

# Victims Reparation for Derg Crimes: Challenges and Prospects

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## **Executive Summary**

This research is about challenges and prospects to ensure victims' reparation for mass human rights violations in circumstances where States fail their obligations to avail remedies. International human rights embodied in conventions and customary international laws set the minimum standards States shall guarantee to the subjects of their jurisdiction. Moreover they stipulate the remedies States shall avail in case of violation of those minimum standards. However, it still remains within the power of States to live up to their obligations, or not.

Particularly, this paper explores challenges and prospects for claiming reparation for victims of mass atrocities that occurred in Ethiopia between 1974 and 1991 by the Derg era. The findings indicate that there are challenges such as expiry of period of limitation and non-justiciability of constitutional provisions in domestic Courts. And in the presence of these impediments locally, international mechanisms are also blocked due to the principle of State immunity even if those violations pertain to peremptory rules of international law such as prohibition of genocide, torture and grave breaches of the laws of war.

This thesis finds innovative reparation mechanisms in jurisprudences of regional and international tribunals with regard to mass human rights violations. However, victims of the Derg crimes face challenges accessing them due to the intricacies of the international law that are ill-fitting to the regime of human rights laws.

Navigating through the experiences of other countries in this thesis reveals prospects too. The Holocaust and Apartheid reparations evince that it is not only the litigation approach that ensured the reparations for the victims of those mass atrocities, but the moral wrong of egregious violations. Even in situations where the States were not bound by international human rights laws, victims have managed to procure reparations from responsible States and they are still pushing for it. The strong and persistent pressing of victims and interest groups has kept the discourse on Holocaust reparation active even after half a century. The same holds true for the reparation claims of South African Apartheid and Rwandan Genocide where the victims persist on for victim reparation, though their outcome is not yet known.

This paper concludes that the development in human rights reparation globally cannot operate unless the initiative comes from the victims themselves. Those positive experiences of other countries provide opportunities to be exploited by the victims to ensure the provision of reparation. To do so they have to engage the government, scholars and civic societies in reparation discourse.

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## List of Abbreviations

- ANC-African National Congress
- CAT-Convention against Torture and other Cruel, Inhuman or Degrading Treatment
- ECHR-European Convention for the Protection of Human Rights and Fundamental Freedoms
- ECtHR-European Court of Human Rights
- EPRP- Ethiopian Peoples' Revolutionary Party
- FARG- *Fonds National pour l'Assistance aux Rescapés du Génocide*
- FDRE- Federal Democratic Republic Ethiopia
- FRG-Federal Republic Germany
- HRC-Human Rights Committee
- IACtHR- Inter-American Court of Human Rights
- ICCPR-International Covenant on Civil and Political Rights
- ICESCR-International Covenant on Economic Social and Cultural Rights
- ICJ-International Court of Justice
- ICL- International Criminal law
- ICTR-International Criminal Tribunal for Rwanda
- ICTY-International Criminal Tribunal for former Yugoslavia
- ILC-International Law Commission
- PCIJ-Permanent Court of International Justice
- RPF-Rwandan Patriotic Front
- RTMMM-Red Terror Martyrs' Memorial Museum
- SPO-Special Prosecutor's Office
- TGE-Transitional Government of Ethiopia
- TRC-Truth and Reconciliation Commission
- UDHR-Universal Declaration of Human Rights
- VCLT-Vienna Convention on the Law of Treaties

## **Introduction**

International criminal law (ICL) has witnessed unprecedented development in the last two decades in terms of prosecuting perpetrators of international crimes: genocide, crimes against humanity and grave breaches of the laws of war. The achievements of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) marked a new era for ICL. These developments in ICL have resulted in prosecution and conviction of the main perpetrators responsible for atrocities in the Former Yugoslavia, Rwanda, and Sierra Leone among others.

However these achievements are not free from criticism especially with regard to the Tribunals' failure to provide effective remedy to the victims. Despite the heinous and gross the nature of the crimes that render it impossible to effectively rectify the damage the victims suffer, the survivors usually find themselves in dire need of support such as food, shelter, clean water, schools, and medical services. Justice in the context of grave human rights violations is not only criminal conviction of the perpetrators, but also victims' reparation: restitution, compensation, and satisfaction. Reparation of victims is an important step not only in terms of redressing the harm done of the victims, but also to ensure sustainable peace and security. In the absence of reparations for victims of war crimes, one of the objectives of the establishment of these international tribunals -ensuring peace and security- will be difficult to achieve.

The very visible case where international human rights laws and a national legal system failed to address reparation of human rights atrocities is the Derg crimes committed between 1974 and 1991 by the military junta government of Ethiopia. The military government, also known as Derg, had committed egregious atrocities, during its stay in power, such as genocide; torture, war crimes, cruel and inhuman treatment, arbitrary detention and forced

disappearance. The Derg committed those crimes through extra-judicial executions; bombardment of civilians; mass resettlement programs; and blockade of humanitarian relief.

However the response to these mass atrocities of the Derg was a little more than investigation and prosecution of the Derg officials. Reparation efforts directed to address the economic, social and psychological harms to the victims of the Derg crime are meager. Moreover, neither the domestic nor the international legal forums are conducive for the victims to push forward their agenda for reparation. Hence the objective of this thesis is to analyze the most important developments and challenges lying ahead to ensure effective reparation of victims of violations of the Derg crimes.

The thesis of this research is that the existing human rights mechanisms are short of fulfilling their objectives if victim reparation is not given priority in addition to the prosecution of the perpetrators of mass human rights violations. Hence it will address issues such as: availability of remedies to the human right violations they suffered, presence of sufficient procedural guarantees for them to claim reparation including less restrictive statute of limitation and State immunity; and precedents in national, regional and international practices that substantiate the reparation of victims of Derg crimes through restitution, compensation, and satisfaction measures.

The research employs a comparative approach to discuss the substantive and procedural aspects of victim reparation in Rwanda, and Germany (victims of the Nazi Holocaust), and compares them to the victims of the Derg crimes, forced resettlement, and war crimes committed by the Derg officials in Ethiopia. It also discusses the precedents of international tribunals such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (ICtHR), and the Human Rights Committee (HRC) on reparation for human rights violations.

The thesis has three chapters in addition to the conclusion part. Chapter one focuses on narrating the experiences of the Derg crime and measures taken after the fall of the Derg and Chapter two discusses challenges of seeking reparation for victims both at international and national levels including international and regional human rights laws that establish the international wrongful act of States. Chapter three addresses consequences, specifically reparation, for violation of international human rights law and lessons from international regional tribunals with regard to reparation of victims of mass atrocities. The fourth Chapter will look at reparation experiences of other countries as part of their transitional justice effort. Finally, there is a part dedicated to concluding remarks.

The thesis will contribute to elucidating issues pertaining to reparation of the victims of mass atrocities in Ethiopia, drawing lessons from South African Apartheid, Nazi Holocaust, and Rwandan Genocide reparation experiences. Though there is a reasonable amount of literature with regard to reparation of victims of war crimes, genocide, and crimes against humanity, in other jurisdictions, discussion on repatriation of victims of the Derg crimes are rare, if any. Topics on the prosecution of Derg officials are covered fairly in scholarly literatures; but there is scant coverage on reparation of the victims. Hence it provides perspectives on the reparation of the victims of the systemic human rights violations of Derg and entices further researches on the topic.

# 1 The Derg Crimes and the Victims

## 1.1 Pre 1974 Ethiopia: Brief Summary

The pre-1974 Ethiopia was a highly centralized monarchical empire. The Monarchy claimed its entitlement to the throne for its descent from the union of King Solomon of Israel and Queen Sheba. The Ethiopian history is marked by abundance of internecine and international wars though the country has managed to maintain its independence during the period of the Europeans scramble for the rest of Africa. The last Emperor, Haile Selassie I, consolidated his power using the 1955 Constitution, the second of its type for the country, which gave legitimacy to the legend decent from King Solomon. Though the 1955 Constitution enshrined the basic human rights, it was far from the reality on the ground.

