

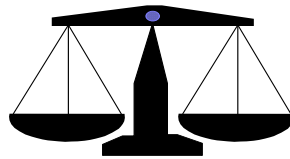
**FOR AN EFFECTIVE IMPLEMENTATION OF REPARATION OF THE
VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS:
THE CASE STUDY OF SIERRA LEONE AND LESSONS FOR THE
DEMOCRATIC REPUBLIC OF CONGO**

Submitted in partial fulfilment of the requirements for the degree LL.M
(Human Rights and Democratisation in Africa)

by

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27 October 2006

DECLARATION

I, **MAVUNGU PHEBE CLEMENT**, declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Professor Alejandro Lorite Escorihuela

Signature.....

Date.....

EPIGRAPH

In honouring the victim's right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and the future of human generations, and affirms the international legal principles of accountability, justice and the rule of law.

Preamble, Bassiouni Report (E/CN.4/2000/62)

DEDICATION

To my Parents Anselme MASIALA MAVUNGU and Pascaline PFUTI MAZEMBO;

To my brothers and sisters;

To all victims of gross and systematic human rights without redress.

ACKNOWLEDGEMENTS

My gratitude goes to the Centre for Human Rights for affording me the opportunity to take part in this wonderful and worthwhile programme for advancement of human rights and dignity in Africa and Worldwide. Special gratitude is due to Prof. Heyns, Prof. Viljoen, Prof. Michelo Hansungule, Martin Nsibirwa, Jeremy Uwimana and John Wilson for their academic and administrative guidance. My sincere appreciation is expressed to the German Academic Exchange Programme (DAAD) for sponsoring my study at the Centre for Human Rights.

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I am grateful to my parents, family and friends whose support, help and prayers have contributed to the success of my LLM studies. The tireless support of my brother Eddy Mazembo Mavungu during my LLM deserves a particular mention. My thanks also go to all my former classmates and friends in the DRC, in particular to Irène Pambu, for their encouragements and indefectible friendship.

Finally, I would like to thank my classmates of the LLM 2006 (University of Pretoria) and of the Law Department (American University in Cairo) for providing me with a family away from home. I will always cherish good memories of this year spent with you.

Finally, my thanks and praise go to the Almighty God, who granted me the grace to tearfully capitalise support, encouragements and affection I have benefited from the abovementioned people. I owe You an everlasting '*Te Deum laudamus*'.

LIST OF ABBREVIATIONS

ACHR	American Convention of Human Rights
ACCR	African Charter on Children's Rights
ACHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Charter on Human and Peoples' Rights
ACtHR	African Court of Human and Peoples' Rights
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo
AFRC	Armed Forces Revolutionary Council
AHRL	African Human Rights Law Journal
AGI	Global and All Inclusive Accord
AP	Additional Protocol
CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CDF	Civil Defence Forces
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESR	(UN) Committee on Economic, Social and Cultural Rights
ECHR	European Convention on the Protection of Human Rights
CRC	Convention on the Rights of the Child
DIC	Dialogue Inter-Congolais
DRC	Democratic Republic of Congo
ECHR	European Convention of Human Rights
ECOSOC	Economic and social Council
ECtHR	European Court of Human Rights
EHRR	European Human Rights Report
GC	Geneva Convention
HRC	Human rights Committee

HRW	Human Rights Watch
IACtHR	Inter- American Court of Human Rights
IACHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTJ	International Centre for Transitional Justice
ICTR	International Tribunal for Rwanda
ICTY	International Tribunal for ex-Yougoslavia
IHRL	International Human Rights Law
ILO	International Law Organisation
IRC	International Rescue Committee
MAHR	Minnesota Advocates for Human Rights
MLC	Mouvement de Liberation du Congo
NGOs	Non-Governmental Organisations
RCD	Rassemblement Congolais pour la Démocracie
RCD-ML	Rassemblement Congolais pour la Démocracie- Mouvement de Libération
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SLA	Sierra Leone Army
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)

TABLE OF CONTENTS

DECLARATION.....	ii
EPIGRAPH.....	iii
DEDICATION.....	iv
ACKNOWLEDGEMENTS.....	v
LIST OF ABBREVIATIONS.....	vi
TABLE OF CONTENTS.....	viii
CHAPTER ONE: INTRODUCTION.....	1
1.2. Problem statement.....	2
1.3. Focus and objectives of the study.....	3
1.4. Research hypothesis.....	3
1.5. Relevance of the study.....	4
1.6. Literature review.....	4
1.7. Methodology.....	5
1.8. Limitations of the study.....	5
1.9. Structure of the study.....	6
CHAPTER TWO: CONCEPTUAL FRAMEWORK OF REPARATION OF VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS.....	7
2.1. Introduction.....	7
2.2. 'Gross and systematic' human rights violations under international human rights standards.....	7
2.2.1. The qualitative element.....	8
2.2.2. The quantitative element.....	9
2.2.3. The state's passivity.....	9
2.2.4. Gross and systematic human rights violations defined.....	10
2.2.5. State responsibility for gross and systematic human rights violations.....	100
2.3. Reparation under international human rights law.....	11
2.3.1. Introduction.....	111
2.3.2. Semantic content of reparation.....	12
2.3.3. Legal basis of the victims' right to reparation.....	13
2.3.3.1. Universal of human rights instruments as source of victims' reparation.....	13
2.3.3.2. Regional human rights instruments as sources of victims' reparation.....	16
2.3.3.3. Victims' reparation in customary international law.....	177
2.3.4. Forms of victims' reparation.....	188
2.3.4.1. Civil mechanisms of victims' reparation.....	188
2.3.4.2. Social mechanisms of victims' reparation.....	19
2.3.4.3. Offenders' accountability.....	20
2.4. Conclusion.....	200
CHAPTER THREE: IMPLEMENTATION OF REPARATION OF VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS: SIERRA LEONEAN DILEMMA.....	22
3.1. Introduction.....	222
3.2. Background of gross and systematic human rights violations in Sierra Leone.....	222
3.2.1. Factual overview of the conflict.....	222
3.2.2. Qualifying violations suffered by victims.....	233
3.2.2.1. Identifying violations suffered by victims.....	233
3.2.2.2. Violations of civil and political rights.....	244
3.2.2.3. Violations of gross and systematic nature.....	255
3.3. Responses to gross and systematic violations.....	266
3.3.1. The Truth and Reconciliation Commission.....	267
3.3.2. Criminal accountability mechanism.....	277
3.4. Responses to gross and systematic violations versus international standards on victims' reparation.....	288
3.4.1. The TRC and the victims' right to reparation.....	28

3.4.2. Criminal accountability mechanism and the victims' right to reparation	300
3.4.3. Juxtaposition the Special Court and TRC versus the victims' right to reparation.....	322
3.5. Conclusion	322
CHAPTER FOUR: LESSONS FROM SIERRA LEONE IN DEALING WITH VICTIMS REPARATIONS IN THE POST-CONFLICT DEMOCRATIC REPUBLIC OF CONGO.....	34
4.1. Introduction	344
4.2. Factual overview of the Congolese conflict.....	344
4.3. Qualifying violations committed during the conflict in the DRC.....	377
4.3.1. Violations perpetrated in the DRC.....	377
4.3.2. Qualifying violations committed in the DRC	388
4.3.2.1. Violations of civil and political rights.....	388
4.3.2.2. Violations of gross and systemaric nature.....	39
4.4. Responses to gross and systematic violations in the DRC.....	39
4.4.1. The truth and reconciliation mechanism	400
4.4.2. Criminal accountability mechanisms	411
4.5. Advancing the victims' right to reparation in the DRC transitional justice: Lessons from Sierra Leone experience.....	422
4.5.1. Relevance of Sierra Leone experience	422
4.5.2. Recommending to the RDC transitional justice lessons from Sierra Leone.....	43
4.5.2.1. Regarding the truth and reconciliation mechanism.....	433
4.5.2.2. Regarding criminal accountability mechanisms	444
4.5.2.3. Regarding the juxtaposition of both transitional justice mechanisms.....	444
4.6. Conclusion	455
CHAPTER FIVE: GENERAL CONCLUSION	46
BIBLIOGRAPHY	47
1. PRIMARY SOURCES.....	477
1.1. INTERNATIONAL INSTRUMENTS	477
1.2. DOMESTIC INSTRUMENTS.....	48
2. SECONDARY SOURCES.....	49
2.1. Books and Chapters in books.....	49
2.2. Articles	500
2.3. Reports.....	510
2.4. General Comments	533
2.5. Case Law	533
African Commission on Human and Peoples Rights.....	53
European human rights Court.....	533
Inter-American Court and Commission	533
International Court of Justice and Arbitrary Tribunals.....	54
International Criminal Court	54
UN Human Rights Committee.....	544
2.6. Websites	544

CHAPTER ONE: INTRODUCTION

1.1. Background to the study

In a state recovering from an armed conflict characterized by massive human rights violations, challenges to effectively address the legacies of the unrest to achieve peace and justice are manifold. Means to address those challenges differ from one context to another as each country's experience is uniquely shaped by its historical trajectory, as well as its current political, legal, social and economic realities.¹ Despite the diversity of post-conflict contexts, which may entail the diversity of ways of dealing with aftermaths of systematic human rights violations that remain unsolved,² it can be found a common way past legacies are addressed. Most states, if not all, resort to transitional justice mechanisms, which provide avenues of societal response to human rights violations.

Transitional justice mechanisms include the following steps: the prosecution of perpetrators, whether in a domestic, a hybrid internationalized, or an international court; the establishment of the truth about the past by creating of a Truth Commission or another similar national institution; the development of victims' remembrance initiatives and the adoption of vetting measures. These mechanisms aim at establishing the truth on incurred violations, determining accountability, offering redress to victims, reconciling people involved in the conflict and generating ways of preventing the repetition of the same patterns of violations in the future.

While transitional justice mechanisms promote social reconstruction and facilitate reconciliation and reintegration of perpetrators and victims in the society,³ the achievement of this goal does not bar the initiating of accountability mechanisms and redress of the harm suffered by victims. The implementation of transitional justice mechanisms in a post-conflict state does not, in principle, overlook victims' right for redress that seems to be formally guaranteed. Thus, the victims' right enforcement usually raises a great deal of controversy and faces serious obstacles, which are discussed by this dissertation. The situation of victims in Sierra Leone and the DRC will offer challenging case studies to ground and stimulate the discussion.

¹ ICTJ *Iraqi voices Attitudes Toward Transitional Justice and Social Reconstruction* (2004) 1. <<http://www.ictj.org>> (accessed on 09-09-2006).

² ICTJ *Truth commissions and NGOs: The essential relationship. The 'Frati Guidelines' for NGOs Engaging With Truth Commission* (2004) 1 (as above).

³ MAHR *Transitional Justice Mechanisms*. <<http://hrights.mnadvocates.org>> (accessed on 09-09-2006).

1.2. Problem statement

Most world's legal systems have recognized the basic principle that 'victims of harmful acts are and should be entitled to some form of redress.'⁴ While domestic legal systems clearly and comprehensively provide for this basic principle, the international law is not silent in this regard either. It is recognized in general international law, in international criminal law as well as in international human rights law.⁵ In particular, Joinet's studies on the question of impunity identify three main components of the victims' legal rights, which are the rights to know, to justice and to reparation.⁶ Of those rights, it has been noted that 'the right to reparation is frequently bettered away for political reasons.'⁷

Whereas victims of ordinary crimes such as theft, robbery, assault or murder find it easier to obtain redress, victims of the most serious violations such as war crimes, genocide and crimes against humanity receive less attention insofar as their redress is concerned.⁸ Apart from some exceptional cases where victims of serious human rights abuses had their right to redress vindicated,⁹ there has not been an effective and comprehensive way of redressing victims of gross human rights violations. In Africa for instance, victims' redress in post- Apartheid South Africa and post-genocide Rwanda have been problematic.¹⁰

Thus, it is meaningful investigating how effectively the victims' right to reparation can be implemented in case of gross and systematic human rights violations. Preliminary to the above interrogation are questions such as: what are gross and systematic human rights violations? What are international standards regarding redress for the victims of such abuses? The case studies of Sierra Leone and the DRC will be closely analysed as an empirical foundation for these questions.

⁴ I. Bottigliero *Redress for Victims of Crimes Under International Law* (2004) 1.

⁵ For example, UDHR (Art. 8); ICCPR (Art.2 (3), Art 9(5) and Art 14(6)); CERD (Art 6); CRC (Art 39); CAT (Art. 14), GC I (Art1 51 & 51); GC II (Art 50); GC III (Art 129); GC IV (Art 146); Oommon art 1 of Geneva Conventions, art 1(2) of API; and the Rome Statute of the ICC (Art. 75). It is also enshrined in regional instruments, e.g. ECHR (Art 5(5), Art 13 and Art 41); ACHR (arts 25, 68 and 63(1)); ACfHPR (art. 21(2)).

⁶ See 'The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), revised final Report prepared by Joinet pursuant to Sub-Commission decision 1996/119 UN Doc. E/CN.4/Sub.2/1997/20/Rev.1(02-08-1997).

⁷ M.C. Bassiouni *Post-conflict justice* (2002) 7.

⁸ Bottigliero (n 4 above).

⁹ See for instance *Mentes & Others v. Turkey* (1997) EHRR 98; *Velasquez Rodriguez v. Honduras* IACHR (21-07-1989) Ser. C/ 4.

