Executive Summary

Reparations are measures intended to acknowledge and remedy the harm suffered by victims, which in turn can contribute to alleviating grievances of the past and preventing violations in the future. In South Sudan reparations could play an important part in entrenching a human rights based culture and moving away from cycles of violence. Reparations can tap into traditional customary principles of compensation in South Sudan and community dispute resolution to redress some of the individual and communal harm. However, with ongoing insecurity and violence, reparations by themselves may appear as ‘buying off’ certain groups, rather than comprehensively dealing with the root causes and drivers of violence. In many other transitional contexts emerging from conflict, reparations play a complementary role to measures of justice (criminal trials, restorative or traditional dispute resolution, conditional amnesty), truth (inquiries, truth commissions, opening archives) and guarantees of non-repetition (vetting, human rights education, constitutional reform). Together these four strands provide a framework for a country to deal with the past so that it does not recur and those who suffer do not bear the burden of the conflict by themselves.

This report is based on engagement with different actors in South Sudan and aims to start a conversation on the merits of reparations in responding to the consequences of the conflict. It also seeks to highlight South Sudan as a case study for further transitional justice research and policy engagement. The report begins by providing the context of the conflict before outlining the scale of victimisation in South Sudan caused by the conflict since 2013. The following section details ongoing transitional proposals on reparations, as well as discussing the traditional practice of compensation and donor support. The final section emphasizes some key challenges for a prospective reparation mechanism in South Sudan. The end of the report provides some recommendations aimed at the South Sudanese government, rebel groups and the international community.

Key Recommendations:

- The South Sudanese government should promptly establish a reparation programme based on principles of non-discrimination, victim-centredness and gender sensitivity. This will require legislation to be passed that defines who is an eligible victim, includes at least the powers of the commission, a victim registry and a dedicated budget line. Reparations should be comprehensive, including a range of measures, and be responsive to the harm and needs of victims. For vulnerable or stigmatized victims this may require tailored strategies for their access and interim relief or prioritization.

- Rebel groups should contribute to reparations through apologies, provision of illegally obtained assets, location of the missing, and community service, that can assist in healing the wounds of victims and affected communities, as well as facilitating their social reintegration.

- The international community should directly and indirectly support the establishment of a reparation programme and empower victims and communities to engage with such a body. Donor support can build resilience in communities to start reconstructing their social fabric. The international community and regional actors have an important role in maintaining the issue of reparations on the South Sudanese government’s agenda and monitoring implementation.
Introduction

Reparations are recognised in international law, domestic legal practice and transitional justice as a key element in dealing with the past and remedying the harm caused by violations. In the past number of years large-scale reparation programmes have been established by states to respond to mass victimisation caused by conflicts. Notable examples include the United Nations Claims Commission (UNCC) established after the Iraqi invasion of Kuwait, the Eritrean-Ethiopian Claims Commission, and the Colombian government’s reparation programme. Other countries emerging from conflict have tried to establish reparation programmes, but have struggled to deliver them due to lack of political will, financial resources or technical capacity, such as Liberia, Timor Leste, Lebanon, and El Salvador. States are not alone in these efforts, international organisations and donors can provide financial support and technical capacity building and/or delivery, such as the World Bank in Nepal, the International Organisation for Migration to the UNCC and Sierra Leone, and the International Criminal Court’s Trust Fund for Victims.

Emerging from conflict South Sudan will face a number of challenges in establishing a reparation programme, alongside seemingly competing agendas of economic recovery and security. While it may be tempting to see economic development and assistance as reparations, such as in Uganda1, the two are distinct. Reparations go beyond economic development as they focus on the needs and rights of those who have been harmed, who may not be able to engage in economic activity because of their physical or psychological injuries, or are left to look after injured family members or young children. In terms of security, having a peaceful society can provide a conducive environment to deliver reparations to victims, particularly for those who are displaced and refugees in other countries. Reparations can in a modest way contribute to reconciliation or at least moderate grievances of the past so that they do not become justifications for future violence. Although violence in the South Sudanese conflict has been perpetrated by a range of state and non-state actors (including the complicity of corporations), reparations should be delivered by the state to reflect its responsibility as guarantor of the rights of individuals within its jurisdiction as well as its failure to mitigate grievances at an earlier stage to prevent armed hostilities.2 There may be space for non-state armed groups and other responsible entities to contribute to reparations, whether through seized assets as spoils of war, contribute to the recovery of remains of those disappeared, or acknowledgements of responsibility and apologies to victimized individuals and communities.

Reparations are usually thought of comprising of five measures to appropriately respond to the harm caused: restitution; compensation; rehabilitation; measures of satisfaction; and guarantees of non-repetition.4 Restitution is the return of property or position to victims, such as the restoration of their rights. Compensation is monetary reimbursement for a victim’s loss, which can take the form of a lump sum payment or periodic pension. Rehabilitation is physical and mental care, as well as social services to re-instate a victim’s health and social functioning.

Background to the Conflict in South Sudan

The Republic of South Sudan, Africa’s youngest nation, has been engulfed in a cycle of a brutal and devastating armed conflicts, and an unfolding political crisis since December 2013. The 2013 conflict was sparked by a growing political disagreement within the ruling party, the Sudan People’s Liberation Movement (SPLM).5 As a liberation movement, the SPLM was an amalgamation of various political groups and militias, only unified in their opposition to a common enemy, the Arab regime in Khartoum, and its maltreatment of the pre-dominantly black Christian tribes and other non-Arab communities in the south of Sudan.6 Throughout the liberation struggle, and upon its formation as a political wing of the Sudan’s People’s Liberation Army (SPLA) in 1983, the SPLM emerged as the dominant force and a symbol of the struggle of Southern Sudanese people, due to its better organization and the visionary leadership provided by Dr. John Garang Mabior.7

Under the leadership of Garang, the SPLM/A made alliances and co-opted other political dissidents within the Sudanese Army, other armed groups and rallied support from the population across the country and beyond with significant foreign backing from the region and international diaspora. Many of the co-opted political factions and armed groups, had strong tribal bases, limited geographical coverage and no common unifying ideology, except to resist Arab domination and liberate their communities.

During his reign, Garang understood the complexity of his movement. He had himself had deposed Joseph Oduku, the first SPLM Chairman, and had survived an attempted coup allegedly orchestrated by Dr. Riek Machar and Dr. Lam Akol in 1991. Amidst growing tensions and infighting, Garang continued to forge alliances. He set out a broad vision of a New Sudan with the SPLM as its vehicle, which appealed to many and that way he managed to navigate the complexities, until the signing of the CPA in 2005 which created a semi-autonomous government in the South, Measures of satisfaction are meant to remedy victims’ moral harm by publicly recognising the wrongfulness of their suffering, such as acknowledgements of responsibility, apologies and memories. Guarantees of non-repetition are efforts to prevent the recurrence of victims suffering further harm, including reform of state institutions to be more human rights and international humanitarian law compliant, such as civilian control of the military. For victims these different types of reparations are required to fully redress their extensive harm, and to address the causes of victimisation. Reparations under international human rights law and transitional justice can be awarded both individually and collectively, such as individual compensation payments or collective measures, including psychological rehabilitation or memorials.8

8 AU Commission Report 2014.
Introduction

shared power and wealth, and a provision for a referendum to be held on self-determination. The CPA contained a provision for a national reconciliation process, but the government of the south did not undertake any credible initiative in this regard for fear that it could revive old grievances and jeopardize the outcome of the intended referendum on self-determination.3

Following Garang’s death in 2005 in a helicopter crash, a leadership vacuum was created in the SPLM and the struggle for succession emerged. His successor, General Salva Kiir Mayardit, an historical founding member and Vice Chairperson of the SPLM at the time took charge and attempted to buy-off other armed groups and galvanize the country in the face of this tragedy.2 He successfully led the country into a referendum vote in 2010 and achieved the declaration of independence on 9 July 2011.1 However, despite his distinguished military record and historical contribution to the struggle of the SPLM as a war hero, President Kiir lacked the charisma and shrewdness of Garang and political cracks soon emerged within the ruling party. There was a growing challenge to his authority within the party, demand for change in leadership and call for reforms within the SPLM Political Bureau.