The 1973 revolution erupted in the middle of the deep entrenched feudal administration and it was catalyzed by a high surge of fuel prices, feudalistic rural land ownership, and famine. Students and urban worker's unions were pioneers of the uprising that ravaged the country. However, as disorganized as the rioters were, it was the military and the police, with better discipline and organization that made use of the opportunity to fill the power vacuum created by the nationwide riots.<sup>1</sup>

## 1.2 The Post 1974 Mass Atrocities

Though the revolution in 1974 in Ethiopia has marked the end of absolute monarchical rule in Ethiopian history, it also marked the beginning of one of the horrendous bloodshed, civil war and systematic human rights violations in the world. The atrocity of the Provisional Military Administration Council, herein after Derg ('Derg' means Council in *Geez*) ranks 7<sup>th</sup> of its

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<sup>1</sup> Mekasha Getachew, *An Inside View of the Ethiopian Revolution*, Munger Africana Library Notes, California Institute of Technology, 8, (1977)

kind in the world that happened in the 20<sup>th</sup> C.<sup>2</sup> The Emperor with his 58 nobility and ministers, Abuna Tewophilos -Patriarch of Orthodox Church-<sup>3</sup> and Gudina Tumsa -General Secretary of the Ethiopian Evangelical Church<sup>4</sup> are among the high profile killings of the Derg regime. The Derg executed some of its own members too in order to consolidate the power of Col. Mengistu Haile Mariam.<sup>5</sup>

Specifically the first five years of the Derg regime were full of strife among political groups that proliferated during and after the 1974 revolution, that resulted in widespread acts of genocide, torture, inhuman and degrading treatment. Within this period, that commenced on April 30, 1976 with execution of hundreds of youth, the Derg has embarked on its systematic and well organized genocide campaign-‘Red Terror’ latter authorized by the Proclamation 121/1977<sup>6</sup> that outlawed one of the rival political parties, the Ethiopian Peoples’ Revolutionary Party (EPRP). The Red Terror when it ended in 1979 took “*half a million people... over 1,000 children between the ages of 11 and 13, whose remains were abandoned on the streets of Addis Ababa*”.<sup>7</sup> According to the Red Terror Martyrs’ Memorial Museum

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<sup>2</sup> Firew Kebede Tiba, *The Mengistu Genocide Trial in Ethiopia*, 5 Journal of International Criminal Justice, 513, 516, (Oxford University Press, 2007)

<sup>3</sup> Ibid

<sup>4</sup> Dictionary of Christian Biography, available at [http://www.dacb.org/stories/ethiopia/gudina\\_tumsa.html](http://www.dacb.org/stories/ethiopia/gudina_tumsa.html) (Last accessed on November 30, 2012)

<sup>5</sup> Human Rights Watch, *Ethiopian Dictator Mengistu Haile Mariam*, (November 24, 1999) available at: <http://hrw.org/english/docs/1999/11/29/ethiop5495.htm>, (Last accessed on Nov 29, 2012).

<sup>6</sup> United States Institute of Peace Ethiopia, *Report of the Office of the Special Prosecutor, The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia*, 2 (February 1994) available at [http://www.usip.org/files/resources/Ethiopia-SPO\\_Dossier-2.pdf](http://www.usip.org/files/resources/Ethiopia-SPO_Dossier-2.pdf) (Last accessed on November 30 2012)

<sup>7</sup> The Red Terror Martyrs’ Memorial Museum website, available at <http://rtmmm.org/redterror.html> “Red Terror” (Last accessed on Nov 30, 2012)

(RTMMM), “*the Red Terror was a modern day holocaust*”.<sup>8</sup> The Special Public Prosecutor (SPO) when it charged the Derg officials have listed 12315 individuals who have died during the Red Terror, while the court found 9546 of them have died due to the crimes during this period.<sup>9</sup> The SPO’s charges listed 2681 as victims of torture and the court confirmed the torture of 1687 of them and 175 of them were women.<sup>10</sup>

Officials of Derg from the lowest administrative unit, ‘*Kebele*’, to the top level officials have implemented the Red Terror with different levels of culpability, from direct execution to policy guidance and decision making. ‘*Kebeles*’ and military barracks served as detention centers and torture. The detentions, tortures, and summary executions were conducted by the Revolutionary Guards, ‘*Abiyot Tibeqa*’, and officials of each *Kebele*.<sup>11</sup> Condition of detention was despicable and inhuman as the small dark rooms without ventilation were usually congested.<sup>12</sup> Moreover tortures are conducted near the rooms so that the others can listen to the anguish of their prison mates being tortured.<sup>13</sup> Families of the executed youth were not allowed to mourn, as the bodies of the youth are left in the open streets for days mandatorily before their families bury them after paying the cost of the bullet used to kill them.<sup>14</sup>

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<sup>8</sup> Ibid

<sup>9</sup> Firew Kebede Tiba, *The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia*, Chacha Murungu & Japhet Biegion (eds) Prosecuting International Crimes in Africa, 163-184, 165-66, (Pretoria University Law Press, 2011)

<sup>10</sup> Ibid, 165

<sup>11</sup> Human Rights Watch/Africa, 6 *Ethiopia Reckoning under the Law*, 7 (November, 1994) available at <http://www.hrw.org/reports/pdfs/e/ethiopia/ethiopia94d.pdf> (Last accessed on 26 November, 2013)

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

The period of Red Terror is followed by other sets of grave crimes in 1984 when an excessive famine occurred in the northern parts of the country. After its attempt to hide the occurrence of the famine in northern part of the country has failed, the Derg embarked on forced resettlement campaign of the community to the Southern and Western parts of the country under the guise of providing fertile land for the victims of the famine. However, the real motive behind the forced resettlement was to dry out the popular support of the then liberation groups fighting in that northern part of the country. Hence it has resettled 600,000 persons by force and among these 100,000 persons died as the result of the poor condition of logistics and insufficient food in the relocation stations between 1984 and 1986<sup>15</sup>. Moreover the Derg used the relief food as a war weapon by blocking food aid, diverting food aid to the military and the towns, and restricting the traditional flow of surplus grain<sup>16</sup>.

Derg was fighting local and international wars for the 17 years it has stayed on power. It was in war almost in all parts of the country with the ethnic liberations in addition to the conflict with the then Republic of Somalia. During the conduct of these wars the Derg officials committed variety of crimes such as poisoning water wells, aerial bombing of civilian villages and markets, mass killing of civilians<sup>17</sup>. These crimes were committed not merely as individual and separate incidents but as part of systematic policy of using trepidation as a means of counter-insurgency strategy.<sup>18</sup> The most significant of these incidents was the day long aerial bombardment of a local market in *Hawzen* that claimed the lives of more than 2500 civilians.

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<sup>15</sup> Ibid, 9

<sup>16</sup> Tiba, *The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia*, 3

<sup>17</sup> Ibid, 8

<sup>18</sup> Ibid

### 1.3 Ratified International Human Rights Instruments

Ethiopia ratified, a number of international treaties relating to human rights and humanitarian law before the coming to power of the Derg. However most of the human rights treaties were ratified only after the fall of the Derg. Among the international human rights treaties ratified are the United Nations Covenant on Civil and Political Rights<sup>19</sup> (ICCPR); the UN Covenant on Economic, Social and Cultural Rights<sup>20</sup> (ICESCR); and the UN Convention against Torture, Inhumane, and other forms of Degrading Treatment<sup>21</sup> (CAT) in 1993. Moreover, Ethiopia had ratified the Convention on the Prevention and Punishment of the Crime of Genocide<sup>22</sup> before the coming to power of the Derg. With regard to humanitarian laws, Ethiopia has ratified the 1949 four Geneva Conventions in 1969.<sup>23</sup>

### 1.4 Transitional Justice Measures

Upon the fall of the Derg after 17 years of bloody internecine wars, the Ethiopian People's Revolutionary Democratic Front (EPRDF) established the Transitional Government of

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<sup>19</sup> International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force Mar. 23, 1976 (Ethiopia acceded to it on 11, June 1993)

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 (Ethiopia acceded to it on 11, June 1993)

<sup>21</sup> Convention against Torture, Inhumane, and other forms of Degrading Treatment, adopted by the General Assembly resolution 3452 (XXX) of 9 December 1975, entry into force 26 June 1987 (Ethiopia has acceded to it on 14 March 1994)

<sup>22</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted by General Assembly resolution 260(III) of 9 December 1948, entry into force on 12 January 1951 (Ethiopia ratified it on 1, July 1949)

<sup>23</sup> See [http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countryLabelSelected=Ethiopia&xp\\_countrySelected=ET&nv=4](http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countryLabelSelected=Ethiopia&xp_countrySelected=ET&nv=4) (Last accessed on 12, November 2013)

Ethiopia (TGE) in June 1991. The TGE established the Special Public Prosecutor Office (SPO) with Proclamation No. 22/1992<sup>24</sup>. The SPO was established with dual purposes:

1. For trial of officials of the Derg, representatives of urban dwellers, peasant associations and other persons who are suspected of committing those crimes
2. To document the atrocities, embezzlement, and plunders committed for the purpose of educating the people to ensure non-recurrence of such crimes<sup>25</sup>

The SPO commenced the indictment of the Derg officials on 13<sup>th</sup> December 1994 charging them for the above mentioned crimes of the regime. The trial of 73 of the top officials of the Derg, including Col. Mengistu, came to conclusion in 2007 with convictions for Genocide<sup>26</sup> and commission to death sentences. By the time the trial was concluded 34 of them were in court, 25 of them including Mengistu were tried in absentia, and the remaining were deceased. On 10<sup>th</sup> of December 2010, the death sentence was altered to life imprisonment and in 2011 the President gave amnesty to 16 of them because they already served 20 years in prison.

The trials of the Derg officials were conducted in three groupings: “... *policy-makers, senior government, and military officials of the Derg...military and civilian field commanders who carried out orders as well as passed orders down, and the individuals who actually carried out many of the brutal and deadly orders.*”<sup>27</sup> The SPO report to the House of Peoples

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<sup>24</sup> *Special Public Prosecutor Office Establishment Proclamation No. 22/1992*, Negarit Gazette (August 8/1992)

<sup>25</sup> *Ibid*, Preamble

<sup>26</sup> *Mengistu found guilty of genocide*, available at <http://news.bbc.co.uk/2/hi/africa/6171429.stm> (Accessed on Dec 3, 2012 8 AM)

<sup>27</sup> Tiba, *The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia*, 169

Representatives (Ethiopian Federal Parliament) in February 2010 shows that the prosecutor had filed criminal cases against 5569 suspects.<sup>28</sup>

The documentation of the human rights violations by the SPO was expected to serve the purpose of preserving the history and educate generations so that the same tragedy will not happen again. In the process the SPO has compiled a large volume of evidences presented to the court for the trial purpose.<sup>29</sup> The Derg regime has left behind sufficient documentary and materials that enabled the reconstruction of the then situation and preserve them.