¹⁰ Bottigliero (n 4 above) 2.

1.3. Focus and objectives of the study

This dissertation seeks primarily to explore the international human rights standards regarding reparation for victims of gross and systematic violations of human rights.¹¹ Secondly, it intends to suggest ways for an effective enforcement of the victims' right to reparation. Thirdly, drawing on the strength of international standards that will be defined, this study will analyse, as a case study, the situation of war victims in Sierra Leone, in order to confront it with the international standards. Fourthly, following the conclusions to be drawn from the Sierra Leone case study, ways of redressing victims of human rights violations in the post-conflict Democratic Republic of Congo shall be recommended.

1.4. Research hypothesis

Though there is no specific binding instrument devoted to the protection of victims of gross and systematic human rights violations, one may find, in relevant universal and regional instruments, provisions guaranteeing the victims' rights to reparation that will cover also victims of gross and systematic violations. The peremptory nature of the concerned norms might also determine the enforcement nature of the right to reparation deriving from its infringement. It will be argued that the victims' right to reparation arising from the violation of a peremptory norm has or should have a peremptory nature as well.

Once the question of the legal status of victims' rights to reparation is known, we will discuss ways for an effective victims' redress. It is assumed that all victims cannot obtain redress of similar nature while the harm undergone differs from one victim to another. In addition to compensation, restitution and rehabilitation, acknowledgment and apology can be seen as the common denominator for all the victims while other types of reparations such as criminal prosecutions will serve as reparation for some specific violations. This solution can realise both justice and peace, which are inextricably linked.¹²

As far as Sierra Leone is concerned, there have been steps toward dealing with victims' reparation in the aftermath of the conflict. Nonetheless, responses for victims' redress seem not to comply with international human rights standards, they appear to have emphasized primarily peace building and the social reintegration of different warlords. Yet, it will be argued that a proper reconciliation in case of gross and systematic human rights

¹¹ This study does not explore the general obligation to prosecute perpetrators for its own sake, but to the extent that it constitutes an effective remedy to which victims have a right.

¹² C.L. Sriram *Confronting past human rights violations: justice vs. peace in times of transition* (2004) 1.

violations should privilege healing victims and punishing offenders. A victims-based approach to dealing with gross and systematic human rights violations in the DRC can equally achieve durable peace and reconciliation based on respect for the enforcement of the rule of law. Since it is covered by *jus cogens*, the victims' right to reparation has to be complied with without derogation.

1.5. Relevance of the study

Several states, particularly in Africa, have experienced gross and systematic human rights violations and continue to grapple with their legacies. In most of these, victims' redress has been frequently bartered away for bartered political settlement, in which offenders' accountability has become object of political trade-offs, and justice has become the victim of *realpolitik*.¹³

Though this choice is often guided by the pursuit of peace, it calls for criticisms. While it is useful to investigate and clarify international human rights standards regarding victims' reparation, it is still more useful to examine the way states have addressed aftermaths of gross and systematic human rights abuses and proposing how to effectively deal with victims' right to reparation, which, according to Bassouni, 'has received second class treatment and no justice at all.'¹⁴

Furthermore, this study contributes to advancing the doctrine relating to transitional justice and a solution to problems states are faced with in the aftermath of conflicts. In fact, not to remain a simple speculative analysis, this study looks into realities on the ground by analyzing Sierra Leonean responses to victims of gross and systematic crimes during the conflict and proposing better ways for the DRC to respond to legacies of the recent conflict.

1.6. Literature review

The debate on transitional justice, particularly, victims' reparation has received a great amount of attention in academic literature. A number of books and articles have been written on the broad subject of transitional justice and on victims' redress. Though it constitutes a good starting point, it does not address the precise question this dissertation raises.

¹³ M.C. Bassiouni Combating Impunity for International Crimes (2000) 71 'U. Colo. L REV.' 409.

¹⁴ As n 4 above.

The International Centre for Transitional justice¹⁵ and Advocates for Human Rights¹⁶ have mostly focused on the explanation of transitional justice mechanisms and their implementation in some specific countries. The book edited by Bassiouni,¹⁷ the study of Sriram¹⁸ and the topic of Ruti¹⁹ also deal deeply with global experiences in transitional justice and accountability for violation of international humanitarian law and other serious violations of human rights. In addition, the thesis of Bottigliero,²⁰ dealing with redress for victims of crimes under international law, constitutes a comprehensive theory on victims' reparations. Nevertheless, they do not raise and address the dilemma post-conflict states are often faced with when dealing with redress for the victims of gross and systematic human rights violations.

Although, since the end of the conflicts in Sierra Leone, there has been a number of interesting studies,²¹ they do not confront Sierra Leonean responses with human rights standards on victims' redress, nor do they address the dilemma between transitional justice mechanisms applied in Sierra Leone. As far as the DRC is concerned, there is an important study which gives an account of transitional justice steps and highlights obstacles faced with by the DRC transitional justice.²² It does not however propose solutions to the problem, particularly regarding redress of victims of gross and systematic violations.

1.7. Methodology

This study has mainly used desktop research method of data collection. It is informed by primary and secondary sources. Domestic and international instruments as well as case law have been used as primary sources; whereas books and journal articles have served as secondary sources. A factual, historical and descriptive method has also been made use of to give the historical background to the violations committed in both case studies. Commentaries of data collected through these methods have played a pivotal role in the elaboration of this

¹⁵ ICTJ (n 1, 2 & 7 above).

¹⁶ MAHR (n 3 above).

¹⁷ Bassiouni (n 7 above).

¹⁸ Sriram (n 12 above).

¹⁹ G.T. Ruti *Transitional justice* (2002) Oxford: Oxford University Press.

²⁰ As n 4 above.

²¹ UNAMSIL *Truth and Reconciliation Compilation of articles on Sierra Leone Truth and Reconciliation Commission* (2001) Freetown <<http://www.sierra-leone.org/trc.html>> (accessed on 10-08-2006).

²² F. Borello (2004) *A few first steps: The Long Road to a Just Peace in the Democratic Republic of the Congo* (as n 1 above).

study. Besides, personal experience and empirical observations made on the ground while in Sierra Leone and the DRC have been helpful for an in-depth understanding of case-studies.

1.8. Limitations of the study

Since the topic of victims' reparation is broad, it has been important to limit investigations to those of gross and systematic violations. This does not mean that there should not be redress for victims of ordinary violations. Gross and systematic violations receive particular attention for the purpose of focus. Besides, victims of ordinary violations generally experience fewer obstacles in obtaining redress than those of the most serious violations.

The choice of Sierra Leone and the Democratic Republic of Congo as case studies is justified by their actuality and similarity as far as the nature of the conflict, the qualification of violations recorded during the conflict as well as the dilemma of victims' redress are concerned. These selected case studies help to anchor the analysis, and may not exhaustively represent the varied approaches to this research. They constitute nevertheless instances that can illustrate the debate and raise a general trend or precedent that can be helpful in solving subsequently similar problems.

Lastly, this study does not discuss in depth, nor does it provide an exhaustive historical account of Sierra Leonean and Congolese conflicts and of the implementation of transitional justice mechanisms in both jurisdictions. It limits itself, to the most part, to describing relevant facts, analyzing legal effects of violations occurred in both conflicts and discussing the advancement of victims' right to reparation as societal responses to those violations.

1.9. Structure of the study

This study consists of five chapters. Chapter one draws the context in which the study emerges. It provides the foundation and the structure of the dissertation. Chapter two outlines the legal framework that is relevant for answering the questions raised by this study. It explores international human rights standards regarding reparation of victims of gross and systematic violations. Chapter three analyses the implementation of victims' reparation in the context of Sierra Leone. It confronts Sierra Leonean responses to war victims with international standards on victims' reparation. Chapter four analyses victims' situation in the post-conflict Democratic Republic of Congo and draws lessons from the Sierra Leonean experience. Chapter five sums up findings of the study.

CHAPTER TWO:

CONCEPTUAL FRAMEWORK OF REPARATION OF VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS

2.1. Introduction

This chapter sets up the conceptual framework that will permit discussion of the redress for the victims of gross and systematic violations in Sierra Leone and the DRC. It explores the international human rights standards on reparation for victims of gross and systematic human rights violations. To do so, it determines the content of gross and systematic violations on one hand, and identifies international human rights standards regarding reparation of victims those violations, on the other.

2.2. 'Gross and systematic' human rights violations under international human rights standards

Though international human rights instruments consider the violation of any rights therein enshrined reprehensible, the wording 'gross and systematic violations' has been several times used by regional human rights systems.²³ At the universal level, even if the ICCPR does not use the term 'gross and systematic', it constitutes the jurisdictional threshold for consideration of human rights complaints following ECOSOC Resolution 1503.²⁴ In the African context, this expression has been used in several cases, which have indicated its peculiarities.²⁵ Yet, there has been no precise definition of gross and systematic human rights violations.²⁶ Nevertheless, from the existing jurisprudence, it can be noted that three characteristic elements allow defining the term 'gross and systematic human rights violations': the quality and the quantity of violations as well as the state's passivity regarding them.

²³ See Article 58 AfCHPR; Article 43(2) of the 11th Protocol to the ECHR. Though ACHR does not expressly refer to gross and systematic human rights violations, its monitoring bodies have made large use of it. See *Aloeboetoe & alii v. Suriname* IACHR (10-09-1993) Ser. C/ 7 and *Velasquez case* (As n 9 above).

²⁴ ECOSOC Resolution 1503 (XLVIII) (1970) authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider communications received from individuals and groups that 'appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'.

²⁵ See for instance *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999); *Commission Nationale des Droits de l'Homme et des Liberte's v Chad* (2000) AHRLR 66 (ACHPR 1995); *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995); *Malawi African Association & Another v. Mauritania* (2000) AHRLR 149 (ACHR 2000).; *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282(ACHPR 1996).

²⁶ R. Murray 'Serious and Massive Human Rights Violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter- American and European Mechanisms' (2002) 340 *NHRQ* 110.

2.2.1. The qualitative element

From a qualitative perspective, 'gross and systematic violations' can be understood to mean violations whose seriousness arises from the types of rights violated, the character of the violations committed and the status of victims.

Concerning the types of rights violated, gross and systematic violations are reprehensible acts that mostly affect human life, personal integrity and personal liberty. The Human Rights Committee (HRC) has courageously qualified number of violations as serious because they impacted on the right to life.²⁷ In several cases,²⁸ the African Commission also found gross and systematic violations on the same ground. If this interpretative approach seems to favour mostly first generation rights, it does not exclude human rights of other generations if it can be demonstrated that their violation affects human life, personal integrity and liberty.²⁹ The programmatic nature of socio-economic rights particularly may make it difficult to appreciate the seriousness of violations. The Inter-American Commission's approach, based on a flexible interpretation, may be adopted to overcome this problem.³⁰

The nature of violations consists in attaching rights to norms of a peremptory nature. In this regard, useful guidance may be found in the work of the International Law Commission regarding the draft Code of Crimes Against the Peace and Security of Mankind.³¹ These crimes are: genocide (art. 19), apartheid (art. 20) and systematic or mass violations of human rights (art. 21). The latter category includes: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labor; persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; deportation or forcible transfer of population. Committing torture, genocide, crimes against humanity or war crimes fall under gross and systematic violations because of the connection of the norms breached to *jus cogens*.

²⁷ See Communication 322/ 1988, *Rodriguez v. Uruguay* UNHR Committee (9 August 1994), UN Doc CCPR/C/51/D/322 (1988); Communication 328/ 1988, *Zelaya v Nicaragua*, UNHR Committee (18-08-1994), UN Doc CCPR/C/52/D/328 (1988).

²⁸ As n 25 above.

²⁹ In *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* (2001) AHRLR 60 (ACHPR 2001) for instance, the African Commission held that collective rights and economic and social rights are essential elements of human rights'.

³⁰ See Situation of Human Rights in Cuba. IACHR, Annual Report, 1996, OEA/ser.L/V/II.95, doc. 7, rev., 14 March 1997.

³¹ See Report of the International Law Commission on the work of its forty-third session (29 April to 19 July 1991) <http://untreaty.un.org/ilc/documentation/english/A_46> (accessed on 20-09-2006).

Regarding the victims' status, violations targeting specific internationally protected groups amount to gross and systematic violations. This is the case of as children, minorities and UN officials are recognized as serious.³² Apart from the qualitative element constituted by the above discussed components, a quantitative indicator can permit to establish gross and systematic violations.

2.2.2. The quantitative element

From a quantitative standpoint, the number of victims and violations can lead to qualification of 'gross and systematic violations'. Armed conflicts and political repression are situations that illustrate this point. While the numerical consideration is relevant as far as the quantitative meaning of gross and systematic violations is concerned, a small number of victims may also be sufficient to amount to a situation of gross and systematic violations. This is the case when the violations have targeted 'certain individuals important to the national community or a vulnerable section of the population.'³³ Regarding the large number of breaches committed, the African Commission's approach finds gross and systematic human rights violations in cases of violation of more than one article of the African Charter.³⁴ The state's passivity also constitutes an important indicator of gross and systematic violations.

2.2.3. The state's passivity

The state's passivity regarding violations committed can aggravate their qualification. This passivity may be due to unwillingness or incapacity to address a situation of insecurity, which can result in committing violations and broadening their scale. This often happens when violations are committed by the Government or when the latter is powerless in the face of violations being committed by non-state actors under its jurisdiction. While the IACHR identifies this element in reference to 'a policy that is positively or negatively favorable to the commission of the systematic disregard of fundamental rights,'³⁵ the ECtHR refers to it as an

³² C. A. Odintaku *Article 58 of the African Charter on Human and Peoples' Rights. A Legal Analysis and Proposals for Implementation* (1996) 8, listing vulnerable groups such as children, women or civilians in situation of conflict.