This growing dissent culminated into the dismissal of several senior SPLM party members, governors and dissolution of the cabinet, including the firing of then Vice President Machar in July 2013. The political fall-outs continued and at the SPLM party conference in December 2013 when unity broke down. What exactly triggered the 15 December 2013 fighting remains contested with allegations of attempted coups and military purges by each side, but expulsions within the SPLM party and military wing, the Sudan’s People’s Liberation Army (SPLA), did little to build trust and allay these fears.

As a result of disagreement between the SPLM leaders at the convention in Juba, it escalated into violence with the armed wing, the SPLA, immediately taking sides. Fighting erupted between forces loyal to the President Kiir, an ethnic Dinka, and those loyal to the former Vice President Machar, a Nuer. The fighting quickly took an ethnic/tribal dimension within Juba and spread into other parts of the country. The regime forces, particularly targeted Nuer civilians in Juba and surrounding areas, and many fled into UN compounds seeking protection.12

Many SPLA soldiers lost their lives, thousands of civilians were massacred in Juba alone, and other parts of the country, especially in Upper Nile region, and Jonglei and Unity States. Property was looted, destroyed and large numbers of people (3-4 million) were evacuated or displaced, with thousands fleeing into exile.12 The SPLMA was effectively fractured, with frequent defections and shift in allegiances, announced by different commanders in different parts of the country. The fighting was immediately condemned by the regional and international community. The Uganda People’s Defense Forces (UPDF) quickly intervened. It entered into South Sudan to back up the regime in Juba, and to fend off possible opposition attack on Juba by the armed opposition groups. The Intergovernmental Authority on Development (IGAD) made several attempts to stop the fighting. It brokered several ceasefires agreements, which were unfortunately violated within hours.

Several top SPLM leaders, opposition politicians and perceived sympathizers of the opposition based in the country, were arrested and detained in Juba. Machar fled Juba, and renamed his breakaway movement, the Sudan People’s Liberation Movement/Army-in Opposition (SPLM/A-IO). The other SPLM leaders, who were arrested and detained in Juba and released, also declared themselves as SPLM Leaders-Former Detainees (SPLM-FDs).

The Peace Process 2014-2018

In January 2014, IGAD invited representatives of the warring South Sudanese parties to Addis Ababa for a peace talks. On 23 January 2014, the parties agreed to cease hostilities and to negotiate political solution to the conflict in Addis Ababa, Ethiopia, but fighting resumed within days. The conflict escalated, more towns were captured, more civilians were displaced and the humanitarian situation worsened. Intermittently, the parties continued to declare and violate ceasefires unilaterally.

Amidst growing threats and impatience from the region and the international community, the two main protagonists, President Kiir and Machar signed a second cessation of hostilities agreement on the 9 May 2014, with a commitment to negotiate a permanent ceasefire, and mechanisms for a transitional government of national unity to end the conflict.14

In November 2014, the government of the Republic of Tanzania, with support from Finland and Switzerland, also initiated another forum. It convened an intra-SPLM dialogue in Arusha from 8 to 9 January 2015, with the aim of reuniting the SPLM. The parallel Arusha talks, controversial as it was, was attended by representatives of the three major SPLM factions: SPLM in government; the SPLM-IO; and SPLM-FDs. It culminated in the signing of the Agreement on the Reunification of the SPLM on the 21 January 2015.15 Despite this agreement, nothing came close to SPLM reunification. If anything, the SPLM remained more divided and the fighting continued.

After almost two years of a brutal and devastating conflict, and with several missed deadlines and recurring violation of the ceasefire, the parties signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) in August 2015. The SPLM-Io and the other parties signed in Addis Ababa on 17 August 2015, but the government of the Republic of South Sudan, initially refused, but later acquiesced and signed several days later on 26 August 2015 in Juba with several reservations.

The Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) 2015

9 Ibid.
The eight-chapter Agreement outlines a comprehensive framework for parties to end hostilities, share power, and address a whole range of governance issues. These included power sharing in the executive and legislature, transitional security arrangements and security sector reforms, humanitarian affairs, economic recovery and reforms, transitional justice, accountability and reconciliation, and parameters for a permanent constitution making process respectively. Chapter VII of the Agreement established a Joint Monitoring and Evaluation Commission (JMEC) and Chapter VIII set out the procedures for amendment and supremacy of the Agreement.

Amongst the government’s reservations were: the demilitarization of Juba; role of the monitoring and verification mechanism of the permanent ceasefire; role and function of JMEC; establishment of the compensation and reparation authority and fund; and the requirement for two vice presidents with different status. In terms of transitional justice, Chapter V sets out three mechanisms: a Commission on Truth, Reconciliation and Healing (CTRH); an independent hybrid judicial body (the Hybrid Court for South Sudan (HCSS)); and a Compensation and Reparation Authority (CRA).

The proposed truth commission (CTRH) is mandated to implement best practices for promoting truth, reconciliation and healing from Afria and elsewhere, establish an accurate and impartial historical record of human rights violation from July 2005, record victims’ testimonies, identify perpetrators and supervise traditional dispute resolution mechanisms. The CTRH includes as part of its mandate the power to recommend processes for the full enjoyment by victims of the right to remedy, including by suggesting measures for reparations and compensation. It receive applications from victims so as to identity and determine their right to remedy, as well to develop ‘detailed recommendations for legal and institutional reforms to ensure non-repetition of human rights abuses and violations, breaches of the rule of law and excessive use of power.’

The Hybrid Court for South Sudan (HCSS) is mandated to investigate and prosecute international crimes of genocide, crimes against humanity, war crimes, and other serious crimes under international law and South Sudanese law, including gender based crimes and sexual violence from the 15 December 2013. The court also has a role in delivering reparations. It can order the forfeiture of property, proceeds and any assets acquired by a convicted person and for them to be returned to their rightful owner. In addition, the court can award ‘appropriate remedies to victims, including but not limited to reparations and compensation.’

The Compensation and Reparations Authority (CRA) is empowered to ‘provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods and to manage the Compensation and Reparations Fund (CRF). The CRA can receive applications from victims as natural or legal persons from the CTRH and

implement the measures as recommended by the truth commission. This may seem like there is an overlap in victims being able to apply to all three bodies for reparations, with no clear delineation on what the scope of reparations or funding is available in each one. Moreover if these three bodies are established the CRA is likely to be delivering reparations to victims long before the hybrid court reaches a judgment or the CTRH final report with recommendations is published, meaning that there could be inconsistencies in the form and extent of reparation ordered. In particular the temporal scope of the CTRH is from July 2005, whereas the hybrid court is from December 2013, with no explicit time period stipulated for the CRA.

On the establishment of the reparation authority and fund, the government argued that such a fund would be impracticable, prone to abuse and that instead proposed that the any such funds should be channelled to the reconstruction of the infrastructure and rebuilding of livelihoods of communities in the states most affected by the conflict. This reflected the understanding that in someway or another everyone was a victim in South Sudan. However this glosses over that some individuals suffered more than others, despite the reluctance of the signatories to advocate for individual compensation to each victim.

From the beginning the parties were sceptical of the commitment of the government to implement the agreement in letter and spirit. In Juba, there was very little enthusiasm on implementation of the ARCSS 2015, despite a strong support from the international community. In October 2015, the government in Juba controversially created 28 administrative states in direct contravention of the ARCSS, which was based on 10 states, and this became an immediate stumbling block. Meanwhile, the IGAD had appointed the former Botswana President Festus G. Mogae to lead the JMEC and with the firm backing of the regional and international members of JMEC, implementation of the ARCSS started slowly after a few months of delay.