In the meantime, the Red Terror Memorial Monument and Museum (RTMMM) for the martyrs of the of Red Terror was built in the Central Square (Mesqel Square) of Addis, which exhibits and the names and photographs persons killed during the Red Terror, archive documents that show the minutes of the Derg members, and materials that were used during the Derg Regime for the purpose of the Red Terror. Though the RTMMM is vastly the initiative of the Association of the Red Terror Victims, the contribution of the government is insignificant except the provision of plot of land for the Monument<sup>30</sup>.

In light of the gravity of the Derg crimes and their systemic character, the State should have embarked on transitional justice measures including the reparation of the victims. However

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<sup>28</sup> Ibid 165

<sup>29</sup> Jeremy Sarkin, *Transitional justice and the prosecution model: The experience of Ethiopia*, 3 *Journal of Law, Democracy & Development*, 253, 257, (1999), quoting the statement of US attorney Stuart H Deming in *The Economist* 30 July 1994: 37-38 “*Not since Nuremberg has such documentary evidence been assembled suggesting the degree of complicity on the part of senior government officials. In many instances, there were verbatim transcripts made of critical meetings. There are over 200 volumes of these transcripts as well as audio tapes of many of these meetings*”

<sup>30</sup> Tiba, *The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia*, 182

no such measures have not yet been designed and implemented in the country. Moreover, in the absence of those measures, the victims have limited access to justice to pursue reparation for the harms they suffered since the domestic legal regime is ill-prepared to accommodate those judicial actions and the international alternative is closed to them since the country was not party to the international human rights instruments at the time they were committed.<sup>31</sup>

### **1.5 Victims and the Derg Trials**

Post-conflict responses to mass atrocities and grave human rights violations usually encompass alternative and additional measures to prosecution of the perpetrators of the crime. However, the Ethiopian response to the atrocities of the Derg regime face fierce criticisms for lack of national reconciliation through truth and reconciliation, absence of public apology, insignificant contribution to symbolic recognition of the wrongs of Derg and compensation of victims of the crimes. Specifically the release of top Derg officials without consulting the victims and without making public apology had stirred additional dissatisfaction in the context of the aforementioned criticisms.

The participation of the victims in the whole process was limited to provision of evidences to the SPO and reparations are rare if they exist at all. Joinder of civil claims of the victims against the perpetrators or the State was not addressed in the prosecution process. No effort is made to restitute properties and monetary interests of the victims neither by the State nor against the convicted Derg officials.

The trial of the Derg officials has never fulfilled neither the procedural nor the substantive rights of the victims of the Derg Regime. Beyond the prosecution of the officials that took unnecessarily long years, measures designed to ensure the participation of victims in national

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<sup>31</sup> The challenges will be discussed elaborately in the next Chapter

reconciliation and truth endeavors were too minimal. Assumption of State responsibility for the wrongs was nonexistent, no measure is taken to retribute and compensate the victims, and the individual perpetrators have made no genuine declaration of apology to the victims, their family, and the Ethiopian people.

## **2 Challenges of Reparation Enforcement**

The previous Chapter discussed the main human rights violations committed during the Derg regime for which the Derg top officials and the main perpetrators were prosecuted. The discussion revealed the absence of proper State-led initiative to recompense the victims and survivors despite the positive efforts to prosecute the Derg officials. Hence in the face of this lack of willingness to launch a transitional justice model that serves the reconciliation, reparation and rehabilitation of victims, this Chapter will discuss the challenges of establishing the legal responsibility of the State and enforcing them to make good the losses and the sufferings of the victims.

### **2.1 Introduction**

The primary alternative for the victims to claim reparation is tort action in the domestic courts against the State and the perpetrators. But this alternative is rarely available for them since the procedural and substantive laws of the country make it difficult to get remedy for human rights violations in domestic courts. Pursuing reparation through extra-contractual liability provisions of the domestic laws is difficult due to the expiry of period of limitation for most of the crimes. In the absence of special procedures that accommodate the special nature of the Derg crimes tort action is doomed to fail.

In Ethiopian current legal context it is difficult to get reparation against the State due to limited liability of the State for actions of State officials. However, in situations of mass human violations, the victims sustain pecuniary and non-pecuniary damages that are usually beyond the financial means of individual perpetrators to make up for. Moreover the very idea of reparation for systematic mass human rights violations dictates not only handing out compensation to the victims by the perpetrators or the State but also an all-inclusive process

of restorative justice.<sup>32</sup> Legally reasoning too, since acts of State officials in the performance of their official duties are attributable to the State, the latter is responsible to make good the damages victims sustained as a result of acts of its officials.<sup>33</sup>

The other alternative is to pursue justice in courts of foreign State, or regional or international tribunals. However this also challenging due to impediments such as state immunity from foreign jurisdiction and absence of positive law that makes the Derg crimes internationally wrongful acts of the State and enforced in international tribunals.

The late ratification of the human rights Covenants ushers in an interesting issue about legal rules that govern the reparations claims of the victims for violations that occurred during the Derg era: whether it is possible for the victims of those violations before the ratification of the Covenants to invoke their human rights locally and/or internationally, and if so whether remedies are available for them.

Even for violations humanitarian and human rights laws the State was a party or for violations pertaining to customary human rights laws binding during that time, the enforcement of those laws is hampered by challenges arising from principles governing state immunity and extra-territorial adjudicatory jurisdiction. Whereas it is insufficient to show violation of the human rights of the victims to seek reparation from the State;

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<sup>32</sup> International Center for Transitional Justice; *Reparations in Theory and Practice*; Reparative Justice Series, available at <http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>, 2 (Last accessed on 08 October, 2013)

<sup>33</sup> International Law Commission (ILC); *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, (Draft articles on State Responsibility)*Text adopted by the ILC at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected, Art. 5

the breach shall pertain to international human rights law augmented by rules that confer jurisdiction to a tribunal through which enforcement is sought. Moreover, the principle of state immunity limits the jurisdiction of courts of foreign States to adjudicate and award reparation to victims of customary human rights violations.

## 2.2 Action for Reparation in Domestic Courts

As pointed earlier, the government that replaced the Derg devised neither administrative nor judicial reparation mechanisms to address the issue of victim reparation. The extra-contractual provisions of the Civil Code provide that the State is liable for actions of government officials where the fault is professional.<sup>34</sup> It is a professional fault if it is committed in good faith and it falls within the scope of the authority of the person.<sup>35</sup> With this definition it is difficult to make the State responsible for the wrongs committed by the Derg officials since the mere fact that their actions were criminalized in the Penal Code<sup>36</sup> makes them *ultra virus*. However, the very fact that the Derg officials had passed a law that allowed the measures can be regarded as fault to make the State liable. More strongly, since the Derg officials were prosecuted and convicted though their actions were sanctioned by the same law, the requirement of fault for the purpose of extra-contractual liability will follow from it and the State can be held liable for that.

The other impediment is expiry of the period of limitation to institute civil action in the domestic courts. Though the ordinary period of limitation for tortuous action is two years,<sup>37</sup>

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<sup>34</sup> Civil Code of The Empire Of Ethiopia, Proclamation No. 165, Negarit Gazette Extraordinary, Art. 2126 (2) (1960)

<sup>35</sup> Ibid, 2127(1)

<sup>36</sup> Penal Code of Ethiopia, Proclamation No. 158, Negarti Gazette, Extraordinary Gazeta, No. 1, (1957)

<sup>37</sup> Ibid, Art. 2143 (1)

for damages arising from criminal offences the period of limitation shall be the same as the period of limitation prescribed for the offence in the Penal Code.<sup>38</sup> The then applicable Penal Code prescribes that the longest period of limitation shall be twenty years for serious crimes punishable with life imprisonment or death.<sup>39</sup> With this, the period of limitation has lapsed for all of the Derg crimes by now.

To seek reparation by establishing the Derg crimes as human rights violations is also a daunting task for an additional reason that most of the human rights instruments are ratified after the fall of the Derg. Even if the State had ratified the human rights conventions prior to the Derg government, the justiciability of them in domestic courts is questioning. Though the 1995 Constitution states that treaties ratified by Ethiopia shall form the law of the land,<sup>40</sup> as per the Negarit Gazeta establishment Proclamation,<sup>41</sup> Courts can take judicial notice of laws published on Negarit Gazeta only<sup>42</sup>. However, since none of the treaties the State has ratified, including the human rights conventions, have ever been published on the Negarit Gazeta courts cannot make judicial notice of them to enforce them.