³³ C. Medina *The Battle of Human Rights. Gross, Systematic Violations and Inter-American System* (1988) 15.

³⁴ See *Commission National des Droits de l'Homme et Libertes* case (n 25 above), where the African Commission found violations of Article 4 on the right to life; Article 5, freedom from slavery; Article 6, freedom from arbitrary detention and Article 7, the right to fair trial.

³⁵ *Velasquez* case (n 9 above), where it was held that state' impotence can be established if 'the practice of gross and systematic violations may be shown to have been carried out by the state or at least tolerated by it'.

‘officially tolerated practice.’³⁶ The state’s failure to take action to protect people under its jurisdiction from violations should also be taken into account when qualifying violations as gross and systematic. The positive step to be taken by the state arises from its general obligation to respect and promote within its jurisdiction the rights recognized in human rights instruments binding upon it.³⁷ The state’s passivity forms with the quantitative and qualitative elements essential elements defining ‘gross and systematic violations’.

2.2.4. Gross and systematic human rights violations defined

Gross and systematic human rights violations are widespread pattern or practice, serious in nature and positively or negatively tolerated by the government. When qualifying violations as gross and systematic, the three aforementioned elements should be considered cumulatively. The rights to life, to personal integrity and to personal freedom must be ‘either continuously and massively affected by the violations, or sporadically threatened, while other human rights are being continuously violated.’³⁸

When the situation on the ground does not allow cumulatively finding the three indicators aforementioned, a broader interpretative approach should consider the qualitative element and the attitude of the government as foundational and necessary elements, and the quantitative element as complementary, without being superfluous. Finding gross and systematic violations would always lead to establishing liability on them.

2.2.5. State responsibility for gross and systematic human rights violations

State responsibility refers to conditions under which, and the manner in which, violations of international law norms can be attributed to states and give rise to their obligation to provide redress.³⁹ The state’s core obligation being to respect and to enforce human rights of all subject to its jurisdiction,⁴⁰ any failure to do so entails its responsibility.

In the case of gross and systematic human rights violations, the state’s responsibility may be engaged directly or indirectly. It is direct when the gross and systematic violations

³⁶ *Mentes case* (n 9 above). A similar reasoning is used in *Kurt v. Turkey* (1998) EHRR 44.

³⁷ Article 2 (1) ICESCR & ICCPR; Article 2 CERD, CAT & CRC; Article 1 GC I, II, III & IV; Article 1 ACHPR, ACHR & ECHR.

³⁸ *Medina* (as n 33 above) 14-15.

³⁹ For an in-depth understanding of this expression, see A. Cassese *International law* (2005) 435.

⁴⁰ This formulation of Art 2 of ICCPR appears in most of human rights instruments, though in various wording keeping the same idea. See n 5 above

occurred are attributable to state institutions or officials' actions. It may also be justified by an omission of state's actors. This is the case of failure to prevent occurrence, to investigate and to address gross and systematic violations. To hold the state directly responsible, it is sufficient to prove that the institution, the person or group of person, by which the alleged violations were committed, were acting on behalf of or under the control of that state.⁴¹

When perpetrators are not vested with official status, international law is constant in that their actions would be attributable to the state if they were under its effective control, especially when 'they were paid or financed by the state, their actions had been coordinated and financed by it; and it had issued specific instructions concerning those wrongful actions.'⁴² In the case of gross and systematic violations, the state's failure to prevent occurrence of or to protect from those violations would ground its responsibility,⁴³ even in absence of link with direct perpetrators. Liability automatically entails an obligation to repair.

2.3. Reparation under international human rights law

2.3.1. Introduction

It is a generally accepted legal principle that 'a violation of one's right calls for action to remedy the injury'. Roht-Arriaza's expresses it clearly in stating: 'That violations should be redressed, that reparation should be made to the victims of an offense is, among the most venerable and most central of legal principles.'⁴⁴ Even at the broader level of international law, 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility.'⁴⁵ Thus, the international responsibility for an internationally wrongful act engages the wrongdoing state to make full reparation for injury caused.⁴⁶ This is the reason why international human rights instruments have enshrined the guarantee of a remedy for victims of human rights violations, which implies that a state has the primary duty to ensure

⁴¹ Article 8 Draft Articles on state Responsibility internationally wrongful acts, which applies under customary international law.

⁴² *Military and Paramilitary Activities in and against Nicaragua Nicaragua v. USA* (24-06-1986) ICJ Reports 14.

⁴³ See *United States Diplomatic and Consular Staff in Tehran USA v Iran* (24-05-1980) ICJ Reports 33.

⁴⁴ Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995) 17.

⁴⁵ The Arbitral Tribunal in the *Rainbow Warrior case (New Zealand v France)* 26 ILM 1346 (1987), cited in D.J. Harris *Cases and materials on international law* (1991) 910.

⁴⁶ *Chorzow Factory Germany v Poland* (1928) PCIJ ser A/17 cited in D.J. Harris (1991) *Cases and materials on international* (1991) 491; Art 31 ILC Draft Articles on State Responsibility.

redress for the victim of the violation.⁴⁷ Let us now look at the meaning of reparation, its legal basis and its various forms.

2.3.2. Semantic content of reparation

The term reparation has a fairly broad meaning.⁴⁸ It is interchangeably used as 'redress' and, particularly in international human rights law, as 'remedy'. Black's Law Dictionary⁴⁹ defines reparation as 'payment of any injury; redress for a wrong done. Payment made by one country to another for damages during war.' It then defines redress' as: '[s]atisfaction for an injury or damages sustained ... [d]amages or equitable relief.' The most interesting meaning is the one given to 'remedy', defined as 'the means by which the right is prevented, redressed, or compensated ... or any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.'⁵⁰ The latter meaning appears more interesting since it understands reparation to mean, as Shelton states it, 'the range of measures that may be taken in response to an actual or threatened violation of human rights.'⁵¹ It also indicates that these measures may be of a judicial or non-judicial nature, the most important thing being that they successfully achieve victims healing.

Under international law, reparation must, as far as possible, 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'⁵² Thus, reparation impacts on individual victims and the wider society or community affected, by refocusing on the restorative in addition to the retributive aspect. In the context of mass atrocities, reparation has an important role to play in rebuilding war-torn societies. To better capture its necessity in advancing peace building in a post-conflict society, it is worth exploring its legal basis.

⁴⁷ D. Shelton *Remedies in International Law* (2001) 15.

⁴⁸ Reparation is a term of wide import. See Shelton (as above) 4, noting that it is used as a generic term for the various methods available to a state for discharging itself.

⁴⁹ Black's Law Dictionary 1990.

⁵⁰ As above.

⁵¹ Shelton 'Subsidiarity, Democracy and Human Rights' in D. Gomien *Broadening the Frontiers of Human Rights* (1993) 4.

⁵² *Corfu Channel UK v. Albania* ICJ (09-04-1949) (1949) Reports 5; *Nicaragua* (n 42 above); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 184; *United States Diplomatic and Consular Staff in Tehran* (n 43 above).

2.3.3. Legal basis of the victims' right to reparation

Inspired by general international law, the principle of victims' reparation and its correlative obligation to avail redress to victims of human rights violations are embodied in several international human rights sources,⁵³ which guarantee both the procedural right of effective access to a remedy and the substantive right to a remedy.⁵⁴ These sources arise from the universal and regional systems as well as customary law.

2.3.3.1. Universal of human rights instruments as source of victims' reparation

The basic principle of victims' reparation is enshrined in the Universal Declaration of Human Rights (UDHR) and International Covenant for Civil and Political Rights. The UDHR stresses that it should be an enforceable right before the competent national tribunals.⁵⁵ Although it is a mere resolution, and as such soft law, it remains one of the more influential international human rights instruments as it has paved the way for them. Human rights instruments attach the right to reparation to various substantive rights, or encompass it into the general obligations provisions.⁵⁶ Following UDHR's manner, the ICCPR provides for an individual right to a remedy,⁵⁷ irrespective of the seriousness of the violation. This means that gross and systematic violations require even more strongly victims' redress. In cases the HRC qualified as serious human rights violations,⁵⁸ it reaffirmed the basic principle.

Commenting on article 2(3) of the ICCPR, Nowak argues that 'the decisions made exclusively by political and subordinate administrative organs do not constitute an effective remedy within the meaning of this provision.'⁵⁹ This view may be understood as a plea for prioritizing judicial remedies, as pragmatism in dealing with gross and systematic violations

⁵³ As n 5 above.

⁵⁴ Shelton (n 47 above) 14.

⁵⁵ Article 8 reads: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

⁵⁶ For instance arts 7(1) & 2(2) AfCHPR, which provide for recourse to national tribunals for human rights violations and compensation for spoliation of natural resources respectively. Art 10 of ACHR establishes expressly the right to compensation for miscarriage of justice. Arts 7 ACHR and 9(5) ICCPR on the right to freedom and security of the person prohibiting arbitrary arrest and illegal detention provides for a right to remedies such as compensation where this right is infringed.

⁵⁷ Art 2(3) ICCPR.

⁵⁸ As n 27 above. See also Communication No. 124/1982, *Tshitenge Muteba v. Zaire* UNHR Committee (30-06-1982) UN Doc CCPR/A/39/40 (1982).

⁵⁹ M. Nowak *The Inter-Relationship between the Covenant on Civil and Political Rights and the European Convention on Human Rights*, cited in Bottiglieri (as n 4 above) 116.

would welcome any of the measures cited by ICCPR, insofar as they can effectively heal victims.⁶⁰ Such a pragmatic approach is in line with the African Commission's jurisprudence, which defines an effective remedy as the one that offers a prospect of success.⁶¹

Like the ICCPR, various specialized human rights instruments have also enshrined the right to effective remedies. The Convention Against Torture, the provisions of which are well-established norms of *jus cogens*, constitutes one of the pillars in the codification of victims' right to reparation for human rights violations.⁶² A similar principle is set forth in the Convention on Elimination of All Forms of Racial Discrimination,⁶³ the Genocide Convention,⁶⁴ the Apartheid Convention⁶⁵ and the Convention on the Rights of the Child.⁶⁶ Even in the field of international labour law, ILO Convention No. 169⁶⁷ and the Migrant Workers Convention provides for the right to reparation.⁶⁸

Even in international humanitarian law, victims' reparation is guaranteed. Article 3 of the Hague Convention Regarding the Laws and Customs of Land Warfare,⁶⁹ the Hague Regulations⁷⁰ annexed to it and the Geneva Conventions,⁷¹ provisions of which have a customary value, enshrine the right to reparation. The first Additional Protocol to the Geneva Conventions even determines that compensation should be the nature of reparation to provide to victims.⁷²

⁶⁰ This approach transpires from Communication 821/98 *Chonwe v. Zambia* (09-11-2000) UN Doc CCPR/C/70/D/821 (1998).

⁶¹ *Dawda Jawara v The Gambia* (2000) ADHLR 107 (ACHPR 2000).

⁶² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Arts 5(2), 7, 8, 13 & 14.

⁶³ Convention on Elimination of All Forms of Racial Discrimination Art 6.

⁶⁴ Arts 4 and 5.

⁶⁵ Art 1 Convention on the Suppression and Punishment of the Crime of Apartheid.

⁶⁶ Convention on the Rights of the Child Art 37, which also adds that recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

⁶⁷ ILO Convention No 169 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, GA Res. 87/182 (17-06-1999), Arts 15(2) & 16(4).

⁶⁸ International Convention on the Protection of Migrants Workers and Members of their Families, GA Res. 45/158 (18-12-1990), Art 15.

⁶⁹ See Art 3.

⁷⁰ See Art 41.

⁷¹ Arts 50 & 51 GC I; Arts 51 & 52 GC II; Arts 68, 130 & 131 GC III; & Arts 55, 147 & 148 GC IV.

⁷² See Art 91

In the same vein, the Rome Statute⁷³ provides that ‘the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’⁷⁴ Recognizing victims’ reparation as an inalienable right, the Rome Statute states that ‘nothing shall be interpreted as prejudicing the rights of victims under national or international law.’⁷⁵ The Rome Statute is thus one of the greatest developments regarding victims’ reparation for its bold confrontation of impunity for serious crimes such as genocide, war crimes and crimes against humanity.⁷⁶ It displays the utmost commitment to combat impunity by ensuring that serious human rights violations do not go unpunished.⁷⁷

In addition to the above, various studies and reports on the rights of victims of atrocities have elaborated treaty provisions and customary law. The UN Basic Principles on victims’ reparation⁷⁸ outlines important aspects of victims’ rights including the requirement that the state ‘shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated.’⁷⁹ Similar provisions are contained in the Joint Report,⁸⁰ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁸¹ the Report of the Working Group on Enforced and Involuntary Disappearances⁸² and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.⁸³ Though they are part of soft law, these instruments constitute a

⁷³ Rome Statute of the International Criminal Court, UN Doc. A/Conf. 183/9th (17-07-1998).

⁷⁴ As above, Art 75 (2).

⁷⁵ See Art 75 (6).

⁷⁶ See Art 5.