The JMEC brokered several deadlocks including on allocation of ministerial portfolio, representation of other political parties in the agreement institutions and mechanisms, the stalemate over increase in the number of states, and facilitated the return of opposition forces. On 29 April 2016, after nearly five months’ delay, the Transitional Government of National Unity (TGoNU) was formed, with Machar as First Vice President and the Council of Ministers reconstituted. However, barely three months into the new coalition government fresh fighting again erupted in Juba on 8–11 July 2016 between the Sudan People’s Liberation Army - in Government (SPLA-AIG) and the Sudan People’s Liberation Army – In Opposition (SPLA-IO), at the Presidential Palace forcing Machar to flee Juba with his senior commanders, including some SPLM/A-IO appointees to the TGoNU, and other opposition politicians.

The Transitional Security Arrangements (TSA) mechanisms and institutions, which had been established prior to the return of Machar to Juba collapsed. The SPLA-IO forces in cantonment sites, including designated Joint Integrated Police (JIP) dispersed. The SPLM/A-IO members that remained in Juba regrouped under the leadership of General Taban Deng Gai, former SPLM/A-IO Chief Negotiator who was then sworn in to replace Machar. This move divided the SPLM/A-IO into two factions with one loyal to exiled leader Machar and another to General Taban Deng Gai.

The regional guarantors and international community acquiesced to the change in the SPLA-IO leadership in Juba as a temporary arrangement and urged the region to work with the current set up of the TGoNU until the parties returned to the status quo ante. The region also requested
for the deployment of a Regional Protection Force (RPF) in Juba to provide a secure environment for the implementation of the ARCSS. The UNSC adopted Resolution 2304 authorized the deployment of a 4,000 strong RPF as part of UNMIS to protect civilians, humanitarian actors and support implementation of the ARCSS. Nonetheless, fighting escalated in different parts of the country, with new non-state armed groups emerging and the implementation of the ARCSS being severely affected.

In June 2017, the IGAD Heads of State and Government approved JMEC’s recommendation to convene a High-Level Revitalization Forum (HLRF) of the Parties to the ARCSS, including estranged groups to discuss concrete measures to restore the permanent ceasefire, full implementation of the peace agreement, develop revised realistic timelines and an implementation schedule towards democratic elections at the end of the transitional period. The first round of the HLRF resulted in the signing of the Agreement on the Cessation of Hostilities, Protection of Civilians and Humanitarian Access (CoHA) on 21 December 2017. The HLRF continued in Addis Ababa, Kampala and Khartoum before culminating with the signing of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) on 12th September 2018 again in Addis Ababa, Ethiopia.

The Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) 2018

Since the signing of the R-ARCSS some significant progress has been made in its implementation, compared to the ARCSS 2015 within the same time. These include the ratification of the peace agreement by the parties’ leadership organs, release of some political detainees and prisoners of war, establishment of new agreement institutions and mechanisms like the National Pre-Transitional Committee (NPTC), the Joint Defense Board (JDB), and the Joint Transitional Security Committee (JTSC). Equally, all the existing institutions and mechanisms have been reconstituted for example the Joint Monitoring and Evaluation Commission (JMEC), Ceasefire and Transitional Security Arrangements Verification Mechanisms (CTSAMVM), the National Constitution Amendment Committee (NCAC), Strategic Defence and Security Sector Review (SDSR) and Joint Military Ceasefire Commission (JMCC).

Some of these mechanisms have already embarked on implementation of their mandate and there appears to be much better political will and support to the R-ARCSS unlike the agreement before it. In addition, several confidences building measures took place and are continuing. For example the two peace celebrations in Khartoum and Juba, which brought all the senior leadership of the parties together, ongoing joint visits by commanders on the ground, and the release of some political detainees and POWs.

In terms of transitional justice, chapter V on the matter remains mostly the same as the 2015 agreement. While many of the provisions on reparations and its linkages with the CRTH and HCSS are similar, the specific provision that the Compensation and Reparation Authority would implement the truth commission recommendations is somewhat more ambiguous. In the 2018 text where it refers to it making ‘the necessary compensation and reparation as provided for in this Agreement.’26 All these transitional justice mechanisms are intended to be complementary and the government is required to enact a legislation to clearly define their mandate and jurisdiction, including their funding, actors and processes.27

Finally, the R-ARCSS provides for the NPTC to establish a fund for the implementation of the activities of the pre-transitional period. The NPTC has so far opened three accounts to manage the funds and the government of South Sudan has pledged 100 million SSP and $1 million USD towards it, even though actual disbursement is yet to take place. Meanwhile, the NPTC and the Office of the IGAD Special Envoy for South Sudan continue to jointly facilitate representatives of the opposition parties to return to Juba and participate in the implementation activities.

Both the CRF and the CRA were supposed to be established within six months from the commencement of the transitional period.28 The CRA is supposed to be run by an executive body to Chaired by an Executive Director appointed by the coalition government. It shall include representatives of the parties in the government and other South Sudanese stakeholders: civil society organizations, women groups, faith based leaders, business community, youth and traditional leaders, selected in accordance with criteria set by law.29 As of early 2019 and the deadline of May 2019 of being six month from the commencement of the transitional period, the CRA and CRF have yet to be established.

In terms of disarmament, demobilisation and reintegration (DDR), the R-ARCSS provides that DDR Commission shall be reconstituted within 30 days of the signing of the agreement and that processing of persons with special needs that are ineligible, or unwilling to serve in the unified army shall commence at the beginning of the pre-transitional period and continue in parallel with the unification process.30 Unfortunately, this has not yet even begun, three months later, and looks to be very far down the road, even though some of the armed opposition groups have started to voluntarily release some child combatants within their ranks.

DDR initiatives have been attempted before in South Sudan, but with very minimal success. Following the CPA in 2005 in Southern Sudan and after independence in 2011, a national Commission for DDR was implemented a range of DDR programmes throughout the country. The DDR Commission was supported by donors, in the beginning and implemented some projects, with partners like UNDP. However, an evaluation on the DDR Commission performance by UNDP concluded that the DDR programmes fell short of the desired impact.31 There was serious question of sustainability and connection of the DDR programming to wider post-conflict recovery strategy including community security, social cohesion, reconstruction and respect for human rights and rule of law.32

Introduction

University of Victims and Harms Suffered

The recent conflicts in the Republic of South Sudan have had a complex and compounding harm on civilians and combatants, leaving behind a trail of physical and psychological harms from mass killing, slavery, sexual violence, use of child soldiers, property destruction and wide-
spread trauma.33 The conflict started two years into the independent South Sudan and barely eight years since the end of a brutal liberation struggle which spanned over 22 years.34 By 2013, people of South Sudan were just starting to recover from their sufferings endured during the liberation war.35

While the actual number of victims of the conflict varies depending on sources, the widespread scale is indisputable. Immediately following the outbreak of the conflict in December 2013, an African Union Commission of Inquiry was established to investigate the cause and impact of the conflict. According to the Commission report, ‘while conflict is not a new phenomenon to South Sudan, majority of those the Commission met with said that they have never seen the scale and nature of violations witnessed during the conflict’ and that ‘what makes it so much worse for them is the targeting of civilians, which they claimed was never a central part of previous conflict’.36

The AU Commission found that ‘serious violations of human rights have been committed by both sides of the conflict including violations of the right to life, prohibition of torture and freedom and security of the person, women and girls through rape and sexual violence, right to property through looting and destruction and right of children’.37 The AU Commission concluded that ‘serious violations of international humanitarian law amounting to war crimes and crimes against humanity have been committed by both warring parties’.38 The victims of the conflict correspond to the nature of violations and atrocities being committed both directly and indirectly against individuals and communities. A whole range of atrocities have been committed on the population including wanton/unlawful killing, sexual and gender based violations, rape, displacement, illegal arrests, arbitrary detention, and torture.39

In the Equatoria region, government forces are alleged to have implemented a scorched-earth counter-insurgency policy of bombarding villages suspected of harbouring rebels and meting out retaliatory attacks against civilians.40 Further accusations levied against the government include using food as a weapon of war by denying relief assistance to civilians in opposition infested areas.41