Moreover, provisions of the Chapter in the Constitution that deals with human and democratic rights shall be interpreted in accordance with “*the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments*

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<sup>38</sup> Ibid, Art. 2143 (2)

<sup>39</sup> Penal Code of Ethiopia, Art. 226 (a) (1957)

<sup>40</sup> Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Proclamation No. 1/1995, 1<sup>st</sup> Year No. 3, Art. 9(4), (Addis Ababa – 21<sup>st</sup> August, 1995)

<sup>41</sup> A Proclamation to Provide for the Establishment of the Federal Negarit Gazeta, Proclamation No. 3/1995, Negarit Gazeta, 1<sup>st</sup> Year No. 3 (Addis Ababa – 22<sup>nd</sup> August, 1995)

<sup>42</sup> Ibid, Art. 2(3)

*adopted by Ethiopia*".<sup>43</sup> Despite the provision of the Constitution, the power of the judiciary to adjudicate cases based on the human rights provisions of the Constitution and human rights instruments ratified by the State is highly curtailed due to the provision that gives the interpretation of the Constitution to the House of the Federation, a Chamber of the Ethiopian Parliament.<sup>44</sup>

Hence, victims of the Derg crimes won't be able to pursue judicial remedies for the harms they suffered, unless legal reform is implemented to accommodate the special circumstances of the Derg crimes or unless the State avails administrative alternatives to address those human rights violations.

### **2.3 Action for reparation in International Tribunals**

International legal responsibility arises from legally wrongful conducts: acts or omissions that bring about legal consequences. Acts and omissions in breach of international laws and attributable to States are internationally wrongful acts that entail international legal responsibility<sup>45</sup>. The Articles on State Responsibility provide that "[E]very internationally wrongful act of a State entails the international responsibility of that State"<sup>46</sup>.

International responsibility of States for international wrongful acts, articulated in Articles on State Responsibility,<sup>47</sup> is well captured, even prior to the World War II, in decision of the

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<sup>43</sup> Ibid, Art. 13 (2)

<sup>44</sup> Ibid, Art. 83(3)

<sup>45</sup> ILC, Articles on State Responsibility, Art. 2

<sup>46</sup> Ibid, Art. 1

<sup>47</sup> Ibid, Art 1 states that "*Every internationally wrongful act of a State entails the international responsibility of that State*" a provision that does not make distinction between human rights laws and other international laws as to their potential to bring international responsibility. Hence this provision is not only about wrongful act of

Permanent Court of International Justice (PCIJ) in *Phosphates in Morocco Case*.<sup>48</sup> It is also reaffirmed in the decisions of ICJ in *Corfu Channel*,<sup>49</sup> *Military and Paramilitary Activities in and against Nicaragua*,<sup>50</sup> and in the *Gabčíkovo-Nagymaros Project*.<sup>51</sup> In the *Phosphates in Morocco Case*, a landmark decision in this regard, PCIJ noted that in case of breach of international law “attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately”<sup>52</sup>

However actions for reparation by victims of the Derg crime in international tribunals are set to face two sets of challenges if they choose to do so. The first one pertains to the absence of substantive laws that establish the international wrongful nature of the crimes committed by the Derg regime. The second pertains to the impediment of state immunity and absence of international jurisdiction inhibiting international tribunals and foreign courts from entertaining the action for reparation. The subsequent sub sections deal with these impediments in more detail.

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state towards another state but covers all wrongful acts against non state entities also. See also Art. 33 which suggests that the application of provisions as to the consequences of violations between States shall not preclude their application to consequences of violations of obligations towards non state organs including individuals. See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, HRLR 6 (2006), 203, 212 footnote 30 (quoting Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 209-10).

<sup>48</sup> *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, 10, 28*

<sup>49</sup> *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, 4, 23*

<sup>50</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, 14, 142, para. 283, and 149, para. 292*

<sup>51</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, 7, 38, para. 47*

<sup>52</sup> *Phosphates in Morocco Case, 28*

### 2.3.1 Breach of international human rights Convention

It is difficult to establish the international responsibility of the Ethiopian State for crimes of the Derg based on its treaty obligations. As shown in the previous Chapter, Ethiopia is a State party to most of international human rights instruments including the ICCPR, the ICESCR, the CAT and the Genocide Convention.<sup>53</sup> However most of these conventions are ratified well after the fall of the Derg except the Genocide Convention and the 1949 Geneva Conventions. However none of these two instruments provide mechanisms for the international complaint by victims of the States party.

In the absence of treaty law that was binding on the State during the Derg regime, it requires ransacking the intricacies of international law to determine the human rights laws violated to establish the wrongs committed by the Derg and its officials. Accordingly, seeking reparations for human rights violations of the Derg era is intricate, if not impossible, due to the absence of relevant treaty based human rights laws binding on the State at the time of the commission of the violations.

The other alternative to establish the commission of internationally wrongful act of the State is the violation of treaty interim obligation through its commission of genocide and other human rights violations. The Vienna Convention on the Law of Treaties (VCLT) imposes an obligation on signatory States to a treaty to refrain from acts that defeat the object and purpose of a treaty, pending the ratification, until it makes its intention not to be a party to the treaty.<sup>54</sup>

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<sup>53</sup> See the footnotes under Section 1.3

<sup>54</sup> Vienna Convention on the law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, 331, Art 18 (a)

However this line of argument is not likely to achieve the goal of establishing the wrongful act of the State for a number of reasons. First, the consequences for breaching an interim obligation are far from being clear especially where the treaty is multilateral. If the treaty is a bilateral one, the fate of the treaty may be dependent on the will of the one of the State parties to revoke the treaty or maintain it. Nevertheless where the treaty is multilateral the consequence of violating the interim obligation by one or more of the State parties is uncertain. Moreover, the possibility of claiming damage due to breach of the interim obligations is not yet settled whether the treaty is bilateral or multilateral one.

Secondly the issue of interim obligations becomes irrelevant with regard to international human rights conventions where the obligations of the States parties are not reciprocal by their nature but for the benefit of subjects of their respective jurisdictions. Since, human rights conventions do not impose obligations among States parties mainly, but towards individuals and groups within their sovereign jurisdictions, there won't be any reasonable reciprocal expectation among States parties to the conventions.

Another ramification that usually arises in relation to Art 18 of the VCLT is lack of acceptable standard for determining the *object and purpose* of treaties.<sup>55</sup> As one scholar put it, "*object and purpose is a term of art without a workable definition*".<sup>56</sup> A number of

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<sup>55</sup>Jan Klabbbers, *Some Problems Regarding The Object And Purpose Of Treaties*, 8 Finnish Y.B. Int'l L. 138, 138-160 (1997)

<sup>56</sup>Davis S. Jonas and Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 Vand. J. Transnat'l L., 565, 567 (May 2010)

standards are proposed for the determination of the meaning of the term *object and purpose* in the VCLT.<sup>57</sup>

In addition to the lack of consensus about the '*object and purpose*' of a treaty as used in Art 18 of the VCLT, it is dubious for the time being as to whom an interim obligation confers the entitlement to invoke its transgression in the case of human rights treaties. Assuming that a State violates the object and the purpose of a human rights treaty before ratification, it is ambiguous whether the basis for the claim can be the VCLT or the human rights treaty. This distinction is important in terms of determining the international tribunal with jurisdiction to entertain the claim and the entities with '*locus standi*' to bring the claim. Hence all these grey area surrounding the interim obligation of States parties make it improbable for the victims of the Derg crimes to succeed by invoking the violation of Article 18 of the VCLT as a basis for claiming reparation from the State.

### 2.3.2 Breach of Customary human rights rules

The international law rules violated by the Derg crimes are the customary international human rights laws. Though there are differences among scholars on the particularities “...nearly all agree that customary human rights law has two primary components which must generally be conjoined: (1) patterns of practice or behavior, and (2) patterns of legal expectation, acceptance as human rights law, or *opinio juris*”<sup>58</sup>

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<sup>57</sup> For an in depth discussion of these tests, see Jonas & Saunders; *Object and Purpose of a Treaty*, 565-609, and Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force*, 283

<sup>58</sup> Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 Ga. J. Int'l & Comp. L. 147, 148 (1995-1996), referring to Jordan J. Paust, *Customary International Law; Its Nature Sources and Status as Law of the United States*, 12 Mich. J. Int'l L. 59, 61 (1990)

Hence one necessary condition to identify a customary rule is continuity and repetition.<sup>59</sup> The ICJ decision, back in 1950, provided that customary rule formed when there is “*constant and uniform usage*”<sup>60</sup> practiced by States in question. However the practice of States shall not necessarily be strictly uniform. The presence of certain degree of homogeneity between the actions and omissions of States with regard to the practice in question is sufficient. States only within one region or with common situation can form a customary international rule to the exclusion of the other States that do not share that commonality.<sup>61</sup>

*Opinio juris* or ‘*opinio juris sive necessitatis*’ refers to the intention of those States undertaking the practice because they consider it as a law or their intention to be bound. *Opinio juris* is demonstrated through States’ conduct that demonstrates their “*belief that this practice is rendered obligatory by the existence of a rule of law requiring it*”<sup>62</sup>

In advisory opinion of the International Court of Justice (ICJ) delivered in 1970, Justice Ammoun, in his separate opinion, was particular about the Universal Declaration of Human Rights (UDHR), writing that though not binding as human rights instruments “*they can bind States on the basis of custom within the meaning*

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<sup>59</sup> Shaw, **International Law**, 76

<sup>60</sup> *Colombian-Peruvian asylum case*, Judgment of November 20th 1950: I.C.J. Reports, 266, 277 (1950)

<sup>61</sup> Shaw; **International Law**, 79

<sup>62</sup> *North Sea Continental Shelf*, (Federal Republic Of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment, *I.C.J. Reports*, I.C.J. Reports, 3, 44 (1969)

*of ...because they constituted a codification of customary law... or because they have acquired the force of custom through a general practice accepted as law.*"<sup>63</sup>

It is usually contended that the provision of the Universal Declaration of the Human Rights have become parts of the international customary law.<sup>64</sup> Despite disagreements among scholars over specific provisions of UDHR that form part of customary international law, it is a matter of consensus that most of the provisions of UDHR customary international law.<sup>65</sup> Hence, since most of the crimes of the Derg are violations of rights to life, liberty, freedom from torture and inhuman treatment which are protected in the UDHR and considered customary rules; the Ethiopian State is internationally responsible for those violations.