⁷⁷ As n 73 above, Preamble para 4. See also W. Schabas *Introduction to the International Criminal Court* (2003) 7.

⁷⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted and proclaimed by GA Resolution 60/147 of 16 December 2005 (Basic Principles).

⁷⁹ As above, Art 4.

⁸⁰ As n 6 above.

⁸¹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

⁸² Report of Working Group on Enforced or Involuntary Disappearances, E/CN.4/1997/34 (13 December 1996).

⁸³ See Rule 11(4).

comprehensive ‘victims’ rights charter’ and may be relied upon as customary law since they constitute a codification of universal standards regarding gross and systematic violations.⁸⁴

2.3.3.2. Regional human rights instruments as sources of victims’ reparation

Of the three regional human rights instruments, the ACHR enshrines comprehensive provisions and jurisprudence on victims’ redress, which have advanced the enforceability of the principle of victims’ redress. While Article 25 of ACHR lays down the basic principle of victims’ redress in the case of human rights violation, Article 63 establishes the most far-reaching provisions in terms of redress for victims of human rights violations by prescribing forms of remedies that may be adequate.⁸⁵ In a number of cases, of which *Velasquez* case stands as the landmark, clarified affiliation of this principle to general principles of international law as follow:

‘It is a principle of international law, which jurisprudence has considered ‘even a general principle of law’, that every violation of an international obligation which results in harm creates a duty to make adequate reparation.’⁸⁶

The Court further stated that ‘the enforcement of victims’ reparation should not be subjected to modification, suspension or limitation from domestic level.’⁸⁷ As far as gross and systematic violations are concerned, the American Court has been of the view that ‘the state’s failure to investigate violations generates suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities.’⁸⁸

Similarly, the European system guarantees reparation of victims in Article 13 of the ECHR, the enforcement of which has advanced international standards on victims’ reparation. The European system understands remedies for the victims of serious human rights violations such as torture beyond mere compensation. The European Court referred to a thorough and effective investigation capable of leading to the identification and punishment of culprits,

⁸⁴ Nowak (n 59 above).

⁸⁵ For a more comprehensive and elaborated analysis of victims’ redress in the Inter-American System, see J.M. Pasqualucci ‘Victim Reparations in Inter-American Human Rights System: A critical Assessment of Current Practice and Procedure’ (1996) 5 *Michigan Journal of International Law* 583.

⁸⁶ *Velasquez case* (n 9 above).

⁸⁷ *Aloeboetoe case* (n 23 above), which clarifies the implications for the reparation regime of Art. 63(1) of IACHR and reiterates that the obligation to provide reparation in case of breach of an international obligation ‘is universally accepted by international law in all its aspects: scope, nature, forms, and determination of beneficiaries, none of which the respondent state may alter by invoking its domestic law’.

⁸⁸ *Blake v. Guatemala* IACHR (22-01-1999) Ser.C/48.

'regardless of whether compensation is awarded by judicial bodies, domestic compensation schemes or other compensation plans.'⁸⁹

Unlike its regional sisters, the African system does not expressly guarantee the right to reparation. Only the Protocol on the Court has recently embodied it.⁹⁰ However, the ACHPR has addressed the lacuna by reading the reparation principle into the general obligation to 'give effect to' provided for in Article 1 of the Charter. This obligation has been interpreted as requiring effective remedies for human rights violations, which constitute 'the main objective of the individual complaint procedure.'⁹¹ This constitutes the ground on which Mauritania was ordered to provide reparation by 'paying compensation to the victims, prosecuting the perpetrators and eradicating slavery.'⁹² By defining effectiveness, sufficiency and availability as the characteristics of remedies to which victims are entitled, the ACHPR has contributed to advancing international standards on victims' reparation. For the Commission,

'a remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the harm alleged.'⁹³

Beyond its guarantee in regional human rights systems, it would be important to explore the reparation principle place in customary law.

2.3.3.3. Victims' reparation in customary international law

Customary international law is a set of international law norms which, by virtue of state practice (*usus*)⁹⁴ and belief in their binding force (*opinio juris*),⁹⁵ give rise to obligations upon states and bind upon them regardless of their consent. As far as the principle of victims' reparation is concerned, its embodiment in various international binding and declaratory instruments, whether universal or regional,⁹⁶ as well consistency of jurisprudence⁹⁷ in that regard displays the uniformity of state practice and its binding nature.

⁸⁹ *Aksoy v. Turkey* ECHR (18-12-1996); *Aydin v. Turkey* ECHR (25-09-1997); *Mentes* (n 9 above);

⁹⁰ Art 27 Protocol on the African Court provides specifically for reparations or compensation and other 'appropriate' remedies, which may include prosecutions, that the Court may order.

⁹¹ *Free Legal Assistance Group* case (n 25 above).

⁹² *Malawi African Association* case (n 25 above).

⁹³ *Dawda Jawara* (n 61 above).

⁹⁴ A. Cassese *International Law* (2001) 120.

⁹⁵ As above, 119-200.

⁹⁶ As n 5 above.

Furthermore, it is unanimously recognized that the norms related to genocide, crimes against humanity, prohibitions on torture, summary execution and arbitrary execution are part of customary international law.⁹⁸ Similarly, the prohibition of discrimination, which lies at the core of IHRL, has also achieved the status of customary international law.⁹⁹ From this obvious fact, it is arguable that victims' reparation arising from the breach of peremptory norms¹⁰⁰ is also among *jus cogens* minima. Since the principle of victims' reparation is unanimously recognized, it is worth investigating the various forms under which it may be implemented.

2.3.4. Forms of victims' reparation

Victims' reparation may take a number of forms, including: restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition and even offenders' accountability. Their implementation in the context of transitional has been problematic as, there have been inconsistencies in choosing between the various forms of reparation and controversy surrounding their prioritization. Though some conventions indicate *expressis verbis* the form of remedy that should be provided to victims,¹⁰¹ the extent of reparation to be ordered has been left to the discretion of national institutions. Forms of reparation can be classified into civil, social and criminal mechanisms.

2.3.4.1. Civil mechanisms of victims' reparation

Civil mechanisms of reparation consist of restoring the victim's individual personality to its status before occurrence of violations. They include various forms that aim at addressing the harm suffered in order to undo the offense. Restitution (*restitution in integrum*) is the standard reparation form referred to in this regard.¹⁰² It is always not possible to restore victims to their original situation before violations occurred, particularly with regard to gross and systematic

⁹⁷ See for instance ruling of the HRC in *Tshitenge Muteba* case (n 58 above); the IACtHR in *Velásquez* case (n 9 above); ECtHR in *Papamichalopoulos v. Greece* ECtHR. (1995) Serial A, No 330-B.

⁹⁸ Roht-Arriaza (n 9 above); M.C. Bassiouni *Crimes against Humanity in International Law* (1992) 503.

⁹⁹ See *South West Africa Ethiopia/ Liberia v South Africa* (18-07-1966) (1966) ICJ Reports 6. See also General Comment 18 (HRC) (1989) para 1.

¹⁰⁰ Roht-Arriaza (n 44 above) 43, making specific reference to the Torture Convention.

¹⁰¹ For instance prosecutions, compensation and rehabilitation in CAT; rehabilitation in CERD; prosecutions with other forms in GC and AC; reintegration in CRC; Compensation in ILOC no 169 and MWC ; indemnity in Art 3 of The Hague Convention; compensation in Art 68 GCIII and Art 55 GC IV; rehabilitation and compensation in Art 63 ACHR and compensation in Art 27 PACHPR.

¹⁰² In *Chorzow Factory* (as n 46 above), it is held that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.

human rights violations. This is why restitution also includes restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence and restoration of employment and return of property.¹⁰³

Where the right cannot reasonably be restored *in integrum*, compensation is needed as a response to redress the damage suffered. It particularly suits any economically assessable damage resulting from crimes, including 'physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services.'¹⁰⁴ In addition to civil mechanisms, social mechanisms may also be employed to redress the victims.

2.3.4.2. Social mechanisms of reparation

Social mechanisms of reparations seek to address the victims' harm in caring about their social personality. They aim at providing to victims moral healing, which can facilitate a proper reconciliation and social reintegration. Among social mechanisms, rehabilitation includes medical and psychological care as well as legal and social services.¹⁰⁵ Victims may also be healed by satisfaction and guarantees of non-repetition, which include individual and collective elements as revelation of the truth, public acknowledgment of abuses and acceptance of responsibility. As a social mechanism of reparation, the usefulness of apology to an effective victims' healing has been acknowledged.¹⁰⁶ In addition, search for the disappeared and identification of remains, restorations of the victims' dignity through commemoration and other means, activities aimed at remembrance, education and at preventing the recurrence of similar crimes contribute to healing the victims.¹⁰⁷ Offenders' accountability also constitutes a mechanism of reparation.

¹⁰³ As n 78 above, para 19.

¹⁰⁴ As above, para 20, 21 & 22.

¹⁰⁵ As above, para 24.

¹⁰⁶ As above, para 22(e).

¹⁰⁷ As above para 23.

2.3.4.3. Offenders' accountability

While measures targeting victims have an obvious healing power, the wrongdoers' accountability is an important component of victims' reparation, especially when the violations committed entail a criminal responsibility. In fact, it is accepted in international human rights law that prosecution of perpetrators is a victims' right. This right becomes even more entrenched as the criminal acts suffered by victims breach *jus cogens*. Thus, beyond civil and social forms of reparation, prosecuting and punishing perpetrators of gross and systematic violations, is a fundamental human right that cannot be taken away from a victim or waived by a government.¹⁰⁸ This is why Aldana-Pindell contends that the framing of prosecution as a victim's right has emerged primarily from 'the interpretation of treaty provisions establishing the right of access to justice, the right to fair trial, and the right to an effective remedy.'¹⁰⁹

Whether gross violations entail a criminal responsibility or not, a variety of disciplinary sanctions may be adopted especially if the perpetrators are members of a disciplined force such as an army or militia with a command structure. These measures can include suspension or loss of employment benefits. Though such administrative measures alone do not meet the yardstick of effectiveness, they can impact on victims' psychological healing and contribute to strengthening guarantees of non repetition of violent situations.

2.4. Conclusion

This chapter concludes that the victims' right to reparation is an inalienable right and well-established in international human rights law. It is even more entrenched as far as gross and systematic human rights violations are concerned, especially when the norms breached are part of *jus cogens*. In this case, the obligation to avail or provide reparation to victims cannot be derogated or restricted. Its implementation may indistinctly be done through civil, social or criminal mechanisms, the most important being that the reparation fulfils requirements of promptness, adequacy and effectiveness.¹¹⁰

Despite these international standards, the variety of transitional justice contexts sometimes results in diversifying states' choices of the forms of redress to avail or provide to the victims of gross and systematic human rights violations. In fact, while some post-conflict

¹⁰⁸ J.M. Dyke 'The Fundamental Human Rights To Prosecution And Compensation' 29 *Denv. J. Int'l L. & Pol'y* 77.

¹⁰⁹ R. Aldana-Pindell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vand. J Transnat'l Law* 1402.

¹¹⁰ As n 61 above.

states prioritize social and civil forms of reparation to reconcile society and strengthen peace, others aim primarily at prosecuting offenders with a view of enforcing the rule of law. This may result in diversifying international standards on victims' reparations, which put into question the whole idea of international guarantee of the victims' right to reparation.

Nevertheless, while it is reasonable to adapt the implementation of the victims' right to reparation to a post-conflict context, victims' reparation in the case of gross and systematic human rights violations is sometimes attached to peremptory norms that should always be taken into account, to achieve 'the overall objectives of preventing the recurrence of the violations and repairing the damage that they have caused, to the extent possible.'¹¹¹ This is the case of international crimes, which unconditionally impose wrongdoers' prosecution as one of the responses for the victims' redress. To diverse transitional contexts, *jus cogens* norms prescribe similar standards with which the implementation of the victims' right to reparation should always be in line.¹¹²

¹¹¹ J. Zalaquett 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints' in Aspen Institute (ed) *States Crimes: Punishment or Pardon* (1989) 29.

¹¹² Bassiouni (n 7 above), starting that the peculiarity of transitional societies cannot exclude the application of the existing international binding norms.

**CHAPTER THREE:
IMPLEMENTATION OF REPARATION OF VICTIMS OF GROSS AND SYSTEMATIC
HUMAN RIGHTS VIOLATIONS: SIERRA LEONEAN DILEMMA**

3.1. Introduction

Redress for victims of gross and systematic violations, is a well established principle. This principle is even peremptory when it comes to violations qualified as international crimes and also those covered by *jus cogens* so that it allows no derogation. However its implementation often encounters dilemmas that it is worth discussing in the context of post-conflict Sierra Leone. After exploring the background of human rights violations in Sierra Leone, various responses for victims' reparation will be explored and then confronted to international standards on victims' reparation.

3.2. Background of gross and systematic human rights violations in Sierra Leone

The armed conflict in Sierra Leone has been described as one of the most brutal wars in recent history as it has resulted in over a million people internally displaced, 500,000 made refugees, 400,000 amputated, and thousands of children illegally conscripted, raped, and killed.¹¹³ Before analysing the gross and systematic nature of the violations committed against those victims, it is important to provide a factual overview of the conflict.