While some categories of the victims are known, the identities of the individuals within those categories are less obvious. The victims, known and unknown includes men, women, children, elderly, civilians, soldiers, and foreigner aid workers. The UN Commission on Human Rights in South Sudan found ‘reasonable grounds to believe that SPLA, soldiers engaged in killing of civilians, rape and other forms of conflict related sexual violence, theft, pillage and destruction of civilian and humanitarian objects ... in Upper Nile in 2017’.42 The UN Commission also found ‘reasonable grounds to believe that SPLA, both factions of the SPLA-IO, as well as the armed groups that support the parties to the conflict have committed serious human rights violations and international law violations throughout the country’.43 Serious violations have included deliberately targeting civilian populations and individual civilians, including on the basis of their ethnic identity and/or perceived political affiliations, and by means of killings, abductions, rape and sexual violence, as well as the destruction of villages.44

Further violations documented include ‘attacks against civilian objects, humanitarian assistance of peacekeeping personnel, arbitrary arrest and detention, looting and pillaging, and the conscription of children under the age of 15 years into armed forces’ and that ‘those violations and alleged crimes have directly resulted in the massive displacement of the civilian population of South Sudan’.45 Some of these aid workers are non-citizens of South Sudan and therefore would have difficulty accessing any domestic reparations programmes. Attacks against civilians have intentionally targeted their homes, livestock and others forms of livelihood and property, as a result have destroyed people’s sense of security and ability to support and care for themselves.46 This in turn means that individuals, families and communities are more vulnerable and less able to be resilient or self-sufficient after an attack and dependent on IDP or refugee camp support.

In terms of numbers, the UN OCHA estimate puts the number of South Sudanese displaced by the conflict to 4.43 million with slightly over 2.47 million as refugees in the neighboring countries.47 An estimated 2.4 million South Sudanese children are not receiving education, the highest proportion of children out of school in the world according to UNESCO.48 According to a recent study by the London School of Hygiene and Tropical Medicine, over 400,000 people have died because of the conflict.49 The study estimates that over 1,177,660 deaths occurred within South Sudan during the period under study (December 2013-April 2014) out of which about 794,600 would have occurred in the absence of the war, but 382,900 directly related attributable the conflict, with nearly 190,000 people died of violent injuries.50 Children have been particularly affected with 72% out of school and accounting for 60% of IDP population.51 Those children abducted by armed groups have little rehabilitation, support or education services upon their release, with little opportunity for employment, risking them being re-recruited into armed groups.52

33 See Amnesty International, Our Hearts Have Gone Dark: The Mental Health Impact of South Sudan’s Conflict, July 2016, and Human Rights Watch, South Sudan New War: Abuses by Government and Opposition Forces, August 2014.
34 AU Commission of Inquiry Report.
37 ibid. p297.
38 ibid. p297.
39 See If Men are Caught they are Killed, If Women are Caught, they are Raped: South Sudan-Atrocities in Equatoria Region Turn Country’s Breadbasket into a Killing Field. Amnesty International, July 2017.
40 See Soldiers Assume We Are Rebels, Escalating Violence in South Sudan’s Equatoria. Human Rights Watch, South Sudan Report, 1 August 2017.
43 UN Commission Report ibid p34.
44 ibid.
49 ibid.
Sexual violence has also been a prevalent atrocity throughout the conflict and used as a means to ‘sow terror’ and rupture family and community cohesion. Amnesty International note that reliable statistics are not available for the scale of the problem, but at least thousands of women, some as high as 61-72% report being subjected to sexual or gender based violence. Sexual violence has included rape, gang rape, forced stripping or nudity, forced sexual acts, rape in front of victim’s children, castration, forced marriage and mutilation of genitalia. The conflict has severely fractured the social fabric of the nascent South Sudan state. The AU Commission observed that ‘the multiple conflicts and repeated violations of human rights experienced in South Sudan have wrecked relations between and among communities, and generated many victims.’ It also established that the policy of amnesty adopted by the government after the signing of the CPA left the past unexamined, conflicts unresolved and their impacts, partly represented in victims and survivors of human rights violations unaddressed.

According to a study done by the South Sudan Law Society, ‘forty-one percent of the survey respondents exhibited symptoms consistent with a diagnosis of PTSD.’ According to the same report above ‘nearly 40% of respondents said that people from other ethnic groups cannot be trusted’, and that the ‘levels of distrust are highest among ethnic groups that are most commonly associated with the conflict.’ The scale of such victimisation has implications for the feasibility and deliverability of reparations.

**Reparations in South Sudan**

Reparations in South Sudan are featured in the proposed peace agreement, but it also reflects traditional customary principles and practices. This section outlines some of the peace agreement reparation framework, past experiences on reparations, before moving on to discuss traditional or customary practices of compensation. This section also draws upon surveys conducted by different local and international organisations on victims’ perceptions on reparations, before ending this section by outlining the current contribution of donors to victim issues and reparations.

**Domestic laws on reparations**

Prior to the signing of the ARCSS in 2015, there were no specific provisions for reparations under South Sudanese laws. The Transitional Constitution of the Republic of South Sudan (TCRSS) 2011 (as amended) is the supreme law of the land. Even though the TCRSS 2011 had no explicit provision on reparations for victims, it acknowledged the legacy of conflict and the need for trust-building and healing in the country, and set out some institutional framework to address such legacy. It also contains a bill of rights, which includes the right to own property and have prompt and fair compensation where private property is expropriated by the state in the public interest, which also applies to communities who own land collectively. Notably there is no recognition of a right to remedy for victims for violations of their rights and the human rights commission does not have the power to order reparations for victims whose rights have been violated.

The ARCSS 2015 and the revitalized ARCSS 2018, set out a framework for possible future laws on reparations in redressing the consequences of the conflict in South Sudan. The agreements provided for their incorporation into the TCRSS 2011. Under Chapter VIII of both Agreements, ‘notwithstanding this process of incorporation, in the event that the provisions of the TCRSS 2011 (as amended) conflict with the terms of this agreement, the terms of the agreement shall prevail.’ The peace agreements therefore, are part and partial of the TCRSS 2011 as amended. The TCRSS 2011 also governs the applicability of international conventions and covenant to which South Sudan is a party, including the one related to rights to remedies and reparations, if any.

The R-ARCSS 2018 also provides that the transitional government shall immediately institute programmes for relief, protection, repatriation, resettlement, reintegration, and rehabilitation of IDPs and returnees. There are also other statutes, for example the Land Act of 2009 and the Relief and Rehabilitation Commission Act 2016, as well as Commissions like the Disarmament, Demobilization and Reintegration (DDR) Commission, and the Commission for War-Wounded, Windows and Orphans which provides for a range of measures including restitution, compensation, rehabilitation, which can be important components of reparations. The Land Act 2009 specifically provides for restitution of land to individuals who lost their land because of displacement because of the conflict from 1983 to 2005. The experience in Colombia and South Africa show that land restitution after mass violence is incredibly difficult to implement, especially in the former case were violence in certain areas is ongoing. While these laws maybe on the statute books and commissions established, there has been little or no delivery to victims to remedy their harm.

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53 Ibid.
54 OHCHR and UNMISS, Conflict-related Sexual Violence in Northern Unity, 15 February 2019.
57 Ibid.
59 Ibid.
60 Article 28(2).
61 Article 170(11).
62 Article 146.
63 See Chapter VIII, Article 8.2 R-ARCSS 2018.
64 See Article 3.1.2 R-ARCSS 2018.
Past-Experience on Reparations

Except for very local level initiatives and intra-communal reconciliation processes, for example the well documented 1999 Wunlit Nuer-Dinka Reconciliation Conference there are very few documented national level initiatives in South Sudan, which entailed some forms of compensation or reparations. The most prominent is the attempted comprehensive DDR programme which followed the signing of the CPA. However, the DDR programme was itself deemed a failure, riddled with corruption and mismanagement, and was not connected to transitional justice mechanisms, whereby combatants could contribute to truth or reparation. The other example is the reservation registered by the government against the provision for reparations in the ARCSS 2015, which highlights the negative perception of the state and its actors on such a critical transitional justice measure. Even though, this (reservation) was not the case in the 2018 R-ARCSS, it may not demonstrate a change in perception, rather an acknowledgement that the major focus of the revitalization process was to deal with governance and security arrangements, with the other provision only affected by consequential amendments.