Moreover some of the human rights violated by the Derg are violations of *jus cogens norms*, norms that are peremptory such as "...*self-determination of peoples, genocide, racial discrimination*".<sup>66</sup> The ILC report shows that almost all negotiating States to the VCLT had accepted the existence of supreme norms of *jus cogens* while they voted for the inclusion of the provision even though they couldn't agree by then which norms are *jus cogens*.<sup>67</sup> Moreover they have left the task of setting criteria for the formation of *jus*

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<sup>63</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, (Ammoun, J. separate opinion) I.C.J. Reports, 16, 76 (1971)

<sup>64</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287, 340 (1995-1996)

<sup>65</sup> *Ibid*, 342 *et seq*

<sup>66</sup> Antonio Cassese; **International Law**, Oxford University Press, 199 (2<sup>nd</sup> ed. 2005)

<sup>67</sup> The provision was adopted majority of 87 votes 8 votes against and 12 abstentions, *Ibid*, 8

*cogens* norms, for future developments in the field as per the recommendation of the ILC report.<sup>68</sup>

The inclusion of *jus cogens* as prerequisites for the validity of treaties has resulted in emergence of a supreme source of international law due to its characterization as “*norm from which no derogation is permitted*”.<sup>69</sup> *Jus cogens* are “*the compelling law*”<sup>70</sup> and, as such, *jus cogens* norms sit at the apex of all other international law norms and principles<sup>71</sup>. Orakhelashvili argues that the *jus cogens* status of human rights treaties emanates from their characterization as non-derogable rights.<sup>72</sup> For him, due to their non-derogable nature their protection is in the interest of the international public order.<sup>73</sup> Moreover the consequence for violation of these norms in terms of reparation is also non-derogable.<sup>74</sup> Hence “[i]t lies thus beyond the power of directly interested States to determine whether and to what extent the reparation is due to the victims of breaches of *Jus Cogens*”.<sup>75</sup> Bassouni also claims that crimes such as “... genocide,

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<sup>68</sup> ILC report, *Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly*, II Yearbook, 247 *et seq* (1966)

<sup>69</sup> Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 *Nordic J. Int'l L.* 211, 215 (1997)

<sup>70</sup> M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, 392 Available at <http://www.sos-attentats.org/publications/bassiouni.violations.pdf> (Last accessed on 26 November, 2013)

<sup>71</sup> *Ibid*

<sup>72</sup> Alexander Orakhelashvili, (Ed. Vaughan Lowe), **Peremptory Norms in International Law**, Oxford Monographs in International Law, 53 (2008)

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid*, 243

<sup>75</sup> *Ibid*,

*crimes against humanity, war crimes ...and torture*"<sup>76</sup> are violations of *jus cogens* norms.

#### **2.4 Jurisdictional Immunity of States**

Even if there is a little prospect to establish that the Derg crimes have violated customary human rights and *jus cogens* norms for reparation of the Derg crimes, enforcement remains to be a practical problem. The first problem is the issue of enforcing customary human rights in national or international tribunals: the *Achilles hill* of customary international human rights law and *jus cogens* norms. Though the victims of the Derg crimes may succeed to have cause of action based on customary international laws or *jus cogens* norms, the strength of those norms to override immunity of States and confer jurisdiction on courts is controversial. Despite the developments in the substantive human rights laws, the international legal regime lacks a universal adjudicator with centralized enforcement mechanisms. This is specifically the challenge to enforce human rights where States choose to violate them without providing effective domestic judicial system.

In the absence of domestic effective domestic judiciary the next resort is to an international/regional tribunal or the court of another state, which is usually called 'forum state'. The adjudication of human rights may make use of either international/regional tribunals or the judiciaries of other countries. The international/regional tribunals are not be feasible alternatives for the case at hand since the human rights instruments that established them were ratified after the Derg

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<sup>76</sup> Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, 393

violations have taken place.<sup>77</sup> The principles of sovereignty, equality and state immunity dictate that no State shall be dragged to an international tribunal without its consent.<sup>78</sup> At the same time States enjoy a degree of immunity from the jurisdiction of courts of other countries.<sup>79</sup>

However there is divergence among scholars and practitioners about the foundation and the reach of State immunity.<sup>80</sup> The view that the state immunity emanates from the parallel position of States towards each other ascribes the basis of state immunity to the customary international laws. Hence since every State is sovereign, territorially, politically and economically, no other State shall interfere in the internal affairs and acts of a State without its consent. The maxim “*par in parem non habet imperium, meaning literally an equal has no power over an equal*”<sup>81</sup> asserts that the immunity of states is absolute. Hence state immunity is a “*fundamental right*”<sup>82</sup> of States in

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<sup>77</sup> See the discussion above in Sec 1.3

<sup>78</sup> For instance, ICJ Statute, Art 36(2) requires the *ipso facto* declaration of each state to accept the compulsory jurisdiction of the ICJ

<sup>79</sup> However state immunity is distinct from the principle of non-justiciability though are closely inter-linked. “*Non-justiciability... posit an area of international activity of states that is simply beyond the competence of the domestic tribunal in its assertion of jurisdiction....On the other hand, the principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising the jurisdiction that it possesses*” Shaw, **International Law**, 699-700

<sup>80</sup> See Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 Am. J. Int'l L. 741, *et seq.*, 2003; and Brownlie, **Principles**, 330

<sup>81</sup> *Ibid*, 748, citing Black's Law Dictionary 1673 (7<sup>th</sup> ed. 1999)

<sup>82</sup> *Ibid*, 749

international law and not subject to variation as per the domestic legal system of every other State.<sup>83</sup>

However others argue that state immunity is an exclusive domain of each domestic legal system. Hence immunity of states is “*is not intrinsic to statehood*”<sup>84</sup> since the sovereignty of States is not tantamount to saying that “*an equal has no authority over an equal*”, as the maxim *par in parem non habet imperium* tries to dictate. They claim that it is apt to States to make an exception to the scope of their sovereign jurisdiction not the international law.<sup>85</sup> This opposing view on the sources of state immunity are reflected in the classic case of *Schooner Exchange*<sup>86</sup> where Chief Justice Marshall wrote that “*perfect equality and independence of sovereigns...have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every state*”.<sup>87</sup> Though many modern international law writers on state immunity favor the restrictive immunity approach the state of practice in this regard is far from uniform.<sup>88</sup>

Some of these problems are common to international law in general. However, States are better equipped to ensure conformity to an international law whether customary or

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<sup>83</sup> Ibid

<sup>84</sup> Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory* 97 Am. J. Int'l L. 741, 752-753, 2003

<sup>85</sup> Ibid

<sup>86</sup> *The Schooner Exchange v. M'Faddon & Others*, 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116

<sup>87</sup> Ibid

<sup>88</sup> Brownlie, **Principles**, 330, stated that the “*divergence of view and the unresponsive attitude of the Sixth Committee of the General Assembly is usually ignored in the Academic sources*”

treaty based using reciprocal measures, diplomatic pressures, and force as the case may be. However, this controversy about state immunity is critically relevant to victims seeking redress for violation of human rights in courts of a forum State that do not wield such enforcement mechanisms.<sup>89</sup>

Though there are a number of international and regional human rights tribunals that render binding and non-binding judgments their mandate is limited to interpretation of issues that arise within the temporal and geographical coverage of the conventions that established them. None of them are mandated to apply customary international human rights law except the ICJ, which, however, is unable to entertain disputes between individuals and States. Moreover the international and regional human rights tribunals are established to implement specific conventions and charters. Hence they face difficulties to implement customary human rights laws which are not parts of the laws they were originally supposed to enforce. Finally, human rights violations by States not party to any charter or convention remains unaddressed since there is no court to enjoy mandatory jurisdiction in circumstances of violation of those human rights.