3.2.1. Factual overview of the conflict

After years of bad governance, endemic corruption and denial of basic human rights, the Sierra Leone conflict started on 23 March 1991 when the Revolutionary United Front (RUF), with the backing of Liberian forces and Libya's support, gave itself the mandate to overthrow the government of Joseph Saidu Momoh and the All People's Congress (APC), which had ruled Sierra Leone since 1968.¹¹⁴

Even after a democratically elected Government had been put in place, the RUF rebels refused to stop hostilities. The Sierra Leonean Army and the government-aligned Civil Defense Force (CDF), with the backing of some West African regional forces, fought unsuccessfully the Revolutionary United Front (RUF) rebels. As the conflict escalated into

¹¹³ C. Schocken 'The Special Court for Sierra Leone: Overview and Recommendations' 20 *Berkeley Journal of international Law* 436.

¹¹⁴ See TRC Report (Executive Summary) para. 11. <<http://trcsierraleone.org/drwebsite/publish/v2c1.shtml>> (accessed on 05-10-2006).

appalling brutality against civilians, the world recoiled in horror at the tactics used by the RUF, its allies and opponents,¹¹⁵ who were well-known for their practice of indiscriminate limbs amputations, abduction of women and children, widespread sexual violence and sexual slavery, recruitment of children as combatants, cannibalism, gratuitous killings and wanton destruction of villages and towns.¹¹⁶

Despite several peace initiatives,¹¹⁷ the signed agreements failed to open adequate avenues for resolving the conflict.¹¹⁸ The government lost control over the capital to the rebels in early 1999. The war slowly came to a close around the signing of Lomé Peace Accord in July 1999, in which controversial amnesty clauses were enshrined.¹¹⁹ Hostilities briefly re-erupted in 2000 but peace was finally and formally declared in January 2002. After the civil war, the country faced challenges of rebuilding democracy, ensuring social peace and stability and setting up accountability mechanisms. These challenges arose from the nature of the violations, which deserve to be qualified.

3.2.2. Qualifying violations suffered by victims

The qualification of human rights violations that were perpetrated during Sierra Leone civil war is determinant for the assessment of Sierra Leone's compliance with international human rights standards with regards to its responses to victims' right to reparation. Before going to task, it is important to outline various violations suffered by victims.

3.2.2.1. Identifying violations suffered by victims

The findings of TRC reveal that all combatant factions, whether internal or external, specifically targeted innocent civilians. The majority of victims were adult males, whereas perpetrators singled out women and children for some of the most brutal violations of human

¹¹⁵ Though RUF was the primary violator of human rights during the conflict; AFRC was responsible for the second largest number of violations and the Sierra Leone Army (SLA) was the third biggest violator, followed by the Civil Defence Forces (CDF). See TRC Report (as above) para 106.

¹¹⁶ As above para 2.

¹¹⁷ The most important are the Abidjan Accord of 30 November 1996 and The Conakry Accord (The ECOWAS six-month peace plan for Sierra Leone) of 23 October 1997. See <<http://www.sierra-leone.org/documents-peaceprocess.html>> (accessed 05-10-2006).

¹¹⁸ Schocken (n 113 above).

¹¹⁹ Article IX (1) of Lomé Peace Agreement reads:

'In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.' This provision did not take into account the nature of crimes committed, most of which cannot be covered by amnesty.'

rights recorded during the conflict. In a few cases, the children victimized were below ten years of age.¹²⁰

Indiscriminate limbs amputations, abductions of women and children, widespread sexual violence and sexual slavery, recruitment of children as combatants, forced drugging and cannibalism, assaults and beatings, gratuitous killings, extortion as well as wanton destruction of villages and towns constitute the core of violations perpetrated.¹²¹ Captives or villagers were forced to eat the flesh and body parts of human corpses, to drink (one's own or another's) blood and to eat one's own body parts. All these violations can be qualified in various ways with respect to human rights standards. However, for the sake of subsequent discussions, this study just qualifies them as violations of civil and political rights as well as gross and systematic human rights violations.

3.2.2.2. Violations of civil and political rights

This qualification links the aforementioned violations to the traditional human rights classification. Its relevance relies on identifying the regime of enforcement of rights relating to each of human rights generations. Despite the existence of the three generations,¹²² the most common distinction often opposes civil and political rights on the one hand, to economic, social and cultural rights on the other. First generation rights aim at 'protecting people against arbitrary action from the state and other individuals and are immediately enforceable and justiciable.'¹²³ Whereas second generation rights are founded on 'the status of an individual as a member of the society, and therefore are not amenable to immediate implementation but to a programmatic implementation,¹²⁴ depending on 'the maximum available resources.'¹²⁵

As far as the Sierra Leonean conflict is concerned, most of human rights violations that occurred constitute breaches of civil and political rights. The violated rights include the rights to life, to physical integrity, to dignity, to freedom from torture, inhuman and degrading treatment, to freedom from slavery and forced labour, to liberty and security, to freedom of

¹²⁰ See TRC Report (n 114 above) paras 76-77.

¹²¹ As n 114 above.

¹²² Developed by Karel Vasak, this notion has been subsequently discussed by several scholars like I. Szabo 'Manuel destiné à l'enseignement de droits de l'homme dans les universités' in *Dimensions internationales des droits de l'homme* (1978) Paris: Unesco.

¹²³ J.C. Mubangizi 'Towards a new approach to the classification of human rights with reference to the African context' (2004) 93 *AHRL* 1.

¹²⁴ Davidson (as n 144 above) 41.

¹²⁵ ICESCR, Art 2(1).

movement, to a fair trial, to privacy, to protection of the family, freedom of opinion and expression and to protection of children. These rights are enshrined not only in ICCPR, but also in CEDAW, CT, CRC and its first Protocol on the Involvement of Children in Armed Conflict, AfCHPR, ACCR, GCs and even the Rome Statute, that Sierra Leone is party to.¹²⁶ Even the Constitution of Sierra Leone guarantees these rights in an entrenched way.¹²⁷ Beyond their affiliation to civil and political rights, the aforementioned violations constitute gross and systematic human rights violations.

3.2.2.3. Violations of gross and systematic nature

The qualification of violations as gross and systematic is based on their seriousness arising from the type of rights violated, the nature of norms breached and the status of victims as beneficiaries of special protection under international law. It also relies on multiplicity of victims affected by those violations and the state's passivity arising from its incapacity to stop those violations and the lack of effective remedies to which victims could resort to have their rights vindicated. This qualification serves to examine the peremptory force of the norms breached and to affirm the peremptory nature of the victims' right to reparation that they hold.

As far as the Sierra Leonean conflict is concerned, most acts committed infringe seriously on human life, physical integrity and human dignity. Besides, violations such as killings, physical torture, forced labor, rape, sexual abuse, amputation, forced recruitment of children in army, sexual slavery are of a horrific nature.¹²⁸ This is the reason why the Security Council, in its resolution 1315 of 14 August 2000, expressed 'deep concern at the very serious crimes committed within the territory of Sierra Leone.'¹²⁹ Besides, most violations perpetrated constitute breaches of peremptory norms of international law, as they amount to crimes against humanity and war crimes.¹³⁰ The extreme seriousness of violations committed is even more evidenced by attacks that were targeting, not only vulnerable groups including women and children,¹³¹ but also the UN associated personnel,¹³² who benefit from a specific

¹²⁶ C. Heyns *Human Rights in Africa* (2004) vol.1 48-49; 94-95. See also <<http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=155#155>> (Accessed on 10-09-2002).

¹²⁷ Heyns (as above) vol.2 1479-1492.

¹²⁸ HRW *World Report 2003: Africa/ Sierra Leone*. Available at <<http://www.hrw.org/wr2k3/africa10.html>>(accessed on 26-09-2006).

¹²⁹ See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. Preamble para. 1.

¹³⁰ Statute of the Special Court for Sierra, 16-01-2002, Art 2 & 3.

¹³¹ Human Rights Watch (as n 126 above). See also TRC Report (n 114 above).

protection under international law. The number of persons affected by those violations and the state's lack of effective response are additional factors to qualify violations perpetrated as gross and systematic violations. The very nature of those violations called on consecutive responses from Sierra Leone to allow victims' redress. Let us now examine those responses.

3.3. Responses to gross and systematic violations

To respond to gross and systematic human rights violations committed in Sierra Leone, two mechanisms were established as transitional justice components: a truth and reconciliation mechanism as well as criminal accountability mechanisms.

3.3.1. The Truth and Reconciliation Commission

Setting up a truth and reconciliation mechanism has been acknowledged as necessary in countries where the number of perpetrators can be so overwhelming that the judicial system is not capable of dealing fully with consequences of the past.¹³³ Uganda, Rwanda, El Salvador, South Africa and Argentina,¹³⁴ to cite but a few, established truth and reconciliation mechanisms to investigate the truth on past abuses and reconcile society by facilitating victims' redress and individual or collective acknowledgement of violations perpetrated.¹³⁵

As far as Sierra Leone is concerned, the establishment of the Truth and Reconciliation Commission was agreed upon in Lomé Peace Agreement,¹³⁶ and confirmed in legislation enacted by the Parliament of Sierra Leone.¹³⁷ Its function was:

'to create an impartial record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict to the signing of Lomé.'¹³⁸

¹³² As n 151 above.

¹³³ P.B. Hayner *Unspeakable Truths: Confronting State Terror and Atrocity: How Truth Commissions Around the World Are Challenging the Past and Shaping the Future* (2001) 12.

¹³⁴ For in-depth information, see <<http://www.usip.org/library/truth.html>>.

¹³⁵ J. Sarkin 'The necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda' (1999) 21 *Human Rights Quarterly* 799, contending further that only by publicly and collectively acknowledging the horror of past human rights violations is it possible to establish the rule of law and the culture of human rights.

¹³⁶ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, 7 July 1999. Art XXVI provides that the Commission was to be set up within ninety days.

¹³⁷ Truth and Reconciliation Commission Act, 10 February 2000, Supplement to the Sierra Leone Gazette Vol. CXXXI, n 9 (Hereinafter referred to as the Act).

¹³⁸ As above, Section 6(1).

In response to its mandate, TRC held confidential and public hearings to obtain testimonies from victims, witnesses and perpetrators. It also carried out independent investigations and conducted a statistical or quantitative analysis, which allowed it to come up with a human rights violations database. At the completion of its investigations, the Commission prepared a report containing its findings on the historical antecedents to the conflict and other events that defined or shaped the evolution of the Sierra Leonean state; the causes of conflict, its nature and characteristics, the role of external actors and factors, the impact of the conflict on specific groups, particularly on women, children and youths; the relationship between the TRC and the Special Court for Sierra Leone. It also recommended efforts that can be made to help Sierra Leone reconcile with its past. As far as victims are concerned, some of TRC recommendations urged the government to 'adopt measures needed to respond to the needs of victims in terms of reparations programs.'¹³⁹ In addition to the TRC, criminal accountability mechanisms constitute a transitional justice mechanism set up in Sierra Leone.

3.3.2. Criminal accountability mechanism

The gross and systematic nature of crimes and others violations committed in Sierra Leone lead to initiating accountability mechanisms against offenders through the establishment of a Special Court for Sierra Leone, without prejudice to prosecutions by domestic Court. Though the Sierra Leonean Government requested an international criminal tribunal,¹⁴⁰ the Security Council adopted on 14 August 2000 a resolution,¹⁴¹ which allowed the Secretary General to conclude on 16 January 2002 on behalf of the UN with Sierra Leone an agreement establishing a Special Court.

The Special Court is a hybrid criminal court because its mixed material jurisdiction, its composition and its oversight mechanism are made of national and international contributions. Its mandate is to try 'those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.¹⁴² Since it became operational in July 2002, the Special Court has indicted thirteen people, among whom two died, whereas the whereabouts of one is

¹³⁹ As n 114 above, para 482.

¹⁴⁰ S. Berewa Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court in UNAMSIL *Truth and Reconciliation in Sierra Leone* (2001) 55-60.

¹⁴¹ UN Security Council Res 1315 UN Doc. S/2000/1315 (2000).

¹⁴² As 151 above Art, 1(1).

still unknown.¹⁴³ They have been charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Specifically, the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on United Nations peacekeepers and humanitarian workers, among others. The proceedings are still underway as the Court has held so far no final judgment on the merits.

Given that the scope of the Special Court's personal jurisdiction is limited to those bearing the greatest responsibility, perpetrators of atrocities who could not fall under its jurisdiction were to be prosecuted by domestic criminal courts. However, the amnesty provisions of the Lomé Peace Accord made it difficult for the domestic court to conduct criminal prosecution.¹⁴⁴ It should be mentioned that even then, a few domestic prosecutions were initiated and the indictees were convicted and sentenced to death.¹⁴⁵ Like the truth and reconciliation mechanism, criminal accountability mechanisms are responses to implement the victims' right to reparation. It is worth confronting them with the international human rights standards on victims' reparation.

3.4. Responses to gross and systematic violations versus international standards on victims' reparation

While traditionally Truth and Reconciliation Commissions have been viewed as alternatives to prosecutions, the unprecedented transitional justice in Sierra Leone combined both truth and reconciliation and criminal accountability mechanisms. Analyzing these responses to atrocities in the light of international human rights standards on victims' reparation consist of finding out whether they have satisfied the victims' right to reparation. To do so, the TRC's work, the Special Court's activities and the impact of their juxtaposition on victims' redress are to be questioned.

3.4.1 The TRC and the victims' right to reparation

The usefulness of the work of the TRC is beyond any doubt. Its findings constitute a comprehensive record on violations committed in Sierra Leone. Besides, its recommendations

¹⁴³ Special Court of Sierra Leone Cases Available at <<http://www.sc-sl.org/cases-other.html>> (Accessed 10-10-2006).

