



International arbitration for victims of Sudanese oil contracts

The 1996-2005 wars over control of Sudan's oil fields caused unspeakable suffering to the population. As part of its justice-and-peace agenda, the Comprehensive Peace Agreement (CPA) established an entitlement to compensation for people whose rights have been violated during the oil wars. But no justice has been done. Meanwhile, inhabitants are disgruntled and angry with the oil industry. Their grievances must be addressed. A domestic legal process would be unrealistic. Therefore, the European Coalition on Oil in Sudan calls upon the parties to the post-referendum negotiations to confirm their people's unalienable right to compensation and to agree to international arbitration to ensure that justice will be done.

*"The question then is not so much is there a right to compensation but how can that right be implemented."*¹

Introduction

The Sudan Comprehensive Peace Agreement (CPA) establishes a right to compensation for victims of oil exploitation. The vast majority of damages dates back to before 2005. Implementing the CPA and addressing past wartime claims would initiate a difficult judicial process to determine who bears responsibility and who should pay how much in compensation. On the other hand, historic grievances are fuelling the tensions between oil companies and local communities. These grievances are discouraging investment and are threatening the very future of the oil industry. Failing to address justified grievances will undermine trust and foster political instability in the oil regions. *A political process for reconciliation through justice is paramount for the viability of Sudan's future successor states.*

A right to compensation for victims of violations of human rights and International Humanitarian Law is established in international treaties generally recognized by States.² Art. 208.5 of the National Interim Constitution, which quoted the relevant article of the Comprehensive Peace Agreement³, specifically recognizes this entitlement for those people in Sudan whose rights were violated as a result of oil contracts. A material right to compensation was thereby created for injustices committed

¹ *Victims' Compensation and Participation, Appendix to the Letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/1063, 12, par. 22.*

² See for instance Article 3 of the Hague Convention (IV) of 1907 and Article 91 of the Additional Protocol I. See also, more recently and conclusively, the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of Humanitarian Law", Commission on Human Rights Resolution 2005/35 (19 April 2005).

³ See the 2005 Sudan Comprehensive Peace Agreement, Wealth Sharing Agreement (art. 4.5); Sudan's Interim National Constitution (art. 208.5); and Southern Sudan's Interim National Constitution: *'Persons whose rights have been violated by oil contracts are entitled to compensation. On the establishment of these violations through due legal process, the Parties to oil contracts shall be liable to compensate the affected persons to the extend of the damages caused.'*

in the course of oil exploitation, whether linked to international crime and human rights violations or otherwise. This right cannot be expunged, but its implementation requires solid political agreement and scrupulous execution.

The existence of a right to compensation under international and domestic legislation does not automatically imply the existence of an appropriate enforcement mechanism to uphold this right. Implementation modalities for Sudan's constitutional right to compensation are unclear. Some lawyers argue that the issue must be handled by the Constitutional Court, others believe that civil courts are the appropriate forum. Neither the national Government nor the Government of Southern Sudan have provided any guidance as to how this right should be implemented. There is no legal counsel at hand in most of the affected areas, and if it were it would be way beyond the financial means of the vast majority of victims. Moreover, Sudan's court system is poorly staffed and funded, and it would, in any case, be incapable of handling mass claims of this nature. As a result, the compensation clause of the CPA has remained totally ineffective.

International commissions have a good track record of dealing with compensation claims. The most notable recent examples include the United Nations Compensation Commission (UNCC) established by a UN Security Council resolution to resolve damage caused by the Iraqi attack on Kuwait; and the Eritrea-Ethiopia Claims Commission (EECC) that handled claims from the Eritrea-Ethiopia war on the basis of an agreement between the two states.

Northern and southern Sudan will become sovereign states as of 9 July this year and the two governments are currently negotiating a wide range of issues. Safeguarding the rights of their populations is one of them. In the absence of a given enforcement mechanism, the parties to the negotiations on post-Referendum Arrangements have two options: either introduce an international mechanism in the post-Referendum Arrangements, or ensure that claims are recognized before national courts.

Advantages of an international procedure

Domestic courts and authorities are empowered to grant compensation pursuant to international norms. State parties may also invoke an international process if they believe this to be more effective. Claims based on national law are enforceable by individuals before domestic courts as they have procedural capacity before these authorities and they may initiate proceedings themselves. Some national legal systems allow for group actions, which are usually appropriate in situations where mass violations have taken place. The claimant in group actions seeks recompense for damages sustained by all the members of the group represented. Since communal rights and a communal sense of belonging are highly developed in Sudan, it would seem appropriate if Sudanese law were to allow for group actions.

As for compensation claims based on international law, States are obliged to recognize existing rights for compensation under international law. The obligation is reiterated as a recommendation by the *Basic Principles and Guidelines*, which state that States should make "available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to compensation for gross violations of international human rights or serious violations of humanitarian law".

