and Reconciliation Commission adopted recommendations surrounding a reparations scheme targeted at victims of Sierra Leone’s civil war. The government adopted a proposal to implement reparations, but this proposal was criticized by war victims and human rights organizations and discussions as to implementation are still ongoing.

**History**

The 1991 Constitution of Sierra Leone recognized reparations by making allowance for victims of fundamental human rights abuses to seek “redress.” Sierra Leone’s Truth and Reconciliation Commission was mandated by the 1999 Lomé Peace Agreement and set in place by the 2000
Truth and Reconciliation Act. The Commission was directed to “address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.” Although the TRC Act did not specifically refer to reparations, it called on the TRC to “address the needs of victims.” The TRC interpreted this to require reparations.

The Reparations Program:

The Truth and Reconciliation Commission defined reparations as:

… the provision of redress to victims of human rights abuses. Reparations can take many forms, including rehabilitation; restitution; compensation; establishing the truth; restoration of dignity and improving the quality of life of those who have suffered harm. (TRC Report, Volume 2, Chapter 4, Reparations).

The TRC recommended compensation to:

1. Amputees,
2. Other war wounded-temporarily or permanently, partial or total disabled,
3. Children,
4. Victims of sexual violence, and
5. War widows.

Q. How were victims identified?

A. The Commission recommended a registration system of potential beneficiaries sensitive to the following issues:

- Accessibility to victims
- Utilization of local leaders and civil society
- Privacy of victims
- The need for awareness prior to registration.

The Commission offered the use of its own database of victims as a starting point.

Q. Who paid compensation?

A. The TRC recommendations saw reparations as the primary responsibility of the government, with the recognition that outside funding would need to be sought. Commission recommended government funding, a reparations or peace tax, donor contributions, seized assets from convicted persons, “In-kind” contributions, and available funds. The recommendations were later criticized as overly ambitious and unrealistic given available resources.

Q. How was the amount that each individual received determined?

A. In most cases, services were preferred to monetary payments. The Commission did, however, recommend payment of pensions for war wounded who had lost at least 50% of their earning capacity (basing its standards upon the Workmen’s Compensation Act of 1955, the Second Schedule). This qualified amputees who had lost a limb or those who lost their sight, for example.
Q. What particular difficulties were encountered?
A. These recommendations have yet to be implemented in the forms proposed. Victims rights groups have complained, but the government insists that it cannot implement the recommendations as they are.


South Africa

Compensation to: Victims of apartheid government
Payment Method: Cash deposits per annum (intended)
Amount: Approximately $3,500 per year (intended)
Distribution Details: Interim payments were expended in the amount of $16 million dollars before regular payments began
Duration of Compensation: Six consecutive years (intended)
Number of Recipients: As of 1999, 2,500 payments between $330 and $1,000 had been made in the form of interim reparations
Notable Rehabilitation Information: None available

Q. How were victims identified?
A. The South African Truth Commission (conducted December 1995-2000, covering 1960-1994; henceforth “Commission”) made detailed recommendations regarding a reparations program, including compensation, rehabilitation and symbolic reparations. They met with state representatives to secure an agreement requiring over $600 million in financial assistance to more than 25,000 victims. After announcing a reparations program would be initiated and cover only those who had been placed on the commission’s list, there was a significant increase in testimonies.

The subsequently established President’s Fund at the Ministry of Justice had a staff of just three people. Hence, the Commission carried out the bulk of work necessary to document reparation claims. Following the release of the Commission’s report in 1998, the Commission Reparation and Rehabilitation Committee expanded its staff to process additional reparation claims. (The Commission also continued to process outstanding amnesty claims.)

The government followed the recommendation of the Commission in determining that cash payments were the most cost effective method of distributing reparations; this way, victims could individually determine their needs.

Q. Who paid compensation?
A. The state, by direct deposit to claimants’ bank accounts.
Q. **How was the amount that each individual received determined?**

A. The Commission recommended that each victim or family of a victim should receive $3,500 each year for 6 consecutive years. A slightly higher amount was determined to be necessary for larger families or those in rural areas where services are more expensive. The Commission hoped that emergency medical funds might be made available during the course of their work, but this did not come to fruition.