¹⁴⁴ See n 119 above.

¹⁴⁵ The author interviewed on 14-10-2006 an official the Special Court prosecution office of Sierra Leone on who preferred to be anonymous. It confirmed this fact, stating that access to references of those few cases is not easy.

stand as 'useful guidance for the government and people towards a broad social transition,'¹⁴⁶ implementation of which can guarantee non repetition of the gross and systematic violations suffered. However, three main factors can be identified to have barred the Commission from effectively contributing to victims' right to reparation enforcement: the completion of its activities before the Special Court's, inadequacy of its recommendation on victims' reparation and lack of active involvement of external actors and of victims' views on remedies.

To come up with an impartial record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, TRC findings relied on testimonies collected from witnesses, victims and perpetrators other than those found to have born the greatest responsibility. Yet, this category of persons is supposed to have played an important role in the conflict. Their statements could constitute an added value to the truth sought by the TRC. Despite their willingness to testify, some of them were denied that possibility.¹⁴⁷ While the interest of proper administration of justice reasonably might have been at stake, it is arguable that the need for having such testimonies in TRC report is indispensable. Since TRC has completed its work, there is no way to incorporate judicial truth in its findings. Above all, in case of contradiction between its findings and what will arise from judgments of the Special Court, the credibility of TRC work would be questionable.

Besides, after making its findings on the causes and consequences of the conflict as well as violations perpetrated, TRC formulated recommendations to the Government whereby it urged it *inter alia* to adopt 'reparations programmes'.¹⁴⁸ The Government of Sierra Leone reacted by declaring that it would 'use its best endeavors to ensure the full and timely implementation of the said reparations programmes, subject to the means available to the state.'¹⁴⁹ Given the vagueness of the recommendation and the inadequacy of the government's response, I would argue that the peremptory nature of the victims' right to reparation is not complied with. In fact, since this right is of civil and political nature, its enforcement has to be immediate and not subject to availability of state's resources. Reparations programs as remedy are appropriate in case of violation of economic, social and cultural rights as their implementation often ends up suffering delays. Even due to lack of

¹⁴⁶ W. Schabas 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *J Int Criminal Justice* 1088.

¹⁴⁷ Controversial has been the decision on Appeal by TRC and Samuel Hinga Norman against the decision of His Lordship, Justice Bonkole Thompson, delivered on 30-10-2003 to deny TRC request to hold public hearings with Hinga Norman. See (SCSL-2003-08-PT) 28-11-2003.

¹⁴⁸ As n 114 above para 382- 413.

¹⁴⁹ Sierra Leone Government *White Paper on the Report of the Truth and Reconciliation Commission* June 2005, 12.

resources, delay of reparation would always amount to a denial of reparation.¹⁵⁰ Yet, this right is primarily an individual right. But, given the dilemma of transitional contexts, the collective enforcement of it is understandable insofar as it is adequate, prompt and effective. Unfortunately, the Sierra Leone Government is still resistant to implementing key recommendations made by TRC.¹⁵¹ As a result, since its reaction to the TRC recommendations, which indeed does not fit the nature of its obligation, no concrete step has been taken implement at least what they meant in terms of reparations programs.

Furthermore, while it has emerged that external actors have played a key role in planning, beginning and ending the conflict,¹⁵² the TRC has considered the conflict mainly as ‘atrocities committed by Sierra Leoneans against Sierra Leoneans.’¹⁵³ This explains why external actors have not been actively involved in truth seeking and reconciliation process. Though it is arguable that truth and reconciliation process with those actors can be better dealt with at the sub-regional or regional level, the TRC had to put forward the fact that Sierra Leone should seek truth and reconciliation with the states formerly involved in those atrocious hostilities. While TRC can broker reconciliation between citizens, a similar forum between the said states has the potential of laying down foundations that guarantee non-repetition of similar nightmares. Thus, lack of reconciliation between external actors would always make the internal efforts fragile and under perpetual threat. Yet the victims’ reparation includes guarantee of non-repetition of atrocities they suffered from.

3.4.2. Criminal accountability mechanism and the victims’ right to reparation

It should be recalled that, like other forms of redress for human rights abuses, having the perpetrators of such violations prosecuted and punished constitutes ‘a fundamental human rights that cannot be taken away from a victim or waived by a government.’¹⁵⁴ In Sierra Leone, criminal prosecutions as responses to gross and systematic violations encounters shortcomings due to the Special Court interpretation of the concept ‘those bearing the greatest responsibility’ and insufficiency of domestic prosecutions.

The interpretation of the expression ‘those bearing the greatest responsibility’ has not been an easy task. On one hand, some scholars have argued that ‘it means that leaders of

¹⁵⁰ *Chorzow Factory* case (n 102 above).

¹⁵¹ HRW (n 128 above).

¹⁵² As n 114 above.

¹⁵³ As n 114 above, para 16.

¹⁵⁴ Dyke (as 108 above).

various warring factions whose forces committed atrocities are the ones to be tried by the Court.¹⁵⁵ This group has stated since the Court's trials were not intended, to last as long as the ICTR and the ICTY, the focus was placed on the leaders only. On the other hand, other scholars have been of the view that 'the expression should not be interpreted narrowly to exclude from the Court's jurisdiction those who were in command of the forces on the ground.'¹⁵⁶

The latter school of thought appears more convincing as support for this interpretation can be found from articles 6(3) on superior responsibility and article 7, which give the Court jurisdiction over children over fifteen years. Yet, it is usually inconceivable that children can act in positions of responsibility. By giving the Court jurisdiction over children who are over fifteen years, the Statute clearly envisaged the trial of low ranking people and not just the top leaders. Even the UN Secretary General expressed this view in his report on the establishment of the Special Court where he stated:

'While those most responsible obviously include the political or military leadership, *others in command authority down the chain* may also be regarded most responsible judging by the severity of the crime or its massive scale. Most responsible therefore denotes a leadership or authority of the accused, and a sense of the gravity, seriousness or massive scale of the crime.'¹⁵⁷

The prosecutor's approach deserves thus to be severely criticized as narrow and selective.¹⁵⁸ As a result, only thirteen people have been indicted so far by the Special Court,¹⁵⁹ so that most offenders fall under the jurisdiction of domestic courts.

Even at the domestic level, courts encounter obstacles to implement the obligation of trying those who breached peremptory norms during armed conflicts. These difficulties arise from weaknesses of the judiciary,¹⁶⁰ but mostly from the measure of absolute amnesty the negotiators of Lomé Peace Agreement unconditionally granted to each another. While amnesty contributes to reconciliation process, it does not however elude civil responsibility of

¹⁵⁵ See N Passas 'International crimes' in MC Bassioni *Searching for peace and achieving justice: the need for accountability* (2003) 124.

¹⁵⁶ A.D. Haines 'Accountability in Sierra Leone: the role of the Special Court' in JE Stromseth (ed) *Accountability for atrocities, national and international responses* (2003) 212.

¹⁵⁷ Report of the Secretary General on the establishment of the SCSL, para 29.

¹⁵⁸ See International Crisis Briefing, The Special Court for Sierra Leone: promises and pitfalls of a new model, *Africa Briefing*, Freetown/Brussels 4 August 2003. The author's interview with some Sierra Leoneans during the field study also confirmed this.

¹⁵⁹ As 143 above.

¹⁶⁰ See Human Rights Watch Human Rights Overview on Sierra Leone 2002. <<http://hrw.org/english/docs/2006/01/18/sierra12304.htm>> (accessed on 12-12-2006).

offenders and the need for a substantial assistance to victims who may need to initiate a civil action against a particular identified perpetrator. Should victims need to initiate individual action based on civil responsibility, they are still barred by the dysfunction of the judiciary and by the cost of justice. While victims appearing before the Special Court benefit from a substantial assistance, domestic proceedings do not provide such assistance, which could be viewed as part of availing remedies to them. Thus, redress criminal accountability in Sierra Leone has been far from realizing victims' reparation.

3.4.3. Juxtaposition the Special Court and TRC versus the victims' right to reparation

The juxtaposition of the special Court and TRC as responses to gross and systematic violations has been an important feature of Sierra Leone's transitional justice. An abundant literature has indicated that despite their distinct mandates, their activities on the ground doomed to overlap so as to impact on each other.¹⁶¹ Even the UN Secretary General already cautioned that care had to be taken to 'ensure that the Special Court and the Commission would operate in a mutually supportive manner, fully respectful of their distinct but related functions.'¹⁶² This means that any conflicts had to be managed in a way to protect the superior interest, particularly the peremptory victims' right to reparation.

However, since it is provided that 'every natural person or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court,'¹⁶³ in any the case of conflict with the TRC, the decision of the Special Court obviously prevails. This happened when the Court denied Hinga Norman's hearings to the TRC.¹⁶⁴ It could also happen in a case where a central piece of information or evidence gathered by the TRC is requested by the Special Court. The lack of clear regulation of the relationship between the two juxtaposed mechanisms did not guarantee constructive complementarity for the ultimate realization of victims' redress.

3.5. Conclusion

Sierra Leone constitutes an important case illustrating gross and systematic human rights violations. This situation has recorded two simultaneous and complementary transitional justice mechanisms created in the view of *inter alia* implementing the victims' rights to

¹⁶¹ As n 146 above.

¹⁶² Letter dated 12-01-2001 from the Secretary General addressed to the President of the Security Council, UN doc. S/2001/40.

¹⁶³ As n 154 above, Article 14.

¹⁶⁴ As 147 above.

reparation. While the establishment of truth and reconciliation and criminal mechanisms has been an important step towards healing the victims of gross and systematic violations perpetrated, it is found that both institutions' activities have been characterized by shortcomings, which have hampered their mission of effectively achieving the victims' right to reparation. Unfortunate as they may be, these shortcomings may always be capitalized to serve as lessons for other jurisdictions, which may subsequently grapple with similar challenges. Even though the transitional contexts may differ, it is submitted that the rules applicable may be similar, especially when violations perpetrated are gross and systematic and, above all, covered by *jus cogens*. This may lead the DRC to learn from the Sierra Leonean experience.

CHAPTER FOUR:

LESSONS FROM SIERRA LEONE IN DEALING WITH VICTIMS REPARATIONS IN THE POST-CONFLICT DEMOCRATIC REPUBLIC OF CONGO

4.1. Introduction

Since its pre-independence period, the history of the Democratic Republic of Congo has been made of gross and systematic human rights violations.¹⁶⁵ Atrocities perpetrated in the recent armed conflict have called on transitional justice mechanisms capable to respond to abuses recorded. In dealing with those violations, Sierra Leone experience would be informative in many regards. Such is the argument embodied in this chapter. It starts by providing the factual overview of the DRC conflict, which will subsequently permit to qualify human rights violations perpetrated. The steps currently taken towards responding to those violations shall then be explored. And lastly the relevance of Sierra Leone experience will be demonstrated before proposing how best to prevent in the DRC context the shortcomings encountered in Sierra Leone.

4.2. Factual overview of the Congolese conflict

With its diverse natural resources,¹⁶⁶ the DRC suffered from thirty two years of dictatorship, the end of which resulted in a many year devastating and complex conflict. The colonial legacy of problematic citizenship of the *Banyamulenge*,¹⁶⁷ human rights violations arisen from years of dictatorship as well as the crisis in the Great Lakes, particularly the consequences of Hutu-Tutsi conflict in both Rwanda and Burundi,¹⁶⁸ can be identified as its main causes. The

¹⁶⁵ Over five millions of Congolese disappeared and died as a result of colonialism. Others had their hands chopped off, genitals severed, men tortured and women raped. (See L.B Ekpebu *Zaire and African Revolution* (1989) 89.). After independence, rebellions, secessions and dictatorship related human rights violations have resulted in over 500000 deaths (See Act n°/04/018 of 30-07-2004 on the establishment of the TRC, preamble para 1.). Excluding the liberation war which overthrew Mobutu, from 1998 to date, armed conflict in the DRC have caused four millions deaths. (See Dr. Rick Brennan 'How many innocent Congolese have to perish before the world starts paying attention?' <<http://www.theirc.org/media/www/congo-the-forgotten.html>> (accessed on` 26-09-2006)).

¹⁶⁶ DRC natural resources range from gold, diamond, tin, copper, oil, cobalt, fertile soil, seven lakes and more than 100 rivers. See W. Makonero 'Background to the Conflict and Instability in the African Great Lakes,' in Kadina & alii (eds) *Whither Regional Peace and Security? The Democratic Republic of Congo After the War* (2000) 73.

¹⁶⁷ The term '*Banyamulenge*' refers to those of the place called *Mulenge* in the Eastern part of the DRC. They are not ethnic group, neither are they Congolese indigenous, but are made up of Tutsi people who remained in the Congo following the Berlin conference of 1884-1985, and every wave of immigrants including those who came as a result of the Rwandan genocide in and ethnic conflict in Burundi. They were denied Congolese citizenship for a long time. See, Kabemba, *Whither the DRC? Causes of the Conflict in the DRC, and the Way Forward*, <<http://www.cps.org.za/execsumm/pia1.htm>> (accessed 08-10-2006).