*Jus cogens* human rights norms are usually invoked in order to surpass the impediment of state immunity and establish the jurisdiction of a forum State. The prominent decision of the ICJ in *Barcelona Traction case* which attributed prohibition of “genocide... principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”<sup>90</sup> as *erga omnes* obligations, is used a basis of conferring jurisdiction on a forum State. This case is important in terms of gaining

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<sup>89</sup> Caplan, *State Immunity, Human Rights, and Jus Cogens*, 97 Am. J. Int'l L. 741, 747 2003,

<sup>90</sup> *Barcelona Traction, Light and Power Company, Limited, Belgium v Spain (New Application, 1962)*, *Belgium v Spain*, Preliminary Objections, Judgment, [1964] ICJ Rep 6, ICGJ 151 (ICJ 1964), 24th July 1964, International Court of Justice [ICJ], 32

grounds for the restrictive approach to state immunity since it provides a basis to assume jurisdiction in a forum State since it affirms that all States have an interest in the protection of basic rights of the human rights and prohibition of genocide. This is an important milestone for the protection of human rights by giving more importance to *ratione materiae*, i.e., subject matter jurisdiction, in the face of *ratione personae*, which is “based on the status of the defendant as a sovereign state”.<sup>91</sup> The wording of the Human Rights Committee in its General Comment 31<sup>92</sup> is the reflection of this case where it noted that “...every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the rules concerning the basic rights of the human person are erga omnes obligations”<sup>93</sup> Moreover the Committee buttressed this position referring to the UN Charter obligation on member States to “promote respect for, and observance of, human rights and fundamental freedoms”.<sup>94</sup>

The position of the two regional human rights tribunals is different on this issue. The Grand Chamber of the ECtHR has consistently rejected consequences of *jus cogens* norms to lift the defense of state immunity in a number of cases.<sup>95</sup> In *Al-Adasani v United Kingdom*, the Court after appreciating the fundamental nature of the right to freedom of torture, has rejected its effect to abrogate immunity of states<sup>96</sup>.

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<sup>91</sup> Brownlie, **Principles**, 331

<sup>92</sup> Human Rights Committee, *General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (Adopted on 29 March 2004 at its 2187<sup>th</sup> meeting, Eightieth session (2004)

<sup>93</sup> *Ibid*, para. 2

<sup>94</sup> *Ibid*

<sup>95</sup> *Al-Adasani v. United Kingdom*, [GC] no. 35763/97, ECHR 2001; *Kalogeropoulou et al. v. Greece and Germany*, (dec.), no.59021/00, ECHR 2002

<sup>96</sup> *Al-Adasani v. UK*, para 61

Nevertheless, in their dissenting opinion Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajic stated that due to the *jus cogens* status of the prohibition of torture “*a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.*”<sup>97</sup> Hence they disagreed with the majority decision contending that a State cannot “*hide behind the rules on state immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction.*”<sup>98</sup>

In the same manner, the ECtHR referring to its own judgment in *Al-Adsani*, cast a shadow on the prerogative of *jus cogens* principles to override the state immunity claiming that there isn't “*yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity*”.<sup>99</sup> The Grand Chamber of the ECtHR, in its latest decision in *Nada v. Switzerland*,<sup>100</sup> failed to address the applicant's claim that was based on *jus cogens*<sup>101</sup>

However, across Atlantic, there is a positive development with regard to *jus cogens* in the IACtHR, where it ruled that certain human rights fall under the category of human rights so that States cannot call the defense of their reservation to those rights, or non-ratification of those human rights instruments to evade responsibility for violations of

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<sup>97</sup> Ibid., Joint Dissenting Opinion of Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, and Vajic, para 1-4

<sup>98</sup> Ibid

<sup>99</sup> *Kalogeropoulou et al. v. Greece and Germany*, para 9

<sup>100</sup> *Nada v. Switzerland*, [GC], no. 10593/08, ECHR 2012

<sup>101</sup> Ibid, para 38

human rights. Hence for IACtHR certain human rights have attained the level of peremptory norm from which no derogation is allowed.<sup>102</sup> IACtHR, in contradistinction to its European counterpart, affirmed the indelible nature of *jus cogens* rules claiming that “*the principal distinguishing feature of these norms is their relative indelibility*”<sup>103</sup> The Court concluded that the prohibition of capital punishment of persons under the age of 18 has attained the status of *jus cogens* since States have ratified “*...the ICCPR, U.N. Convention on the Rights of the Child, and the American Convention on Human Rights, treaties in which this proscription is recognized as non-derogable, as well as through corresponding amendments to their domestic laws*”.<sup>104</sup>

At ICJ it is recently decided categorically that *jus cogens* “*does not confer upon the Court a jurisdiction which it would not otherwise possess.*”<sup>105</sup> The decision had made a distinction between *jus cogens* norms that deal with obligations of States and procedural matters such as state immunity. Hence as distinct set of rules they do not conflict with each other.<sup>106</sup> It is worth noting that none of the tribunals rejected the *jus cogens* nature of those violations, but merely their consequence to over ride state immunity.

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<sup>102</sup> *Douglas Christopher Thomas v United States* Case 12.240, Report No. 100/03, 29 December 2003, Inter American Commission of Human Rights; and *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1, 913 (2002)

<sup>103</sup> *Michael Domingues v. United States*, para. 49 (quotation omitted)

<sup>104</sup> *Ibid*, para. 85

<sup>105</sup> *Jurisdictional Immunities of The State (Germany V. Italy: Greece Intervening)*, Judgment, I.C.J Reports, 2012, para 95

<sup>106</sup> *Ibid*, para 93

### 3 Human Rights Reparation in International Tribunals

The previous Chapter depicted challenges of finding substantive law basis to establish the breach of international human rights law by the State of Ethiopia for the Derg crimes and the problem of enforcing them both in domestic and non-domestic forums.<sup>107</sup> Building on that the aim here is to discuss the content and scope of human rights reparation as developed in different regional systems to demonstrate the setbacks of victim reparation in Ethiopia. Moreover given the innovativeness of regional and international tribunals to effectively address mass human rights violations similar to the Derg crimes, limitations of the domestic legal system to ensure the reparation will be more evident. While some international human rights tribunals goes to the extent of proposing legislative measures and provision of infrastructure, reliefs available in the national legal system such as compensation and restitution may not be fitting to the circumstances of the Derg crimes.

#### 3.1 Introduction

The consequences for international responsibility of States are illustrated in decisions of PCIJ<sup>108</sup> and the ILC Articles on Responsibility of State<sup>109</sup>. These are cessation of the wrongful act,<sup>110</sup> guarantee of non-repetition<sup>111</sup> and reparation.<sup>112</sup> While the first two

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<sup>107</sup> Discussion on attribution is so evident to be addressed in this research since the crimes committed by Derg officials and State organs in the process of executing laws and policy of the Derg are clearly attributable to the State in international law. It is a well established concept that a state is responsible for the actions and omissions of its organs and officials. See ILC, Articles on State Responsibility, arts 4&5

<sup>108</sup> *Factory at Chorzow, (Germany v. Poland) Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 29*

<sup>109</sup> ILC, Articles on States Responsibility, Art. 30&31

<sup>110</sup> Ibid, Art. 30 (a)

<sup>111</sup> Ibid, Art. 30 (b)

<sup>112</sup> Ibid, Art. 31

consequences are not the direct concerns of this thesis, the third one, reparation, is the main theme of this chapter. Accordingly, it will discuss the different forms of reparation as provided in UN 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<sup>113</sup> and decisions of the ECtHR, IACtHR and the Human Rights Committee (HRC).

The purpose of reparation is to nullify the effect of the violation on the victim. As per PCIJ's statement on objective of reparation that usually influences decisions of the international and regional courts whenever they face the task of determining the appropriate reparation: "*[r]eparation must, so 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.*"<sup>114</sup>

The United Nations and its organs have adopted binding and non-binding instruments relevant to reparations.<sup>115</sup> Among these, the UN Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation is a notable development in terms of providing comprehensive inspiration for reparation of victims of systematic and mass human rights and humanitarian law violations. From regional human rights systems the Council of Europe's Convention on Compensation of Victims of Violent Crimes is the most conspicuous

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<sup>113</sup> 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (alternatively it is identified as '*Van Boven/Bassiouni Principles*')

<sup>114</sup> *Factory at Chorzow (Germany v. Poland)*, (*Merits*), 47

<sup>115</sup> For instance, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, Articles on State Responsibility*

regional effort that addresses reparation for human rights violation due to crimes committed intentionally.<sup>116</sup>

### 3.2 Reparation in Regional Courts and Human Rights Committee of ICCPR

Among regional human rights systems there is consensus on the overarching objective of reparation. However there is also an eminent difference in the approaches of the prominent regional human rights courts: the ECtHR and the IACtHR. At the back of this divergence are the differences in the nature of human rights violations in the two continents and in the Courts' competence to award reparations, and the ECtHR's hesitation not to infringe the sovereignty of member States since the enforcement of its decisions requires States' active collaboration.<sup>117</sup>

The ECtHR's power to award reparation limited by the provision of art 41 of the ECHR which states that:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.<sup>118</sup>

The provision makes the court's power to order reparation dependent on a number of conditions: finding of violation, absence of full reparation in the laws of the wrong doing State, and if the finds it necessary. Though the first condition is a premise for all reparation

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<sup>116</sup> European Convention on the Compensation of Victims of Violent Crimes, *European Treaty Series - No. 116*, Strasbourg, 24.XI.1983, (Entry into force: 1 February 1988)