Q. **How were these schemes funded?**

A. State monies were allocated to a special President’s Fund at the Ministry of Justice. The Fund was created in 1998, several months before the Commission filed its final report. The first amount allocated was $16 million (100 million Rand), far short of the Commission’s recommendation. The government planned to allocate $33 million in the second year and $45 million in the third year.

Additionally, the governments of Denmark, Switzerland and the Netherlands each contributed between $150,000 and $250,000 to the President's Fund for reparations.

Q. **What particular difficulties were encountered?**

A. Following the establishment of the President’s Fund, each person who had testified to the Commission had to be located to fill out reparation forms. Many did not have mailing addresses, so the Commission hired field workers to find the persons and assist them in filling out the forms. They also had to assist many claimants in opening bank accounts so that reparation payments could be made by direct deposit.

Despite the government’s commitment to the President's fund, significant portions of promised monies did not look likely to come through. This causes deep-seated frustration and disappointment to victims and human rights groups.


**Eritrea-Ethiopia Claims Commission**

The Eritrea-Ethiopia Claims Commission was established by Article 5 of the Peace Agreement signed in Algiers on December 12, 2000, between the Governments of the Federal Democratic Republic of Ethiopia and the State of Eritrea. According to Article 5(1), the mandate of the Commission is to:

> …decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict . . . and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

According to Articles 5(2) and 5(3) the Commission has five arbitrators that are appointed by each government through a written submission to the UN Secretary General. The arbitrators cannot be "nationals or permanent residents of the party making the appointment." According to the Permanent Court of Arbitration, the members of the Commission are Professor Hans Van Houtte
(President); Judge George Aldrich (appointed by Ethiopia); Mr. John Crook (appointed by Eritrea); Dean James Paul (appointed by Ethiopia); and Ms. Lucy Reed (appointed by Eritrea). The president of the Commission is selected by the arbitrators and cannot be a national or permanent resident of either party.

The Commission is located in The Hague, but it has the authority to conduct hearings and investigations in the territory of Ethiopia or Eritrea, and it has done so. The claims were submitted to the Commission by each government on their own behalf, and on behalf of their nationals, and had to be filed by December 12, 2001, one year from the effective date of the agreement. The Parties then responded with statements of defence. Chapter Two of the Commission’s rules of procedure provides for the procedures for individual considerations of claims. These claims must be in excess of $100,000, and they must be filed by the government on behalf of the individual.

Ethiopia filed state to state claims, as did Eritrea, but Eritrea also filed claims on behalf of individuals. Both governments filed claims that relate to the treatment of Prisoners of War (POWs) and the treatment of civilians and their property. The Commission is authorized to adopt mass claims cases, although it has not done so. Both parties have agreed that decisions and awards are final and binding.

The Commission first heard the claims regarding POWs, followed by those relating to misconduct in the armed conflict in the Central Front, and lastly, claims regarding civilians. The claims regarding the Central Front were heard from November 11-21, 2003, and the Commission issues Partial Awards on April 28, 2004. The claims regarding the Home Front were held from March 9 to 19, 2004, and Partial Awards were released December 17, 2004. Hearings on the remaining liability claims were held in April 2005.

In regard to POWs, the Commission made 8 findings of liability for violations of international law against Ethiopia, and 12 findings against Eritrea. According to the UN, “The most serious issues of liability against Ethiopia were the failure to provide a proper diet and the delay in repatriation. The most serious issues of liability against Eritrea concerned the refusal to allow ICRC to visit prisoner-of-war camps between May 1998 and August 2000, failing to protect Ethiopian prisoners of war from being killed at capture and permitting pervasive and continuous physical and mental abuse.”
Annex Two

Overall Difficulties of Reparation Programs (generally encountered):

From Priscilla Hayner’s *Unspeakable Truths*

**Determination of payments:**

- First main obstacle: designing a fair and inclusive program.

- Second main obstacle: determining how to compensate, either monetarily or symbolically, for loss of a loved one, for physical injury or handicap, etc.

- Does the program allot compensation equally or in accordance with suffering? If in accordance with suffering, how are such levels determined? Many programs have established that they are not able to make this decision.

**Implementation and administration of program:**

- An individualized approach requires direct contact with thousands of victims. This is time consuming and costly.

- If a Commission is handling victim identification for reparations, such as in South Africa, it may distract them from broader investigations, i.e. into patterns of crime and responsibility.