In the case of Sudan, a domestic solution would have several major disadvantages:

- 1- The only liable private parties with a current presence in Sudan are Petronas and CNPC, while Lundin Petroleum maintains a formal legal presence only in northern Sudan.
- 2- A separate agreement would be required to enforce a ruling by the southern Sudan court against any of Sudan's Successor States, and this is doubtful. In other words, domestic legal processes are unlikely to result in payment.

- 3- Sudan's legal system is not in a position to handle a multitude of complex legal cases satisfactorily.

The capacity problem would be solved by invoking an international process. The other two issues arise in both domestic and international procedures, but are easier to handle in the latter case as this would allow for a role for members of the international community who have jurisdiction over the liable private parties and they are more likely than a domestic legal mechanism to assist, financially or in some other way, in the success of an international process.

At international level, there is to date no satisfactory permanent procedure in place for victims to enforce their right to compensation. Victims must often rely on help from their home State to enforce their rights. This is disadvantageous for the victims, as their rights might be sacrificed to political considerations. This is even more of a problem in Sudan because the national Government is one of the liable parties. Victims are only likely to find redress if the right to compensation is safeguarded by northern Sudan and southern Sudan agreeing to resort to international arbitration, and if financial guarantees are given.

Models of International Compensation Mechanisms

There are three main paths towards an international compensation mechanism.

Firstly, a UN Security Council resolution, which does not require the consent of the defendant. The United Nations Compensation Commission (UNCC) was created in 1991 as a subsidiary organ of the UN Security Council on the basis of a UNSC resolution. Its mandate was to process claims and pay compensation for loss and damage suffered as a direct result of Iraq's invasion of Kuwait. Funds for compensation were drawn from the United Nations Compensation Fund, which received a percentage of the proceeds generated by export sales of Iraqi petroleum and petroleum products. In 2005, the UNCC presented its final report, after having awarded US\$ 52.4 billion for 1.55 million claims. In line with Security Council resolution 1483 (2003), 5 per cent of the proceeds are deposited in the Compensation Fund.

Victims claiming reparation from the UNCC were permitted to make a direct request to the UNCC. The UNCC proved effective in claims against Iraq, but did not consider claims against non-State parties. However, the fact that non-State parties were permitted to present claims indicates that non-State parties may be defendants in international compensation proceedings.

Secondly, international compensation proceedings can be based on an agreement between two or more parties. In their 2000 peace agreement, Eritrea and Ethiopia agreed to an international process to compensate for war-related damages. The 5-member Eritrea Ethiopia Claims Commission (EECC) was established under the Permanent Court of Arbitration (PCA), with two representatives from each party and an independent chair. It passed its final judgment in 2009 for a total of US\$ 260 million. This model has several features that would be useful for Sudan, notably the use of the impartial services of a specialized court, stakeholder involvement in appointing the arbiters, and the fact that the PCA has at its disposal a Financial Assistance Fund that can relieve the parties of much of the cost involved.

While the EECC expressly accepted claims by nationals against countries, the two States agreed that they would themselves bring all claims on behalf of their citizens. The two States were under no obligation to actually compensate the victims themselves. This partly explains why the EEC failed to contribute towards reconciliation.

A third model is provided by the International Criminal Court (ICC). The ICC may order that an award for reparation is made through a Trust Fund as provided for in Article 79 of the Rome Statute. The Fund will receive its resources mainly from voluntary contributions from States, international

organizations, corporations and individuals, as well as through fines and forfeitures imposed by the Court on perpetrators. A weakness of a voluntary fund is that the level of the voluntary contributions is likely to fall short of the extent of the damages. This model requires legal proceedings before the ICC, which does not apply in this case as Sudan's oil wars were mostly over by the time the Rome Statute came into force.

Representation of Private Parties

Natural and private juridical persons usually play a minor role in international compensation mechanisms and only as claimants. However, there are no formal objections to private parties playing a full role in an international compensation procedure. The mandate of the EECC was “*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 (...).*”⁴

The UNCC accepted claims from individuals, corporations and Governments, submitted by Governments, as well as those submitted by international organizations for individuals who were not in a position to have their claims filed by a Government. A fundamental flaw of the UNCC procedure is the fact that it does not fully recognize Iraq as a defendant party.