For most part, the political establishment in South Sudan has become accustomed to ‘peace/reconciliation conferences’, offering public apologies and slaughtering a ‘white bull’ as a symbol with the other provision only affected by consequential amendments.

The ARCSS 2015 and R-ARCSS 2018 also make provisions for lustration of those convicted by court for various crimes and abuse of office to be barred from public office. However, the practice in the current regime is the direct opposite, as several army generals accused of committing crimes including those already indicted by the UN sanctions, continue to get promotion and dancing is common. It is also traditional practice that the family or clan takes collective responsibility for a homicide or other serious violation is a way to restore responsibility and asking for forgiveness. More recently President Kiir has apologised in October 2018 saying,

“As your president, I want to apologize on behalf of all the parties for what we have caused you, our people. Today marks the end of the war in the republic of South Sudan. It was a complete betrayal of our people and the liberation struggle.”

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Traditional Practices of Compensation

Traditionally in South Sudan, acknowledgment of responsibilities and compensation are integral component of conflict resolution, peacebuilding and justice. Although not very well documented and publicised, a lot of the conflicts within South Sudan at the local level are resolved customarily using traditional customs including compensation and symbolic reparation. The country is governed based on a decentralized system, with several powers devolved to the State and Local governments. This include the administration of justice which has dual system of a statutory courts presided over by judges and trained legal personnel, and customary courts presided over by chiefs and elders. The customary courts are administered under the Local Government Act 2009 and even though they do not have jurisdiction over criminal matters unless the case has a customary interface, the practice is that the customary courts adjudicate all matters, criminal or civil and issue various sentences, fines or corporal punishments as well as compensation orders.

Traditionally, compensation is paid in cattle and in the case of murder, the amount of cattle paid to the relative of the deceased vary from community to community and depending on the nature of killing. The practice of local reconciliation feasts, involving slaughtering of cattle, sharing meals and dancing is common. It is also traditional practice that the family or clan takes collective responsibility to pay compensation for the homicide committed by its members, whereby the fortunes and misfortunes are mutually shared. The intention is that making compensation by the individual and/or community for a homicide or other serious violation is a way to restore the ‘social equilibrium which has been disturbed’. However with sexual violence, it is the responsibility of the individual to make compensation, as the community wants to distance itself from this crime and not render the perpetrator collective assistance.

With regard to non-state actors, there is no documented record of reparations by non-state actors, leave alone the state itself, in South Sudan. This is perhaps not surprising, given the very short life span of South Sudan as a country. Also since the country’s formation in 2011, and except for the short period of prosperity following the 2005 CPA to the referendum vote in 2011, the economy of the country has stagnated since the war begun in 2013. The country is ranked one of the world’s most fragile state, with a government that lacks control of, not only territories, but also its national army. Because of the recurring fallouts within the ruling party, the SPLM, and growing split within the national army, the SPLA, and all other organized forces, it is difficult to tell whether a group is allied to the State or are non-state actors. Some parts of the country are held and run by the SPLM/A-IO, and others are simply accessible due to the multiplication of unknown gunner.

References


70 President Salva Kiir Apologies for the December 2013 War, Sudan Tribune, 7 January 2016 available at http://www.sudantribune.com/spip.php?article57630. Also see Machar has apologized to Dinka Bor Community Army Official, Sudan Tribune, 10 August 2013.

71 Okech Francis, Declaring Civil War Over. South Sudan President Says He’s Sorry. Bloomberg, 31 October 2018.

72 See Article 5.5.1 of the R-ARCSS 2018.


76 Rens Willems and David Deng, Justice and Conflict in South Sudan: Observations from a Pilot Survey-Intersection of Truth, Justice and Reconciliation in South Sudan, Briefing Paper, November 2015.

77 Makec, n.73, p204.

78 Makec, ibid. p198.

Reparations in South Sudan

In terms of using traditional justice to resolve the conflict or inter-community disputes caused by the conflict, it may not be easy to guarantee results of reconciliation or remedy to communities. Other reconciliation ceremonies or processes that have tried to replicate the success of the 1999 Wunlit Nuer-Dinka Reconciliation Conference, have been met with much less success due to ‘expeditious processes, externally driven by donors and with unrealistic timelines’.80

**Perception of Victims on Reparations**

Several surveys have been conducted in South Sudan that attempts to map out victims’ needs and perception of justice and demands for reparations. Most of the surveys found strong demands by victims for truth telling, prosecution of perpetrators, direct and individual based monetary reparations, memorialization and public apologies.81 The Willems and Deng survey of 163 individuals from Kator in Juba found that 80% of respondents were supportive of trials, with imprisonment (26%) as the most appropriate form of punishment, followed by confessions (18%) and convicted persons forced to pay compensation (17%).82 If amnesties were to be used instead 64% would require that it should include a confession or apology, 43% a change in behaviour away from violence, and only 20% thought that those receiving an amnesty should pay compensations to victims.83 In terms of what justice is, while imprisonment was seen as the most appropriate solution (53%), followed by judicial execution (23%), paying compensation to victims (20%) was third followed by public acknowledgment of responsibility and apology (15%), and confessions (13%), this may reflect compensation as a fall back option where in a less than ideal world not all perpetrators will be prosecuted.84

A more representative survey (1,525 individuals in 11 locations across six of the ten states) by the South Sudan Law Society and the UNDP found there was strong support amongst victims for reparations (80%).85 In terms of the form of reparations – 40% wanted individual reparations, and 34% believing individual and community reparations should be available, with 26% for communities only.86 Respondents’ views were split on what modality it should take the form of direct payments of cash (36%), collective provision of development projects (35%), direct non-cash payment in kind (23%), with less support for memorials or other symbolic reparations (4%). That said there was strong backing amongst respondents that efforts should be made in order to honour victims, to serve as a lesson to future generations (61%), it is the right thing to do (53%), it will reduce violence (38%), or is based on the individual’s cultural or religious belief (15%). What form such symbolic measures should take included a national day of remembrance (29%), construct memorials (24%), develop teaching materials for schools (23%), write books (12%), rename streets or buildings (11%), traditional ceremonies (9%) and list names (8%) were amongst the responses reflecting a diverse range of efforts needed to honour victims’ suffering, not just for the survivors, but the whole of society.87

**Donors Contribution to Transitional Justice in South Sudan**

Donors have made substantial financial support to South Sudan, though its impact is debatable in the face of ongoing violence.88 Immediately after the CPA was signed in 2005 and until the conflict broke out in 2013, a lot of donor support was extended to Sudan in all spheres of life. However, when conflict broke out in December 2013, most of the investment was dismantled. Today, most donors are focused on humanitarian aid with less development and reconstruction assistance provided.

Regarding support to transitional justice processes and reparations specifically, most of the past and ongoing initiatives are dependent on donor funding, including from local reconciliation, public sensitization, advocacy and memorial initiatives. The UNDP for example was instrumental in the setting up of a South Sudan Transitional Justice Working Group, development of its strategic plan and capacity building of many South Sudanese civil society on transitional justice issues. Other donors, for example the United States Holocaust Memorial Museum is supporting an initiative to set up a South Sudan Justice Advisory Group. Other private donors and foundations are supporting different projects, including documentation and memorial project by local and national level NGOs within the country. The UNDP and UNMISS were also instrumental in supporting the Ministry of Justice and Constitutional Affairs to conduct some public sensitization on the establishment of the CTRH.

However, because of the cyclical nature of the violence, state impunity, widespread corruption, mismanagement and ethnic polarization, the major donors like the OCHA Troika, China and EU are tiring of providing support and very skeptical of any initiative or projects. Most donor support is therefore directed to small NGOs and international organizations whose impact tends to be negated by lack of government backing and support.