<sup>117</sup> Mejia, *Remedies in the International Human Rights Law*, 12

<sup>118</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Art. 41

claims, the other conditions restrict the power of the Court to award reparation. The provision suggests that once violation is ascertained by the court it is the primary responsibility of the State to make it good. It is only when the concerned State Party's laws do allow only partial reparation the Court is empowered to order a reparation. Moreover, reparation is not automatic, since it is apt to the Court's appreciation to determine whether it is necessary to award just satisfaction. It is based on this limited power and its restrictive interpretation the court in *Mehemi v France*,<sup>119</sup> ruled that the “*it does not have jurisdiction to issue such an order to a Contracting State*”<sup>120</sup> when the claimant sought for the specific remedy of returning to France. The same attitude is reflected in *obiter dictum* of the Court, which states that States Parties “*are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach*”.<sup>121</sup>

However this trend has started to change during the first decade of this century where two major changes began to unfold in the Court and in Europe too.<sup>122</sup> The first one was the introduction of pilot judgment procedure following the beginning influx of similar but numerous cases that share similar root causes.<sup>123</sup> The objective of pilot judgments is to “*assist States ...in solving systemic or structural problems at national level; offer a*

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<sup>119</sup> *Mehemi v France*, no. 25017/94, ECHR 1997

<sup>120</sup> *Ibid*, para. 42&43

<sup>121</sup> *Papamichalopoulos and Others v Greece*, no. 14556/89, Para. 37, ECHR 1995. However in this case the court deviated from its custom and ordered the restitution of the property contested between the applicant and the High Contracting Party, *Ibid* para. 39- 40

<sup>122</sup> Juan Carlos Upegui Mejia, *Remedies in the International Human Rights Law. A Comparative Approach between the Case Law of Both the Inter-American Court and the European Court of Human Rights*, 5

<sup>123</sup> ECHR, *Factsheet Pilot Judgments*, 1, available at [http://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf) (Last accessed on 5<sup>th</sup> November, 2013)

*possibility of speedier redress to the individuals concerned*".<sup>124</sup> Hence the pilot judgment procedure allows the ECtHR to order the State concerned on how to address an underlying root cause for violations affecting many people, a type of reparation order that has never been activated since the Court commenced its operation. Second, after the fall of socialist regime the Council of Europe is joined by new States from Central and Eastern Europe bringing with them a menu of new forms human rights violations, which had not been there before to the attention of the ECtHR. Hence the Court has to shift its approach to reparation in order to address the underlying causes that caused these human rights violations at such scale.<sup>125</sup> The first pilot judgment was delivered in 2004, in *Broniowski v. Poland*<sup>126</sup> though the Court updated its Rules to incorporate pilot judgment in March, 2011.<sup>127</sup> The Court also started giving out injunction orders for States at the same time in *Assanidze v Georgia*<sup>128</sup>, and *Ilascu and others v Moldova and Russia*<sup>129</sup>

However it is difficult to ascertain at this stage whether the change in ECtHR with regard to its construction of just satisfaction is merely incidental or a consequence of change of the Court's fundamental approach to reparation.<sup>130</sup> According to Antkowiak, there is still a focus on 'cost' in the ECtHR taking as example the Court's approach to the case of reparation for

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<sup>124</sup> Ibid

<sup>125</sup> Mejia, *Remedies in the International Human Rights Law*, 5

<sup>126</sup> *Broniowski v. Poland*, [GC], no. 31443/96, ECHR (2004)

<sup>127</sup> ECHR, *Factsheet Pilot Judgments*, 2

Available at [http://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf) (Last accessed on 05 November, 2013)

<sup>128</sup> *Assanidze v Georgia* [GC], no. 71503/01, §203, ECHR 2004

<sup>129</sup> *Ilascu and others v Moldova and Russia* [GC], no. 48787/99, §490, ECHR (2004)

<sup>130</sup> Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim Centered Remedies and Restorative Justice*, 47 Stan. J.Int'l L. 279, 289 (2011)

forced disappearance where the court orders payment of compensation while the in the victim oriented approach the reparation shall include injunction for the proper investigation and prosecution of the disappearance, domestic publication of the judgment, and apology in addition to compensation.<sup>131</sup>

On the other hand the Inter-American human rights system has adopted a more comprehensive and holistic approach in determination of reparation to victims of mass human rights violations wherein reparation addresses both the collective and individual interests for justice.<sup>132</sup> The IACtHR enjoyed, from the beginning, a wide and open power to award reparation compared to the ECtHR. Indeed, the very distinct nature of the Inter-American human rights system is its reparation system which is more victim focused.<sup>133</sup> Art 63 (1) of the American Convention on Human Rights says that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, the consequence of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>134</sup>

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<sup>131</sup> Ibid

<sup>132</sup> Gina Donoso, *Inter-American Court of Human Rights' Reparation Judgments: Strengths and Challenges for a Comprehensive Approach*, 49 *Revista IIDH*, 29, 42

<sup>133</sup> Mejia, *Remedies in the International Human Rights Law*, 7

<sup>134</sup> American Convention on Human Rights, (*Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969*) Art. 63(1)

Hence the provision gives wide range of powers for the court that enables it to select from the list of appropriate reparation measures from restitution, to compensation, and to recommendation of legal and administrative reform aimed at ensuring non-repetition.<sup>135</sup>

The courts maneuver with the remedial power inscribed in the Convention commenced with its judgment on its first contentious case of *Veldsquez-Rodriguez v. Honduras*<sup>136</sup>, where the Court held Honduras responsible for its failure to fulfill positive obligation to conduct proper investigation of the circumstances of the disappearance of the victims. The victim oriented and comprehensive approach of the IACtHR towards reparations is well depicted in its recent decision of a case involving the Guatemalan Army and Militia that conducted series of massacre directed against “*the Mayan community of Río Negro ... the persecution and elimination of its members and the subsequent violations directed against the survivors*”.<sup>137</sup> After finding the Guatemalan State responsible for human rights violations, the Court ordered the provision of basic services and infrastructure for the Río Negro in Pacux Settlement, to implement a project to resurrect the *Maya Achi* culture, to provide medical and mental health services for the survivors of the violations among others.<sup>138</sup>

The other source of experience on reparations for human rights is HRC established as per the Art 28 of ICCPR. The HRC receives complaints as per the Additional Protocol.<sup>139</sup> However the competence of the Committee is too limited to come up with binding reparation

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<sup>135</sup> Mejia, *Remedies in the International Human Rights Law*, 8

<sup>136</sup> *Veldsquez-Rodriguez v. Honduras Case, (Merits)* (1988) Inter Am. Ct. H.R. (ser. C) No. 4 para. 181

<sup>137</sup> Inter-American Court of Human Rights, *Case of the Río Negro Massacres V. Guatemala, Judgment of September 4, 2012* (Preliminary objection, merits, reparations and costs), para. 2

<sup>138</sup> *Ibid*, 9

<sup>139</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1, (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976)

mechanisms.<sup>140</sup> The HRC has not limited itself to finding violations only since it usually suggests the measures the wrongdoing shall take, such as payment of compensation,<sup>141</sup> restitution of fine,<sup>142</sup> guarantee of non-repetition<sup>143</sup>, and satisfaction through the publication of the Committee's views<sup>144</sup>, whenever appropriate.

### 3.3 Types of reparations

Depending on the context reparation may cover a wide range of remedies to violations from investigation and prosecution of violations of human rights, restitution, compensation and acknowledgement of wrongful conduct and responsibility. Since the focus of this thesis is more specific, the discussion here is limited to measures that enable the restitution- *restitutio in integrum*- of the victims of human rights violations, restitution, proper compensation, and just satisfaction.

As per the provisions of Articles on State Responsibility, reparation consists of: restitution<sup>145</sup>, compensation<sup>146</sup> and satisfaction<sup>147</sup>. This section deals with them in separate sub-sections subsequently.

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<sup>140</sup> Ibid, Art. Article 5 (4) states that “*The Committee shall forward its views to the State Party concerned and to the individual*” (emphasis added)

<sup>141</sup> *Mirta Cubas Simones v. Uruguay*, Communication No. R.17/70, U.N. Doc. Supp. No. 40 (A/37/40) 174, para. 13 (1982) & *Yoon and Choi v Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004, CCPR/C/OP/9, p 223, para. 10

<sup>142</sup> *Bodrožić v Serbia and Montenegro*, Communication No. 1180/2003, CCPR/C/OP/9, 15, para 9

<sup>143</sup> *Yoon and Choi v Republic of Korea*, para. 10

<sup>144</sup> Ibid, para. 11

<sup>145</sup> ILC, Articles on State Responsibility, Art. 35

<sup>146</sup> Ibid, Art. 36

<sup>147</sup> Ibid, Art. 37

### 3.3.1 Restitution

The main purpose of restitution, *restitution in integrum*, is to place the victims to the original position they just had before the violation occurred at the first place. However there is difference in approach as to the definition of restitution, as noted wisely by the ILC in its commentary on Articles on State Responsibility.<sup>148</sup> In the narrower sense of restitution, it means restoring the victim to “*the status quo ante, i.e. the situation that existed prior to the occurrence of the wrongful act*”<sup>149</sup>.