¹⁶⁸ Griggs *Geostrategies in the Great Lakes Conflict and Spatial Designs for Peace* <http://www.cwis.org/hutu3_1.html>, (as above).

immediate cause was genocide in Rwanda and ethnic conflict in Burundi, which brought approximately one million Rwandan refugees to the Congolese Eastern provinces. The Ex-Rwandan Armed Forces (ex-FAR)¹⁶⁹ and the *Interahamwe*,¹⁷⁰ who escaped reprisals by the tutsi new regime after genocide settled as refugees in eastern DRC. They soon started harassing the *Banyamulenge* and launching attacks against Rwanda without intervention of the DRC Government led by Mobutu.¹⁷¹ As a result of the insecurity and the Zairian State incapacity to maintain order, many local authorities created their own militias known as the *Mayimayi*,¹⁷² whereas the *Banyamulenge* in alliance with Uganda, Rwanda, Burundi, Angola and Eritrea,¹⁷³ and under the leadership of Laurent Desiré Kabila, formed the Alliance of Democratic Forces for the Liberation of Congo (ADFL),¹⁷⁴ which overthrew Mobutu on 17 May 1997.

By mid 1998, another armed conflict erupted between Kabila and his Rwandan and Ugandan allies, after Kabila decided that they had to leave the country. Infuriated by Laurent Kabila's ingratitude and failure to uphold secret business agreements signed in the course of the anti-Mobutu war, Rwandan and Ugandan governments backed two rebel groups respectively Congolese Rally for Democracy and Congolese Movement for Liberation.¹⁷⁵ To resist rebel groups' attempts to topple Laurent Kabila regime and gain control of the capital, the government side relied on the effective military support of Zimbabwe, Angola, Namibia, Chad and Sudan. From 2 August 1998 until the final ceasefire agreement at Sun City,

¹⁶⁹ The former Hutu dominated Rwandan army, which carried out the Rwandan genocide in 1994 and fled to the eastern region of the DRC. See Griggs *The Great Lakes Conflict: Strategies for Building Long-Term Peace*, <<http://www.cwis.org/burtalk.html>> (accessed on 08-10-2006).

¹⁷⁰ A Hutu Militia group organized to carry out the genocide of Rwandan Tutsis in 1994. Originally organized as youth wings of the Hutu political parties, it became militia group trained by the president guard and other members of Rwandan army for the specific purpose of terrorizing Tutsi citizens. See, Sarkin (as n 135 above)781.

¹⁷¹ Griggs, *The Great Lakes Conflict: Strategies for Building Long-Term Peace*, <<http://www.cwis.org/burtalk.html>> (as167 n above)

¹⁷² It has been used to describe indigenous militia involved in a number of uprisings in the Great Lakes since the colonial era. Today, the term is used to refer to indigenous militia groups of ethnic origin in the eastern part of the DRC. It includes members of Hutu, *Tembo, Nande, and Nyanga* in North Kivu and *Fulira and Bembe* ethnic groups in South Kivu. They often undergo traditional initiation rites, which are intended to make them invulnerable to bullet and other weapons of their enemies. See Mamdani '*Preliminary Thoughts on the Congo Crisis*', in Mandaza (ed) *Crisis in the DRC* (1999) 47-48.

¹⁷³ See Solomon and Kwezi 'Towards Conflict Transformation in the DRC with Specific Reference to the Model of Kumal Rupesinghe' (2000) 22 *Strategic Review for Southern Africa* 24-29.

¹⁷⁴ Amnesty International DRC: A long-Standing Crisis Spinning Out of Control (2004) 32. <<http://www.web.amnesty.org/ai.nst/index/AFR203319998>> (Accessed 08-10- 2008).

¹⁷⁵ H. Weiss *War, Peace in the Democratic Republic of Congo* (2000) 3.

Congolese people lived under the painful plight of the 'Africa's first world war' and the deadliest conflict since the end of World War II.¹⁷⁶

Negotiating peace has been a long and costly process. Though a cease-fire agreement was signed as early as July 1999, its violation by all the parties prevented its full implementation. After Laurent Kabila's assassination in January 2001, Joseph Kabila, his successor made a lot of compromises which resulted in the signing of an agreement committing Rwanda to withdraw its troops from the DRC and Kinshasa to address Rwanda's security concerns in the DRC. This allowed organizing the Inter-Congolese Dialogue (DIC) that reached the so-called 'Global and All Inclusive Agreement' signed in Pretoria on 17 December 2002 among the DRC former government, the MLC, the RCD, the political opposition, civil society, the Mai-Mai, the RCDML, and the RCD-National (the last two being splinter groups of RCD). The agreement was the basis for unanimous adoption of the transitional constitution on 1 April 2003 in Sun City, South Africa. The most notable features of the settlement have been the establishment of the '1+4 presidential system.'¹⁷⁷

Despite the formal cessation of hostilities evidenced by the Pretoria Agreement and the transitional constitution, sporadic violations have continued to erupt in the Kivus, Ituri, and parts of Katanga regions. The deadliest arose from the suspension of Nkunda and Mutebusi, two dissident generals, formerly commanders in RCD, who took up arms against the government.¹⁷⁸ Rwanda was accused of backing them and the tension it created with the RDC was resolved after a summit between Kabila and Kagame in late June 2004, in Abuja, where the two recommitted themselves to the terms of the Pretoria Agreement.¹⁷⁹ Another tension arose from massacres of more than 160 Congolese refugees, who had fled the violence in South Kivu in June, on the night of 13 August 2004 in the camp of Gatumba, in Burundi.

Despite ongoing isolated and sporadic patterns of violence, the transitional period has recorded the adoption of number of laws including the Amnesty Acts and the constitution of

¹⁷⁶ For the IRC, nearly 4 million people were killed and died from war-related causes in Congo since 1998. In a matter of eight years, the world lost a population equivalent to the entire country of Ireland or the city of Los Angeles. See Brennan (as 165 above).

¹⁷⁷ System where the government comprises one president with four vice-presidents, with representativity of the five main components of the DIC at all state's institutions during the transition period of a maximum of three years.

¹⁷⁸ See HRW 'DR Congo: War Crimes in Bukavu,' June 2004, available at www.hrw.org.(accessed on 07-10-2006).

¹⁷⁹ 'Les presidents Kabila et Kagame se sont entendus à Abuja', Le Monde, 28-06-2004. This was a bilateral agreement signed by Rwanda and DRC in July 2002, which led to the withdrawal of Rwandan troops from the DRC. It is not to be confused with the Pretoria peace Accords.

the third republic, which has allowed the organization of elections on 30 July 2006. Though the announcement of a run off between Joseph Kabila and Jean Pierre Bemba triggered military confrontation between troops loyal to both sides, the political climate has been appeased for the second round scheduled on 29 October 2003. The establishment of a legitimate government would permit to deal properly with all human rights violations committed during the conflict, which deserve to be explored and qualified.

4.3. Qualifying violations committed during the conflict in the DRC

The qualification of human rights violations occurred during the Congolese crisis is determinant for the assessment of the conformity of responses to these violations with international human rights standards with regards to the victims' right to reparation. Before going to task, it is important to outline various violations occurred.

4.3.1. Violations perpetrated in the DRC

The Congolese conflict has been characterized by appalling widespread and systematic human rights violations. Many, if not all, sides to the conflict have regularly used the tactic of murdering, raping, maiming and terrorizing civilians. International and Congolese organizations have reported that most rebels were recruiting child soldiers, committed rape and sexual violence and atrocious acts like cannibalism, mutilation and the burying of live people as well as illegal exploitation and trafficking of natural resources of the DRC.¹⁸⁰

It is estimated that millions of unarmed civilians have been arbitrarily and deliberately killed and massacred by combatants belonging to the DRC government and other armed groups.¹⁸¹ Further, thousands of Hutus and Tutsis refugees comprising of women, children and men who were too weak to flee were arbitrarily and deliberately killed by ADFL

¹⁸⁰ Of the numerous reports on human rights violations committed within the DRC, the following most important can be mentioned: HRW 'War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny', 20-08-2002; 'The War within the War: Sexual Violence Against Women and Girls in Eastern Congo', 20 June 2002. <<http://hrw.org/english/docs/2002/08/20/congo4226.htm>>; Amnesty International 'DRC on the precipice: the deepening human rights and humanitarian crisis in Ituri 20 March 2003. <<http://web.amnesty.org/library/Index/ENGAFR620062003?open&of=ENG-COD>>; Situation of human rights in the DRC E/DEC/2003/240 <http://ap.ohchr.org/documents/dpage_e.aspx?m=81>; Report of the joint mission charged with investigating allegations of massacres and other human rights violations occurring in eastern Zaire since September 1996 <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/bb0a99b02d16ddd280256724005e2200?OpenDocument>>; Interim Report of the Special Rapporteur on the situation of human rights in the DRC <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/580/40/PDF/N0358040.pdf?OpenElement>>; Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, <<http://www.monuc.org/downloads/N0262179.pdf>>; Report of the Secretary-General on children and armed conflict in the DRC Doc S/2006/389, 13 June 2006 <www.un.org/documents/repesc.htm>; Héritiers de la Justice Crimes against humanity being committed in the Eastern part of the Congo and ethical concerns over aid provided to the countries involved in this conflict <<http://129.194.252.80/catfiles/1842.pdf>> (All accessed on 26-09-2006).

¹⁸¹ As above.

combatants and the allies in different camps in Kabare, Bukavu, Masisi, Walungu, and Rutshuru regions.¹⁸² Others were forced to flee into the forests where many died of illness, hunger and exhaustion.¹⁸³ Torture methods used are mutilation including the severing of genitals and cutting out of hearts, rape of women, hanging of men by their genitals, prohibiting detainees from urinating and defecating, whippings and detention in waterlogged pits.¹⁸⁴ These various violations deserve to be qualified.

4.3.2. Qualifying violations committed in the DRC

Various violations recorded during the Congolese conflict can be qualified in several ways as far as international human rights law is concerned. In the context of this study and for the sake of the subsequent developments, they are just qualified as violations of civil and political rights, and gross and systematic violations.

4.3.2.1. Violations of civil and political rights

As far as the Congolese conflict is concerned, most human rights violations that have been recorded constitute breaches of civil and political rights. The violated rights include primarily the rights to self determination and to freely dispose of one's resources. Evident are infringements of the rights to life physical integrity, to dignity, to freedom from torture, inhuman and degrading treatment, to freedom from slavery and forced labour, to liberty and security, to freedom of movement, to a fair trial, to privacy, to protection of the family, to protection of children, to freedom of opinion and expression. These rights are enshrined not only in ICCPR, but also in CEDAW, CT, CRC and its first Protocol on the Involvement of Children in Armed Conflict, AChHPR, ACCR, Geneva Conventions and even the Rome Statute, that the states formally involved in the hostilities are party to.¹⁸⁵ In addition to their affiliation to civil and political rights, the aforementioned violations constitute gross and systematic human rights violations.

¹⁸² Approximately 200,000 refugees on Congolese territory, the majority of whom are ethnic Tutsi, have lost their lives or disappeared in an arbitrary manner, as a result of a deliberate strategy of gradual extermination of a portion of the Rwandan population from 1998-2000. See, Great Lakes Thousands of Civilians Victims of Atrocities in the DRC, <<http://www.web.amnesty.org/ai/inst/index/AFR620381998>> (accessed on 09-09-2006).

¹⁸³ See, Rights and Democracy, International Centre for Human Rights and Democratic Development <<http://www.chrdd.ca/111/english/commdoc/publications/congoeng/html>> (accessed on 08-10-2006).

¹⁸⁴ As n 182 above.

¹⁸⁵ Heyns (as n 145 above).

4.3.2.2. Violations of gross and systematic nature

The analysis of various violations committed in the DRC lead to qualifying them as gross and systematic violations because of their seriousness arising from the type of rights violated, the nature of norms covering the violated rights and the status of victims. The overwhelming scale of victims and violations as well as the state's lack of effective response regarding those violations evidence their gross and systematic nature.

In fact, these violations offend seriously human life, physical integrity and human dignity. Besides, the rights violated are covered by peremptory norms, which led the ICJ, at least regarding activities of Uganda, to find grave violations of international human rights and humanitarian law, particularly the provisions declaratory of international customary law.¹⁸⁶ More eloquent are findings of the ACHPR, which express the grossness of the violations by Rwanda, Uganda and Burundi by using the adjectives such as 'flagrant', 'barbaric', 'reckless'.¹⁸⁷ Besides, the various reports issues on the Congo have emphasized not only the seriousness of the violations committed, but also the cruelty of the way they were sometimes being performed on vulnerable civilians, women and children.¹⁸⁸

In addition, the number of persons affected by the violations as well as the state's lack of intervention in favour of victims further supports the qualification of gross and systematic violations. Even the participants in ICD recognized the seriousness of the violations perpetrated during the conflict, which the Commission on Peace and Reconciliation recommend to address. Let us now explore steps taken in the DRC for that purpose.

4.4. Responses to gross and systematic violations in the DRC

The ICD in Pretoria was the starting point of discussions on responses to the violations suffered by the victims of gross and systematic human rights violations. Its Commission on Peace and Reconciliation, recommended a truth and reconciliation mechanism in conjunction with criminal mechanisms to deal particularly with victims' redress and to ensure justice for sustainable peace. Let us examine these mechanisms more closely.

¹⁸⁶ See *Armed activities on the territory of the Congo DRC v. Uganda* (19-12-2005) <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>> (accessed on 07-10-2006).

¹⁸⁷ *Communication 227/99, DRC v. Burundi, Rwanda and Uganda 20th Activity Report*.

¹⁸⁸ As 182 above.