The Compensation and Reparations Fund will require a significant donor contribution if it is ever to be established and operationalized, which seems very unlikely, with the current donors’ perception unless implementation of the R-ARCSS takes a dramatic turn and there are sufficient and effective financial transparency and accountability mechanisms.

To date, the major donors have not been forthcoming to extend financial support to the incumbent government, and to the various agreement institutions and mechanisms, seriously impacting on its implementation and progress in the peace process more generally. Many of the donors keep repeating the need for demonstrable political will and commitment of the parties as a pre-condition for their support, a song which never seems to end or change and with no yardstick to measure against. It is unlikely that they will fund reparations, if they cannot fund cantonment and demobilisation of the fighting forces.

The R-ARCSS provides that the R-TGoNU, in collaboration with the Chairperson of IGAD, African Union Commission and Secretary General of the United Nations should convene a South Sudan

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81 See Rens Willems and David Deng, Justice and Conflict in South Sudan: Observations from a Pilot Survey-Intersection of Truth, Justice and Reconciliation in South Sudan, Briefing Paper, November 2015.
82 Ibid., p.17-18.
83 Ibid. p.18.
84 Ibid. p.19-20
85 Search for a New Beginning: Perception of Truth, Justice, Reconciliation and Healing in South Sudan, South Sudan Law Society in partnership with United Nations Development Programme (UNDP), June 2015.
86 Ibid. p.54.
87 Ibid. p.57.
88 Between 2012-2019 some $718,958,634 has been provided by donors and delivered through UN and other bodies. See http://mptf.undp.org/factsheet/fund/HSIS30
Challenges to Reparations Mechanisms

There are a number of legal, evidential and practical challenges in translating the provisions of the R-ARCSS into practice. Legally, there are few barriers to establishing a reparation mechanism in South Sudan. Both the TCRSS 2011 as amended and the R-ARCSS now provide for the creation of a reparation and compensation authority and fund. Legislation is required to establish such a reparation mechanism. Under the previous agreement as similar provision existed, but in the three year period since its signing (2015-2018) no such law was ever enacted or even discussed within the coalition government. The R-ARCSS 2018 stipulates the enactment of legislation by the R-TGoNU to establish the various transitional justice mechanisms, including the Compensation and Reparations Authority (CRA), within six months, a deadline which is fast approaching. In other contexts legislation has been key to guarantee victims’ right to reparation, transparency and to facilitate a dedicated budget line to ensure funding and administration of the reparation programme is sustainable. Evidently, there are a number of barriers given the widespread commission of atrocities in South Sudan. It will be difficult for victims to present sufficient evidence by themselves of these atrocities, there is no central national repository documenting the violations during the war, and there is a lack of sufficient infrastructure and capacity to currently gather such data.

There are also some practical barriers to creating a reparation mechanism in South Sudan. The single biggest challenge to establishing a reparation scheme would be the number of potential victims that would be entitled to it, thus creating political ramifications. This is partly the reason for the governments reservations on the CRA in the 2015 ARCSS. There is fear that implementing reparation would only create discord and thus it is better that such a scheme is channelled as reconstruction fund. Victimisation in the South Sudan’s cyclical conflicts dates to colonial times, united Sudan, the liberation struggle against Arabs domination, intra- and inter-communal conflicts, and to pre-independent/post-independent political fall outs and most critically the recent civil wars within the new state. Therefore, any reparation mechanism would have to consider potential redresses for different categories of victims within those episodes of violence, some of which may be overlapping and compounding.

The second practical obstacle is the lack of political consensus on who is or who is not a victim. The political leaders in South Sudan vocalise their own victimisation at times, over the civilian population who are directly affected by these conflicts. Third, is the ethnic nature of the conflict, which would require any reparation mechanisms would have to be guided by principles of impartiality, non-discrimination and neutrality. However a reparation mechanism should also appreciate the ethnic pattern of violence during the conflict and tailor symbolic measures to respond to such violence. Fourth, financial constraints could render any reparation mechanism ineffective or unpopular due to the overwhelming demand for the delivery of social services and critical development projects that are needed to sustain recovery and reconstruction in the aftermath of the conflict.

Finally, insecurity and instability would make implementation of a reparation mechanism risky for claimants. There are still armed groups who are not party to the R-ARCSS operating in some parts of the country, which are inaccessible for the government. This is compounded by rampant inter-tribal clashes and the growing attacks by unknown gunmen in different parts of the country. Therefore, unless there is a complete cessation of hostilities and consolidation of state authority, throughout the country, any process leading up to the creation or implementation of a reparation mechanism would be extremely difficult and less participatory. Equally, cattle raids, which has long been a cause of inter-communal conflict in some parts of the country, frequently occurs leaving scores of victims, who might not easily access reparations. This points to the need for effective community dispute resolution and DDR programme to facilitate ex-combatant transition away from violence to provide a conducive environment for reparations to operate in.

Conclusion

Reparations are a key mechanism to alleviate and acknowledge the loss and wounds caused by conflict. Reparations can also provide an educational function or expression of values in that society is transitioning away from violence and focusing on repairing and learning from the mistakes of the past. In the face of ongoing insecurity and conflict, implementing reparations will be difficult, especially where victims who are awarded compensation become targets. While the peace agreements for South Sudan recognise the need to deliver reparations to victims, it will take political leadership, strong grassroots engagement with victims and support of the international community to deliver. No matter who is responsible for the violence, the South Sudanese government has obligations under international law to ensure the delivery of reparations to all victims within its territory for gross violations of human rights and international crimes. Any reparation programme established in South Sudan with need to complement other transitional justice mechanisms such as the hybrid court and the CTGH, such as uncovering the broader patterns of violence, prosecuting those most responsible for violations and vetting them from holding government positions.

Recommendations

We have a number of recommendations to the South Sudanese government, rebel groups and the international community on reparations.

To the South Sudanese government

Principles

Reparations should be based on principles of remedying and acknowledging the harm caused in a non-discriminatory, victim-centred manner. Reparations can only be effectively delivered on a national level where there are sufficient guarantees of peace and security. Reparations can play an important part in establishing a human rights-based culture and rebuilding the social fabric amongst individuals and communities, as well as civic trust in the state. Such efforts have to be complemented with wider efforts to deal with the past and the root causes of violence, including issues such as power sharing and constitutional and administrative governance reform. Reparations have to be part of a broader, coordinated transitional justice process, that

89 See Chapter 3, Article 3.2.8 R-ARCSS 2018.
collectively seek to prevent victimisation going unaddressed and grievances festering to cause future social disruption and potentially violence.

The South Sudanese reparation programme should take a gender-inclusive approach to reparations at the design, access and implementation stages. Women and girls can suffer harm differently from men and boys. Wider social inequalities can disproportionately compound the suffering of women and girls, such as being subjected to sexual and domestic violence, being forced to abandon their education or career to care for their family after parents or a spouse is killed or seriously injured, suffering loss of income, or being left to search for the remains of loved ones and to demand justice. Girls and women can also have distinct reparation preferences from their male counterparts, such as prioritising healthcare over compensation. It may be appropriate for the South Sudanese government to adopt certain bespoke reparations based on gender. Reparations as such should also be gender-sensitive in content and delivery. Attention should also be paid to conflict-related sexual violence and efforts to provide an inter-disciplinary approach to responding to the harms caused to the physical, psychological health and dignity of such victims.

The South Sudanese reparation programme should consider the needs and interests of youth, who have been disproportionately affected by the conflict, not only through their direct victimisation and coercion to join armed groups, which have meant they have lost out in education and job opportunities later on, but also from the transgenerational impact of harm caused to their family, which can result in psychological trauma. It may be that interim or prioritized reparations are made to vulnerable victims, such as those who have suffered sexual violence, children, disabled or elderly to help mitigate early on their harm. Prioritisation can take the form of paying interim relief payments, as in Nepal and Sierra Leone, or fast tracking their applications.