The CPA specifies that claimants are *persons whose rights have been violated* – i.e. citizens of Sudan - and those liable are *signatories to oil contracts* – i.e. companies and the Government of Sudan. As several companies that were signatories to the contracts are no longer present in Sudan, they cannot be represented by either northern or southern Sudan and can therefore only defend themselves. All claimants are citizens of Sudan and could therefore be represented by their State. However, North and South Sudan, being successor States to Sudan, are also defendants, either both of them or only one, depending on how they settle the succession of the relevant rights and duties. In order to avoid the conflict of interest that would arise if they were to represent claims against themselves, a third party could be created to represent victims who wish not to be represented by their own State. The international guarantors of the CPA could establish such a party. They have a strong commitment to implementation of the CPA and are allocating considerable funds to this end. Therefore, the number of parties before the Commission can be limited to less than 10, ensuring a speedy and effective process, while avoiding a conflict of interest.

Enforcement and Funding

The potential right for victims to be compensated has to be distinguished from the enforcement of the right, i.e. the procedural capacity to exercise the right and power of the State to enforce an obligation to pay compensation. In other words, how can the parties found to be liable be made to foot the bill?

In the June 2010 report ‘Unpaid Debt’, ECOS states that conservative estimates of damages incurred during the oil war in Block 5A amount to US\$ 600 million. Considering the fact that the adjacent Blocks 1 and 2 and Block 7 have also seen large scale crimes linked to oil exploitation, the final extent of damages may hypothetically amount to several billion US Dollars. This amount would mean insurmountable problems for the liable parties.

In the case of a key liable party i.e. the Government of Sudan, financial guarantees can be included in the post-Referendum economic and financial arrangements. The effectiveness of the UNCC

⁴ Article 5.1, AGREEMENT BETWEEN THE GOVERNMENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA AND THE GOVERNMENT OF THE STATE OF ERITREA, December 2000. See: <http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf>

depended largely on it receiving over 5% of Iraq's oil revenues. A similar arrangement would work for Sudan. Any other arrangement would most likely be frustrated by the fact that Governments tend to have too many other financial priorities.

The two main private parties, CNPC and Petronas, continue to have a considerable presence in Sudan, in both the north and the south. Domestic legislation must be enacted to impose compliance with the decisions of a claims committee.

If the private parties, i.e. companies - notably Talisman, Lundin, and OMV - were to refuse to contribute their dues to the Compensation Fund, the onus would be on their home governments to ensure compliance. They must make compliance conditional on export guarantees, consular assistance and any other state services to the liable companies. Petronas, CNPC, and OMV are wholly or partly owned by their home governments, all of which have expressed support for the CPA.

The CPA states that affected persons must be compensated "*to the extent of the damage caused*". If the ECOS calculation is correct, then compensation may run into billions of dollars. It is unlikely that the defendants will be able to pay this amount. The mandate of a Claims Commission should provide for this by allowing less than full compensation. Such a system may only provide *rough justice*, but it would also substantially increase the chances that the defendants will accept arbitration. The alternative may be no justice at all.

Finally, it is important to recognize the fact that individual rights in Sudanese society must be balanced against collective rights and interests. A system of differentiation was found by the UNCC in categorizing the claims of individual victims into different categories and providing pre-determined fixed sums and/or an established amount depending on the seriousness of the violation and the possibility of providing documentary evidence.

PROPOSAL

1. The parties to Sudan's post-Referendum negotiations confirm the right established in art. 4.5 of the Wealth Sharing Agreement of the CPA, and agree to
 - transfer the State's liability for compensation to Sudan's two successor states;
 - implement that right through binding third party arbitration;
 - pass legislation compelling the oil companies found to be liable to make appropriate compensation funds available through bank guarantees;
 - that there will be no immunity for the 'signatories to oil contracts'; and
 - allocate a fixed maximum percentage of Sudan's oil revenues to pay for the State's liability.
2. The parties to Sudan's post-Referendum negotiations invite the Permanent Court of Arbitration to establish a Claims Commission, conveying their wish to
 - apply for the services of the Permanent Court of Arbitration's Financial Assistance Fund;
 - allow all signatories to oil contracts to appear as defendants;
 - allow States to represent claimants who so wish;
 - create an independent third party to represent claimants who so wish;
 - allow for group action;
 - provide for adjusting the actual levels of compensation to the available funds; and
 - establish and administer a Compensation Fund that will receive contributions from the signatories to the oil contracts and voluntary contributions, including from the CPA Guarantor States, and home states of the liable companies, International Organizations, and any member of the international community.
3. The guarantors to the CPA and other members of the international community assist in ensuring implementation of the right to compensation by

- assisting in establishing an independent third part to represent claimants who so wish;
- using all available means to ensure acceptance of the arbitration and contributions to the Compensation Fund by relevant oil companies in their jurisdiction; and
- making voluntary contributions to a Compensation Fund, ensuring a minimum level of contributions that guarantee that the process will be meaningful.

The European Coalition on Oil in Sudan (ECOS) represents a large group of European organizations working for peace and justice in Sudan. ECOS calls for action by Governments and the business sector to ensure that Sudan's oil wealth contributes to peace and equitable development.

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