4.4.1. The truth and reconciliation mechanism

Thanks to its Commission on Peace and Reconciliation, the ICD adopted two key resolutions, one of which recommended the creation of a TRC.¹⁸⁹ Provided for in the transitional constitution as one of the democracy supporting institutions,¹⁹⁰ the TRC was effectively set up by an organic law,¹⁹¹ which laid down its mandate, organisation and its functioning modalities. The new constitution does not count it among democracy supporting institutions. It provides that ‘all democracy supporting institutions, including TRC, not provided for will be doomed dissolved *de jure* with the installation of the new parliament.’¹⁹² The latter has however the power to set up other similar institutions.¹⁹³ The window is therefore open for the TRC to be reconfirmed, since it has not been able to complete its work.

Composed of eight members proposed by all parties to the ICD and thirteen additional members appointed from religious institutions, academic institutions, associations of women and other associations whose activities are related to the objective of the TRC, the Congolese TRC is vested with the mandate of investigating human rights violations as well as preventing and resolving conflict through mediation between torn communities. It intervenes in amnesty granting process in proposing to the competent authority to accept or refuse any individual or collective amnesty application for acts of war, political crimes and crimes of opinion. As far as victims’ redress is concerned, it has the mandate to recommend reparations due to victims and on their rehabilitation in its final report.¹⁹⁴ However where the perpetrator is identifiable, the TRC has to play the role of mediator between perpetrators and victims for an amicable agreement.¹⁹⁵

Notwithstanding its two year work, the Congolese TRC has not been able to carry out its mandate,¹⁹⁶ especially regarding investigation of human rights violations. Its composition that includes members of former warring factions and the transitional political environment

¹⁸⁹ See Res. No 20/DIC/2002 of ICD, < www.drcpeace.org> (accessed on 04-08-2006).

¹⁹⁰ See Articles 154–160.

¹⁹¹ See Act n°/04/018 of 30 July 2004 (as n 187 above)

¹⁹² See Art 222.

¹⁹³ As above.

¹⁹⁴ As n 221 above, art 51.

¹⁹⁵ As n 165 above, art 45.

¹⁹⁶ See Interview of the third vice chairman of the DRC TRC by Digital Congo Journal. <<http://www.digitalcongo.net/article/36772>> (accessed on 02-08-2006).

dominated by the ruling of the said factions have been the main obstacles to the success of its work. Instead, TRC has devoted its efforts exclusively to conflicts mediation with some on-site visits in South Kivu and Kisangani.¹⁹⁷ Though conflict prevention might be one of the top priorities in the DRC, where tensions between communities remain high in many regions, and institutional conflicts are visible, such work does not conceptually and operationally constitute the core mandate of Truth and Reconciliation Commissions.¹⁹⁸ Criminal accountability mechanisms also are viewed as response to human rights violations committed in the DRC.

4.4.2. Criminal accountability mechanisms

Criminal accountability mechanisms were also envisaged and agreed upon by the delegates of the ICD. They were of the view that prosecuting perpetrators of gross and systematic violations would further the goal of true reconciliation in a torn society, could serve as a form of comfort and redress for victims and could act as a deterrent against the repetition of similar abuses.¹⁹⁹ Even various reports of non-governmental and intergovernmental institutions have put forward the need for accountability for the violations perpetrated.

This is why, after requesting to the Security Council the creation of an international tribunal for crimes committed in Ituri,²⁰⁰ and several pleas for the assistance of the UN for an international criminal court for the DRC,²⁰¹ the government indicated, in its statement to the UN General Assembly Sixth Committee on 20 October 2003, that ‘an international tribunal in the DRC could model itself after those set up in Sierra Leone or Cambodia.’²⁰² While the transitional political environment was not favorable to such an international criminal setting, the upcoming government is expected to lay down the foundation for the establishment of an international criminal court for the DRC.

Some domestic criminal prosecutions have taken place in Bunia, Kisangani and Lubumbashi.²⁰³ However, crimes against humanity and war crimes are not defined in the

¹⁹⁷ Borello (as n 22 above).

¹⁹⁸ As above.

¹⁹⁹ See Final report of the ICD, as n 189 above.

²⁰⁰ Borello (n 22 above) 33.

²⁰¹ See President Joseph Kabila, Address to the General Assembly on 24-09-2003 UN General Assembly Document, A/58/PV.10, at 15.

²⁰² Amnesty International, ‘the Democratic Republic of Congo: Addressing the present and building a future’, AFR 62/050/2003, at 22. Cited in Borello (As n 22 above) 37.

²⁰³ As n 225 above.

ordinary criminal code, but the military one, creating thus obstacles relating to personal jurisdiction of and applicable law before military courts. Borello also points out the amnesty process, lack of Independence and capacity of the Judiciary, lack of political will and lack of cooperation of foreign governments as additional obstacles.²⁰⁴ For its part, the ICC has shown interest to prosecute criminals with the cooperation of the Congolese Government.²⁰⁵ Nevertheless, most atrocities were committed before its entry into force so that several crimes and perpetrators would fall out of its temporal jurisdiction. This is one of the key reasons supporting the creation of international criminal body for the DRC, which would work in juxtaposition with the TRC. For the greatest interest of the victims' right to reparation, advancing both mechanisms in the fragile post-conflict DRC would require strategies.

4.5. Advancing the victims' right to reparation in the DRC transitional justice: Lessons from Sierra Leone experience

In its long way to a just peace subject to its ability to respond to legacies of gross and systematic violations, the DRC has accomplished only first few steps, to use Borello's expression.²⁰⁶ While the DRC will have to meet many challenges peculiar to its realities, lessons from Sierra Leonean experience would be beneficial for advancing the victims' right to reparation. Before drawing these lessons, let us analyze first the relevance of Sierra Leone case.

4.5.1. Relevance of Sierra Leone experience

Dealing with gross and systematic gross and systematic human rights violations is being immediately confronted with the dilemma of prosecuting perpetrators without hampering peace building in a post-conflict society. Above all is the complex question of addressing the harm suffered by the victims in a way that guarantees social reconciliation without overlooking respect for peremptory obligations. As far as the DRC is concerned, this dilemma is even more manifold, given the complexity of the conflict both in terms violations committed, victims, parties formerly involved and the responses to those violations.

To address legacies of the conflict regarding the victims, Sierra Leone experience stands as a lesson from the perspective of the qualification of the violations committed. In fact,

²⁰⁴ See n 227 above.

²⁰⁵ Thanks to the Cooperation Agreement between the DRC and the ICC, the latter has indicted one person one person. See *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 <<http://www.icc-cpi.int/cases/RDC.html>> (accessed on 05-10-2006).

²⁰⁶ As n 22 above.

it is previously demonstrated that in both, violations committed are of civil and political nature, on the one hand, and gross and systematic violations on the other hand. This allows in both cases applying similar principles and norms, the implementation of which may encounter similar problems. Besides, transitional justice mechanisms applied in both cases are identical so that it is believed that dilemma experienced by Sierra Leone may be faced with by the DRC. Lastly, in both cases notable has been the role of external actors both in launching the conflict, in its intensification and in its end. Addressing legacies of conflicts would require involving them to guarantee non repetition of atrocities both internally and externally. It is therefore worth proposing how best the DRC can overcome them.

4.4.2. Recommending to the DRC transitional justice lessons from Sierra Leone

Transitional justice in the DRC is confronted with several challenges. As far as the implementation of the victims' rights to reparation is concerned, the Sierra Leone experience can illuminate the DRC with regard to the truth and reconciliation mechanism, criminal accountability mechanisms, and the issue of their juxtaposition.

4.5.2.1. Regarding the truth and reconciliation mechanism

To prevent that an unresolved past inevitably returns to haunt citizens,²⁰⁷ establishing the truth on past gross and systematic human rights violations is a necessary step in the process of reconciliation and peace building. To ensure exhaustiveness of the TRC report, the latter should not complete its work without incorporating the judicial truth. If, however, the TRC is about to complete its mandate, a provisional report may be issued and be subsequently complemented by judicial findings. This would also prevent contradictory truths on same facts with which both institutions dealt and ensure that the truth published is incontrovertible.

Besides, recommendations of the TRC should be as appropriate as to fit the types of the rights violated and the nature of norms infringed. The TRC should recommend reparations in a precise manner so as to avoid all tendencies by the states to understand them as subject to available resources or of progressive realisation. Even in case of scarcity of means for redress, the first step for the state should be the acknowledgement of the harm suffered by the victims. Involving them in appreciating the nature and the extent of reparations should be the golden rule.

Finally, the success of the internal peace and reconciliation also relies on neighbouring relationships, particularly with states that got involved in hostilities. Therefore, the need for a

²⁰⁷ Sarkin (as n 135 above).

'regional truth and reconciliation setting' would a necessity for an everlasting peace be within the Great Lake sub-region. The African Union, through its Peace and Security Council, would be the suitable forum that can host or organize a 'regional truth and reconciliation mechanism' on human rights violations committed within the DRC. Acknowledgements and apologies arising from this forum would be the threshold of a regional peaceful coexistence.

4.5.2.2. Regarding criminal accountability mechanisms

Conducting criminal prosecutions in the aftermath of gross and systematic human rights violations has been challenging, particularly when the potential criminals are part of the government. As far as the DRC is concerned, the post-electoral environment is seen favorable for the emergence of an international criminal court. While the principle of prosecuting 'those bearing the greatest responsibility' might help decongesting that court, domestic courts should also be paid attention to so as to strengthen their capacity to try 'small fry' who cannot be covered by amnesty.

Furthermore, the statute of the international court to be set up should be clear about, or at least provide guiding criteria for 'bearing the greatest responsibility'. While the political or military leadership role of the accused would obviously be the starting point, a sense of the severity, seriousness or massive scale of violations perpetrated should also be taken into account. This would help avoiding, like was the case in Sierra Leone, the narrow and selective interpretation that may negatively impact on the real perception of justice.²⁰⁸ The expected court should also be given the possibility to deal with civil reparation when the victim and the perpetrator are identifiable and the damage obviously appreciable.

4.5.2.3. Regarding the juxtaposition of both transitional justice mechanisms

The major problem arising from the juxtaposition of truth and reconciliation and criminal accountability mechanisms has been the one of managing their overlapping personal jurisdiction. It is proposed that individuals indicted by criminal mechanisms do not appear before the TRC before the end of proceedings. This would first allow a fair and proper administration of justice. For the sake of truth, the TRC will still resort to judicial truth arising from judgments or interview those individuals if they are willing to testify.

While the TRC should not deal with those falling under the courts jurisdiction at first place, it should focus on witnesses, victims and perpetrators eligible for amnesty. Since

²⁰⁸ See International Crisis Briefing, The Special Court for Sierra Leone: promises and pitfalls of a new model *Africa Briefing* Freetown/Brussels 4 August 2003; The author's interview with some Sierra Leoneans during a field study (March 2006) also confirmed this.

judicial truth is useful to complement other TRC findings, a partial and provisional report could be issued, if the courts proceedings are not yet over. Realizing the victims' right to reparation relies on a proper management of the juxtaposition of the TRC and criminal mechanisms.

4.6. Conclusion

Like Sierra Leone, the DRC has also been the landscape of gross and systematic human rights violations. While post-conflict political environment has not been favorable to a proper treatment of legacies of the said violations, the post-electoral period is prospective of timely responses to gross and systematic violations perpetrated capable of realizing the victims' rights to reparation.

It is therefore foreseeable that the DRC TRC will be working in conjunction with criminal mechanisms, like in Sierra Leone. Taking advantage of its similarity with Congolese transitional justice regarding to the nature of violations perpetrated, the role of external actors and the responses to the said violations. Notwithstanding peculiarities of both cases, the norms applicable are similar, so that shortcomings encountered in Sierra Leone can be better overcome in implementing the victims' reparation.

This is why recommendations are formulated to make Congolese responses to gross and systematic human rights violations effectively realize the victims' right to reparation.

CHAPTER FIVE:

GENERAL CONCLUSION

This study has presented, in Chapter One, the implementation of reparation of the victims of gross and systematic human rights violations as the central focus of our investigation.

Consequently, Chapter Two permitted to explore international standards to that regard. It found that gross and systematic violations entail reparation for the victims. When the violations breach peremptory norms, the right to reparation deriving from this breach has a peremptory force so that it overreaches any derogation, being it justified by peace building reasons.

In light of these standards, Chapter Three analyzed Sierra Leone transitional justice in order to find out the extent to which its implementation has advanced the victims' right to reparation. This study found that the TRC, the Special Court for Sierra Leone and the management of their juxtaposition have hampered an effective implementation of the victims' right to reparation.

Following Sierra Leone experience, Chapter Four analyzed the conflict in the DRC, which it found to have with Sierra Leone's similarities regarding the nature of violations committed, the responses to those violations and the role of internal actors. Taking advantage of these similarities, it is argued that Sierra Leone experience should caution the implementation of the victims' reparation in the DRC.

Thus, lessons from the shortcomings experienced in Sierra Leone are drawn in terms of recommendations relating to the truth and reconciliation and criminal accountability mechanisms as well as the management of their juxtaposition, the implementation of which can advance the victims' right to reparation in the DRC.

Despite its merits, this study has not deeply discussed the tension arising from collective implementation of the victims' right to reparation. What would happen when a victim refuses the benefit offered by transitional justice mechanisms and decide to initiate a personal judicial action? This question is meaningful as the victims' right to reparation is primarily a personal right. This opens avenues for further investigation.

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