The government before delivering reparations needs to engage with and consult victims, victim associations and civil society on what reparations should look like, so that they adequately and appropriately respond to their needs. This may require some sensitization on what reparations means in international law and the practices of other jurisdictions. Civil society and donors could play an important role in improving the reach of the state in these efforts across the country, particularly given the size of the country and poor infrastructure. A range of mediums should be used, such as community mobilization events, radio broadcasts, SMS messaging, and newspaper notices. Engagements with victims, victim associations and affected communities should be made in accessible and understandable terms, including in local languages and using mediums such as visual representations and storytelling where appropriate for those who are illiterate. Consultations and participation of victims in the design of reparations should make a special effort to ensure that women, children, elderly and those who are disabled are able to contribute to the process and have their views and concerns heard and considered. Particular attention and provision should be paid to victims of sexual violence and torture, who may feel stigmatized, socially excluded or psychologically harmed, such as private, discreet forums.

Victims, their relatives and the public should have access to easily obtainable, in relevant languages and concise information on the transitional justice processes and progress. The state is responsible for disseminating information to victims and the general public on ‘all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.’ Engagement with victims should be a ‘two-way communication … to conduct interactive activities, to listen to victims and respond to what they are saying, and to take into account victims’ concerns.’ The Office of the High Commissioner for Human Rights as stated that ‘national consultations are a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of transitional justice programmes.’

As such consultations are not PR exercises and are distinct from outreach, which aim to sensitize affected communities. Once institutions are legislated for, set up and operational, outreach to affected communities is key. The United Nations Secretary General notes the importance of outreach in ensuring the impact and sustainability of transitional justice institutions so that they are clearly understood and coherently communicated. Effective consultation also can contribute to the collective dimension of the right to truth for society and not just victims to be aware of the consequences of the conflict and the need to redress the suffering of those most affected.

Administration

The South Sudanese government should pass legislation to give effect to the creation of the CRA. The legislation should stipulate the organisation and membership of the CRA, its powers, funding and audit procedures. The government should designate a dedicated budget line to ensure the financial security of the CRA and demonstrate its commitment to delivering redress to victims. While the international community and regional actors may provide technical and/or financial assistance in the delivery of reparations, any long lasting solution must come from within the society itself, requiring the South Sudanese government to take ownership and responsibility for implementing reparations. There has been some innovation in finding funding

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90 See Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparations 2007; and Reparations for Conflict-Related Sexual Violence, UN Guidance Note of the Secretary-General, June 2014.
92 See such an approach in Northern Ireland - Transgenerational Trauma: Dealing with the Past in Northern Ireland, WAVE Trauma Centre, March 2014; and in Peru Article 7(c), Reglamento de la Ley Nº 28592, Ley Que Crea El Plan Integral de Reparaciones (PIR), Decreto Supremo Nº 015-2006-JUS.
94 Section 16 Agreement between the Federal Republic of Germany and the State of Israel 1952.
99 Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p.10.
for reparations in other contexts that may be useful for South Sudan, such as a wealth tax, a levy on natural resources, debt buyouts, legal and illegal assets of members of non-state armed groups, and donor contributed trust funds.

The South Sudanese government will need to establish a registry of victims’ harm and identification details to help map out the type of violations and provide transparency for costing. Application forms for reparations should be limited to requiring victims to provide essential information, such as basic personal information, statement of facts and violations suffered, confidentiality issues, harms suffered, and supporting documents. The International Criminal Court has reduced its initial application for victim participation and rehabilitation forms from 17 pages to 1 page, with further information asked later on when determining amounts and forms of reparations.

Consideration will need to be made on how personal identifying information of victims can be securely held and if it needs to be verified or shared with other bodies, such as the hybrid court, CTGH or government institutions such as the Ministry of Health for provision of rehabilitation. Thought will be needed on how to facilitate victims’ access to the process. In other contexts this has included evidential presumptions that victims’ claims for certain reparations would be accepted on the grounds of ‘good faith’ subject to verification by the state administrative body.

As millions of South Sudanese are displaced or refugees, efforts will need to coordinate with refugee and migration bodies to facilitate their return or at least awareness of their eligibility for reparations. Many individuals are likely to have lost their identification, have insufficient medical records, or be unable to provide other evidence to support their claims for reparations. To require victims to supply such evidence may exclude most victims, in particular impoverished and rural victims who cannot afford to travel to the capital to have new documents issues. The government has a responsibility to provide displaced individuals with new documentation.

In other contexts identification by two credible witnesses’ statements were deemed necessary to support victims’ claims on harm and identification. The Inter-American Court of Human Rights in dealing with reparation claims after conflict has taken a relaxed burden of proof, finding that such claims are ‘not subject to the same formalities as domestic judicial actions’ and the court pays ‘special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties.’

The UN Claims Commission for the Iraqi invasion of Kuwait took a flexible approach requiring claimants to provide ‘simply documentation on the proof of the fact and the date of injury or death, i.e. prima facia proof.’ For those claiming for property damage up to $100,000 they had to be ‘supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss,’ i.e. on the higher evidential burden of a balance of probabilities.

Eligibility should be based on data and surveys of harm caused to the civilian population during the South Sudanese civil war. Not all victims will likely be eligible given that reparation programmes often prioritise those who suffer the most, i.e. those who have been killed or disappeared, suffered serious injured resulting in disability, torture, slavery or sexual violence.

The CRA will have to define the temporal scope of eligibility from the start of the civil war within South Sudan in 2013, or allow more historic claims from the war with Sudan. The CRA will also have to determine which reparations should be included, but it is recommended that torture, disappearance or murder, sexual violence, conscription of child soldiers, and serious injury should be prioritised as causing particular gross violations of human rights that requires reparations.

Some countries have included IDPs and refugees in their reparation programmes, such as Peru and Colombia. In the case of Colombia the inclusion of IDPs resulted in them accounting for 7.48 million claimants out of 8.7 million registered victims. However including such a large number of victims has meant that only a fraction of victims have actually received redress. The Kenyan Truth, Justice and Reconciliation Commission categorised and prioritised victims to concentrate resources on those most vulnerable and only provide individual reparations to IDPs and refugees where they died. The Commission organised victims of gross violations of human rights into the following categories: (1) violations of the right to life; (2) violations to the right to personal integrity; including sexual or gender based violence; (3) forcible transfer of populations; (4) historical and contemporary land injustices; and (5) systematic marginalisation. The TJRC prioritised victims in categories 1 and 2 as those most vulnerable under the heading of Priority A, and eligible for monetary compensation through a ten-year annual pension, as well as medical and psychological vouchers for rehabilitation. Under the TJRC reparation recommendations, all victims in the five categories are entitled to collective reparations, with other victims in Priority B only able to claim collective reparations.
These collective reparations are to address the policies and practices that negatively impacted entire groups of people, and include measures such as apologies, memorials, and land restitution. The purpose of these collective reparations is to recognize victims’ experiences, acknowledge the state’s responsibility, restore their dignity and ensure non-repetition.

Efforts should also be made to make the DDR process more comprehensive and integrated with the transitional justice system, in particular for disabled or otherwise victimized ex-combatants, such as former child soldiers. In Kosovo the reparation law includes provision for civilians and combatants killed or injured during the conflict. Protection measures such as anonymity or private, discreet meetings are held with victims wanting more information on the reparation process. The Presidency and Vice-Presidency should strongly support the reparation process and encourage people to apply, so that security forces do not feel that there is a risk to their own position. Allegations of threats or intimidation of victims applying for reparations should be thoroughly investigated and those responsible prosecuted and punished.

In terms of splitting amounts of compensation amongst family members who have lost a loved one during the conflict, there are different practices to ensure an equitable outcome. In Chile reparations were allocated according to a standard formula whereby the pension for a person disappeared or killed was apportioned as 40% for a surviving spouse, 30% for a mother or father in the absence of a surviving spouse, 15% for the mother or father of victim’s biological children and 15% for each child of a victim. Apportionment of reparations does not have to follow domestic inheritance law. The Moroccan Equity and Reconciliation Commission (IER) departed from sharia-based inheritance law to give a larger percentage to widows (40% rather than 12.5%) instead of the eldest son. In Peru the Comisión de la Verdad y Reconciliación (CVR) prioritised compensation to the spouse or widow over children and parents. This amount was to be split with the spouse or cohabitee partner to obtain not less than 2/5, with 2/5 for children (to be equally divided), and not less than 1/5 for the parents (equally divided).