- If a Commission is handling victim identification for reparations, their function may be skewed; also, the possibility of money resulting from testimony could create the problem of false statements, increasing the commission’s task of investigating claims.

- Reparations should be open to those who did not testify to the Commission, thereby creating the need for a separate administrative body to investigate and process those claims.

**Alternatives**

- Where funds are limited, symbolic or community oriented reparations are recommended.

- These may include monuments, memorials, days of remembrance, and school or community centers.

- However, for those who have lost a breadwinner, these types of reparations may not suffice, and basic services, such as free access to medical care and education, may be necessary as basic reparation.
Addressing the Past: Reparations for Gross Human Rights Abuses, Pablo de Greiff.

One useful source, recommended by the ICTJ on the challenges associated with reparations programs in general is “Addressing the Past: Reparations for Gross Human Rights Abuses” by Pablo de Greiff. The following is a brief overview of that article.

De Grieff begins by identifying broad swings in the development of transitional justice from more retributive models (i.e. Nuremberg) to model focusing on stabilization (amnesties in Brazil and Paraguay.) He identifies reparations as one of four major areas of transitional justice, along with truth-telling, criminal justice and institutional reform.

History

De Grieff then explores the historical development of the idea of reparations, he traces the idea back to Aristotle, who in book V of *Nichomachean Ethics*, defined “rectificatory justice” as requiring a judge to “equalize by means of the penalty, taking away from the gain of the assailant.”

Grotius laid out a system of inter-state reparations in his 1625 *On the Law of War and Peace*, and this idea was included in the Treaty of Westphalia of 1648, Wars of 1830, 1870, and WWI: provisions for extensive reparations paid for by defeated parties. Reparations for Holocaust are identifies as a “watershed in history of reparations” because they involved civil society and addressed individuals as well as states (in this case Israel).

Legal sources

He then goes on to cite recognition of the principle in international law. “Effective remedies” are included in the UDHR, Art 8, “enforceable right to compensation,” ICCPR, Art. 9, “fair and adequate compensation,” CAT Art 14. *Restitutio in integrum*, going back to the stats quo ante or, failing that, providing compensation equal to suffering is identified as an important general principle.

It is noted, however, that the criterion of *restitutio in integrum* can rarely be met in transitional contexts, both because the abuses are so great and because of the limitation of resources. De grief goes on to suggest that in the alternative other goals, for example:

- Measure of recognition to victims; solidify position as citizens, bearers of rights.
- Material form of recognition owed to fellow citizens whose fundamental rights have been violated

This conception, the article argues, calls for reparations programs which:

- Focus not on restoring the status quo ante, but in assuring that the new regime is committed to equality of rights of all citizens.
• It demands society (and victims’) participation,

• They must contribute to the effort to rebuild trust.

**Designing and Implementing Reparation Measures**

A. Reparations may take different forms:

i. *Restitution*: re-establishment of status before violation

ii. *Compensation*: provision of money deemed to be the equivalent to every quantifiable harm, including economic, mental and moral injury

iii. *Rehabilitation*: necessary medical and psychological care, with legal and social services

iv. *Satisfaction and guarantees of non-recurrence*: includes cessation of violations, verification of facts, official apologies and judicial rulings to re-establish the dignity and reputation of victims.

B. Classifying existing programs

i. Scope—how many beneficiaries (not so useful without consideration of how many victims).

ii. Completeness—ability of the program to cover the universe of potential beneficiaries (strong commitment to completeness is needed).

iii. Comprehensiveness—what violations are covered (problems with evidence, especially with cases of torture, although there is international legal consensus that torture requires reparations, many programs have opted not to include it (or to fold it into other violations) due to evidentiary concerns.

iv. Complexity—does the program provide more than one type of reparation? Argentina provided one lump sum, whereas others have included apologies, truth telling, etc.

v. Integrity or Coherence.

vi. Internal-relationship between different types of benefits a program distributes and its aims.

vii. External-requirement that the reparations efforts be designed in such a way as to bear a close relationship with other transitional mechanisms, minimally, with criminal justice, truth-telling and institutional reform.

viii. Finality—does the reparation precludes or limits other measures, bringing civil or criminal cases against perpetrators?

ix. Munificence-characteristic of reparation programs that relates to the magnitude of their benefits from the individual beneficiary’s perspective.
Trade-offs and Financial Goals

Some advantages and disadvantages for different schemes are listed, so useful I have simply inserted verbatim.

**Symbolic Measures**

- *Individual* (personal letters of apology, copies of Truth Commission reports, proper burial for the victims, etc.)

1. **Advantages:**
   - Constitute a way to show respect for individuals.
   - Express recognition for the harm suffered.
   - Low cost.

2. **Disadvantages:**
   - May create the impression that by themselves they constitute sufficient reparations for the victims.

- *Collective* (public acts of atonement, commemorative days, establishment of museums, changing of street names and other public places, etc.)

1. **Advantages:**
   - Promote the development of:
     - Collective memory;
     - Social solidarity; and
     - A critical stance toward, and oversight of, State institutions.

2. **Disadvantages:**
   - May be socially divisive.
   - In societies or social sectors with a proclivity toward feeling victimized, this feeling may be heightened.
   - May create the impression that they alone constitute sufficient reparations for the victims.

**b. Service Packages**

Service packages may include medical, educational, and housing assistance, etc.

1. **Advantages:**
   - Satisfy real needs.
   - May have a positive effect in terms of equal treatment.
   - May be cost-effective if already existing institutions are used.
   - May stimulate the development of social institutions.

2. **Disadvantages:**
• Do not maximize personal autonomy.
• May reflect paternalistic attitudes.
• Quality of benefits will depend on the services provided by current institutions.
• The more the program concentrates on a basic service package, the less force the reparations will have, as citizens will naturally think that the benefits being distributed are ones they have a right to as citizens, not as victims.

c. **Individual Grants**

1. **Advantages:**
   - Respect personal autonomy.
   - Satisfy perceived needs and preferences.
   - Promote the recognition of individuals.
   - May improve the quality of life for the beneficiaries.
   - May be easier to administer than alternative distribution methods.

2. **Disadvantages**
   - If they are perceived solely as a way of quantifying the harm, they will always be viewed as unsatisfactory and inadequate.
   - If the payments fall under a certain level, they will not significantly affect the quality of life of the victims.
   - This method of distributing benefits presupposes a certain institutional structure. (The payments can satisfy needs only if institutions exist that “sell” the services that citizens wish to purchase.)
   - If they are not made within a comprehensive framework of reparations, these measures may be viewed as a way to “buy” the silence and acquiescence of the victims.
   - Politically difficult to bring about, as the payments would compete with other urgently needed programs, may be costly, and may be controversial as they would probably include ex-combatants from both sides as beneficiaries.

There are those who think that reparations can also take the shape of development programs. I do not subscribe to that approach but for the present analysis’ sake, the following may be said.
d. **Development and Social Investment**

1. **Apparent Advantages:**
   - Gives the appearance of being directed toward the underlying causes of the violence.
   - Would appear to allow due recognition to be given to entire communities.
   - Gives the impression of making it possible to reach goals of justice as well as development.
   - Politically attractive.

2. **Disadvantages:**
   - Has very low reparative capacity, for: development measures are too inclusive (are not directed specifically toward the victims), and - they are normally focused on basic and urgent needs, which make the beneficiaries perceive them as a matter of right and not as a response to their situation as a victim.
   - In places characterized by a fragmented citizenry, these measures do nothing to promote respect for individuals rather than as members of marginal groups.
   - Uncertain success: development programs are complex and long-term programs. This threatens the success of the institutions responsible for making recommendations regarding reparations, which may lead to questions regarding the seriousness of the transitional measures in general.
   - Development plans easily become the victims of partisan politics.

V. Conclusions and policy recommendations

1. Class of beneficiaries should be complete (linked to comprehensiveness excluding some crimes means excluding some victims.)

2. Special care should be taken in implementing effective outreach to publicize existence of programs.

3. Reparation programs should work in coordination with other measures such as truth-telling, criminal prosecutions, and institutional reform.

4. Have victims involved in designing and implementing program.

5. Advocates of reparations should not expect significant international resources.

6. International community should: rethink its participation in providing reparations for these communities, provide technical assistance in designing and implementing programs, pressure multilateral governments to foster conditions, allowing attention for victims, pressure governments to establish meaningful reparations for victims.