**Form of Reparations**

Reparations can take the form of restitution, rehabilitation, compensation, measures of satisfaction and guarantees of non-repetition. These measures are intended to be used together to comprehensively respond to victims’ harm. For instance, the Chilean National Corporation of Reparation and Reconciliation provided the children of those who had been disappeared a pension, as well as military service waivers and education support, including university fees and expenses.

In terms of compensation this can take the form of one off payment of a lump-sum, periodic or pension payments, micro-financing or even a top-up for collective measures, such as housing or education. Compensation can be more discreet than collective measures, given ongoing insecurity; it can make use of technology, such as mobile banking. While compensation in South Sudan could be based on traditional concepts of blood debts, such as 30 head of cattle for a murder, the scale of loss would frustrate the operation of reparations if this were the standard to each victim. A symbolic amount to provide victims with some means to start a new life or to cover costs for education, may provide some remedy and acknowledgement of their suffering.

In South Africa, the Truth and Reconciliation Commission recommended that $2,700 be awarded for six years to victims of gross violations of human rights (namely killing, abduction, torture or severe ill-treatment) who came before it, but the government only made a single payment of less than $4,000. In Colombia compensation for disappearance, murder, torture or sexual violence is calculated based on 30 or 40 monthly minimum salaries, depending on the seriousness of the harm ($6,218-$8,290). In Argentina families of those disappeared were awarded a far larger amount of $224,000 based on the highest earnings of public employees, rather than the industrial accidents scheme, so as to distinguish their individual harm as intentional, wrongful acts. Regional and international courts have determined the appropriate amount of compensation based on discretionary amounts of ‘equity’ or what seems fair, not to enrich or impoverish the victim. The South Sudanese government should engage with victims to find an equitable amount for different categories of harm.

The conflict in South Sudan did not just harm individuals, but also ruptured family, clan and community social fabric, the government should consider collective reparations to respond to this. Collective reparations are meant to provide ‘benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law.’ Collective reparations can include the collective delivery of victim-focused services, such as to child soldiers, as well as symbolic measures, such as memorials or apologies to a community for a massacre. Collective reparations are distinguishable from general economic development to war affected areas, by being responsive to victimised groups’ suffering and acknowledging such harm by a responsible actor. Providing collective reparations alongside compensation may help to broaden benefits and inclusion of affected communities in the reparation process.

As far as possible the South Sudanese government should examine those who were expelled or forced to leave their jobs, and find appropriate restoration of their employment or in-kind measures to restore them to their previous status of employment. The South Sudanese Land

117 Ibid., p107.
118 Ibid., p108.
119 Ibid., p114.
123 Law 19.123, 8 February 1992: educational scholarships were made transferrable to grandchildren under Law 20.405, 10 December 2009.
128 Article 149, Decree 2800 of 2011.
129 Garrido and Bajgara v Argentina, Judgment, Series C No. 39, IACHR, 27 August 1998, para.43; Case of Tomaux and Others v Turkey, ECtHR, 18 September 2009, para 224; and Prosecutor v Katanga, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-ENG-17-08-2017, para.191.
130 Friedrich Rosenfeld, Collective reparation for victims of armed conflict, International Review of the Red Cross 92(879), September 2010, 731-746, p.372.
Act 2009 does provide for restitution or compensation for land lost since 16 May 1983, but there has been no commitment by the government to ensure the return of those displaced.

Rehabilitation should also be freely provided to victims, including healthcare, social and legal support. At the International Criminal Court in the Lubanga decision, rehabilitation services for victims of murder should include the provision of medical services and healthcare, psychological, psychiatric and social assistance to support those suffering from grief and trauma, and any relevant legal and social services. Such support may include equipping public or NGO-run hospitals and health centres to provide psychological assistance to victims. Rehabilitation is vital for victims, as it often serves as a precondition for victims to benefit from other forms of reparations.

The South Sudanese government beyond compensation and rehabilitation, reparations should also aim to provide symbolic measures to awaken society to the violations to occur so that they remember and victims’ suffering is publicly acknowledged to prevent its repetition. Symbolic measures can include memorials, apologies, acknowledgements of responsibility and memorial prayers as a ‘communal process of remembering and commemorating the pain and victories of the past’. Traditional rituals should be incorporated where appropriate to ensure social security forces.

To rebel groups
Ex-combatants and commanders can play an important role in contributing to truth recovery and location of the remains of those missing or disappeared during the conflict. It may also be helpful for ex-combatants to engage in community rebuilding activities, such as infrastructure repair or traditional ceremonies, to facilitate their social reintegration and diffuse tensions. In Colombia in coordination with international and local NGOs, members of FARC are assisting in demining operations, there may be a role for ex-combatants to contribute to such processes in South Sudan, but sufficient training, adherence to protocols and support would be needed. Leaders of organisations should also provide acknowledge responsibility and apologies for atrocities committed, which should be reflected in any sentencing brought against individuals before the hybrid court. There are a number of factors that can make an apology successful in that it mainly satisfies victims: timeliness; explicit statements of apology and regret; an acceptance of personal responsibility; the avoidance of offensive explanations or excuses; sincerity; willingness to make amends and promises to avoid future transgressions. This may mean that an effective apology takes the form of an individual or group: 1 Acknowledging the wrong; 2 Acceptance of their responsibility in that wrong; 3 Expression of regret to victims for the harm caused; 4 Assurance of non-repetition; and, 5 An offer of repair or corrective action.

To international community and regional actors
The international community and regional actors (AU and IGAD) can provide important backing of a reparation programme in South Sudan. This can involve providing financial support to local civil society groups to sensitise affected communities on the issue, legal advice or assistance to victims in completing application forms and supporting evidence, or psychological support to survivors. Donor assistance to affected communities could help to improve social bonds and make communities more resilient to cope with the trauma, giving victims a baseline of community support to claim reparations.

Alternatively financial support can be provided directly to the reparation programme to cover its administrative costs, or to fund technical capacity building. Reparations are measures intended to provide some sense of justice to victims, this often means that the responsible party should contribute to make good the damage caused. In cases of international crimes, often this means that state is responsible for delivering reparations to all victims, donors financially funding the cost of reparation awards may detract from the South Sudanese facing its responsibilities for the consequences of the war. Successful reparation programmes have worked because there was will to politically and financially support them through a dedicated budget line rather than a donor contributed trust fund, which can have associated concerns of being non-sustainable and subject to corruption. While the AU has recently established the trust fund in light of the conviction of Hissène Habré, it has struggled to attract sufficient funding to meet the reparation judgment of the Extraordinary African Chambers. There may be a balance to be struck in donor and state engagement from the international community, such as providing international loans or reducing or restructuring national debt payments.

The international community and regional actors also have a vital role to play in maintaining the transitional framework and the sustainability of the peace process by applying pressure to the South Sudanese government that the peace benefits those most affected and not just political elites. Reparations are a key victim-centred measure to alleviate and acknowledge individuals and communities suffering, so that they are able to economically, personally and culturally develop as well as to mitigate their grievances from becoming tomorrow’s sites of conflict. More broadly, the role of international community and regional actors (IGAD and AU) is thus to keep reparations on the government’s agenda and ensure transparency to such a process.

131 Article 78(1), Land Act 2009.
132 ICC-01/05-01/08:3399, para.42.
133 See Clara Sandoval, Rehabilitation as a Form of Reparation under International Law, (London, REDRESS, 2009).
136 See Apologies and Institutional Abuse, 2018, p7 available at https://apologies-abuses-past.org.uk/outputs/reports/
137 Pablo de Greiff, Reparations: Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 8 October 2014, A/69/518, para.56.
Reparations, Responsibility
Victimhood in Transitional Societies

REPARATIONS IN SOUTH SUDAN
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United Nations Photo - Children of South Sudan