Under the wider definition, restitution refers to the reconstruction of a situation that would have existed had the violation not occurred.<sup>150</sup> This definition requires judges’ to construct what would have existed (or would not have existed) had the human right violation not existed. The ILC has adopted the narrower definition arguing that the other one requires constructing a hypothetical situation which is not an easy task.<sup>151</sup> It can also be argued that since restitution by itself is insufficient to restore the situation that would have existed had the wrongful act not occurred, it shall be complemented by other forms of reparation, usually compensation. For instance, if a State expropriates a property illegally, the return of it after ten years will not suffice to cover the lost income the person would have had had the property not been taken at the first place unless compensation awarded to recompense the lost income from the property for the ten years. That is just another way of making distinction between restitution and reparation, whereby the former is of a narrow scope, while the later has wide wider coverage than ensuring restitution.

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<sup>148</sup> *Materials on the Responsibility of States for Internationally Wrongful Acts, United Nations Legislative Series, ST/LEG/SER B/25, 225, para. 2* (New York, 2012)

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ibid, the same approach with regard to the purpose of restitution is adopted in the UN Basic Principles and Guidelines for Reparation, para 19

In reparation the whole purpose is to eradicate or minimise the harsh consequences and losses the victim suffered due to the wrongful act of the wrongdoer. Restitution is the best proximate to this purpose of reparation,<sup>152</sup> but the scarcely available one since undoing the consequences of most human rights violations is not usually possible. For instance in the case of violations involving forced disappearance, death or permanent physical disability, it is impossible to undo the consequences of the violation. Hence, restitution is available in the case of violations that are related to deprivation of liberty, or loss of property. In those circumstances it is possible for the wrong doer to return the lost right by setting free the person who lost the liberty, returning the property illegally taken. It is the most pertinent form of reparation in the case of human rights violations, since “*the deepest desire of any victim of a human rights violation is to turn back the clock*”<sup>153</sup> and restitution is the closest thing to it.<sup>154</sup>

Due to its close nexus to the objective of reparations, decisions of international tribunals give primacy to the use of restitution over the forms of reparation wherever appropriate.<sup>155</sup> The provision of the UN Basic Principles and Guidelines, considering this problem associated with restitution, requires States to reinstate the victims “*to the original situation before the*

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<sup>152</sup> *Materials on the Responsibility of States*, 225, para. 3.

<sup>153</sup> Antoine Buyse, *Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law*, 68 *ZaöR*, 129, 129 (2008). Available at [http://www.zaerv.de/68\\_2008/68\\_2008\\_1\\_a\\_128\\_154.pdf](http://www.zaerv.de/68_2008/68_2008_1_a_128_154.pdf) (Last accessed on 29, August 2013)

<sup>154</sup> See *ibid*, 133, “*the advantage of restitution is that it is most in conformity with the general goal of reparations: to wipe out the consequences of the illegal act and to restore the situation as it was before that act*” referring to the *Material on the Responsibility of States*, 238 and Felipe H. Paolillo, *On Unfulfilled Duties: The Obligation to Make Reparations in Cases of Violations of Human Rights*, in: Götz et al. (eds.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag*, 291-311, 303 (Berlin 1999)

<sup>155</sup> *Factory at Chorzow, Merits*, 48

*gross violations of international human rights law or serious*<sup>156</sup> whenever possible. The ILC Articles on State Responsibility, also uses similar language. It states that the State which bears responsibility for the internationally wrongful act has a duty to make restitution to restore the *status quo ante* unless such restitution “*is not materially impossible*”.<sup>157</sup> Moreover, Articles on State Responsibility, requires that the restitution shall not cause “*a burden out of all proportion to the benefit deriving from restitution instead of compensation*”.<sup>158</sup> Accordingly, the cost or restitution shall not exceed the cost the victim can derive. But that does not mean that the State is absolved of its duty to reparation. It just means that the State Party shall make use of the other alternative redress mechanisms, usually compensation.

However there exists divergence among tribunals about the primacy and role of restitution as a mode of reparation. In one case the Tribunal on *BP* case argued that restitution as a remedy is not a recognized principle in public international law.<sup>159</sup> More specifically, it argued that “*the concept of restitutio in integrum has been employed merely as a vehicle for establishing the amount of damages*”.<sup>160</sup> The Tribunal in the *Texaco Case*,<sup>161</sup> however, reaffirmed that *restitutio in integrum* of the property constitutes a “*normal sanction for non-performance of contractual obligation*”<sup>162</sup> under international and Libyan law unless and otherwise

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<sup>156</sup> UN Basic Principles and Guidelines, principle 19

<sup>157</sup> ILC, Articles on State Responsibility, Art. 35(a)

<sup>158</sup> Ibid, Art 35(b)

<sup>159</sup> *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic*, Award, 10 October 1973 and 1 August 1974, 53 ILR, 297, 347

<sup>160</sup> Ibid

<sup>161</sup> *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, 17 I.L.M. 1 (1978)

<sup>162</sup> Ibid, 36

“restoration of the status quo ante is impossible”.<sup>163</sup> In the same manner, the European Court of Human Rights has reaffirmed the priority to restitution in *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland*<sup>164</sup> and *Guiso-Gallisay v. Italy*<sup>165</sup> referring to the provision of Art 35 of the Articles on State Responsibility. In the former case the Court argued that “while restitution is the rule, there may be circumstances in which the State responsible is exempted -fully or in part- from this obligation, provided that it can show that such circumstances obtain”.<sup>166</sup>

On the other hand, the ECtHR has begun to order restitution, although it has occurred only in three cases to date: *Karanovic v Bosnia and Herzegovina*,<sup>167</sup> *Assanidze v Georgia*,<sup>168</sup> and *Ilascu and others v Moldova and Russia*<sup>169</sup>. In the first case, the ECtHR found a violation of article 6 failure of local authorities to comply with a former decision of a domestic court related to the applicant’s right to pension.<sup>170</sup> The Court therefore, ordered the State to transfer the victim to Federation of Bosnia and Herzegovina Pension Fund as well as payment of compensation.<sup>171</sup> In the last two cases, where the ECtHR determined that there is a violation

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<sup>163</sup> Ibid

<sup>164</sup> *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, [GC], no. 32772/02, para. 86, ECHR 2009

<sup>165</sup> European Court of Human Rights, *Guiso-Gallisay v. Italy*, (just satisfaction) [GC], no. 58858/00, para. 53, ECHR 2009

<sup>166</sup> *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland*, para. 86

<sup>167</sup> *Karanovic v Bosnia and Herzegovina*, no. 39462/03, ECHR 2009

<sup>168</sup> *Assanidze v Georgia* [GC], no. 71503/01, ECHR 2004

<sup>169</sup> *Ilascu and others v Moldova and Russia* [GC], no. 48787/99, ECHR 2004

<sup>170</sup> *Karanovic v Bosnia and Herzegovina*, para. 25

<sup>171</sup> Ibid, para. 30

of article 5 due to the authorities' delay in releasing the applicants from prison, the Court ordered the immediate release of the applicants.<sup>172</sup>

### 3.3.2 Compensation

While compensation is second best reparation mechanism next to restitution, it is the most common one. It is used most widely compared to restitution due to its relative flexibility. Moreover compensation is important in terms of assessing losses that cannot be addressed through restitution *per se*.

The Basic Principles and Guidelines on Reparation have a different formulation about the heads of compensation items. After stating that the compensation shall be awarded to any financially assessable damages arising from mass human rights violations, it goes to itemizing those damages which can be addressed by the compensation and moral damage is one of them.<sup>173</sup> As per the commentary of the ILC on the Articles on State Responsibility, the reference to financially assessable damages in Art 36 excludes moral damages to States.<sup>174</sup> Rather moral damages are to be remedied as per the provision of the Articles on State Responsibility pertaining to satisfaction.<sup>175</sup> This difference can be attributed to the fact that moral damage has different dimensions for wrongful acts against States and human beings. The moral damage of States cannot be quantified in terms of money and subjected to compensation, while moral damage to individual beings can be assessed in terms of rehabilitation and medical costs it entails depending on the type of harm inflicted. For instance in the case of violations that involve torture or sexual abuse the harm to the victim can be computed in terms of the psychological and social support costs. Award of

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<sup>172</sup> *Assanidze v Georgia*, §§ 176, 202&203; *Ilascu and others v Moldova and Russia*, para. 463 holding no. 22

<sup>173</sup> Basic Principles and Guidelines para. 20(d)

<sup>174</sup> Materials on State responsibility, 231, para. 1

<sup>175</sup> *Ibid*

compensation, though minimal, can have the effect of rehabilitating the moral of an individual victim while such gesture can be derogatory in inter-State situation.

Compensation is a secondary reparation mechanism next to restitution as implied in the provision that states “*insofar as such damage is not made good by restitution*”.<sup>176</sup> However it is not the perfect mechanism since some harm cannot be quantified in terms of money, such as loss of body parts or life, and moral damages. It is with this understanding that the ILC Articles on State Responsibility has limited the reach of compensation to damages that are “*financially assessable*”.<sup>177</sup>

### 3.3.3 Satisfaction

Satisfaction is another form of reparation that aims at addressing non-pecuniary harms the wrongful act causes against victims. The limitation of compensation and restitution to repair for non-pecuniary damages is rectified by the use of satisfaction measures. In the case of satisfaction the reparation is intended to alleviate moral, legal and security concerns of the victims. The Basic Principles on Reparation of Mass Human Rights Violations, principle 22 illustrates a number of measures satisfaction may encompass. Ordering the investigation and prosecution of individuals responsible for the human rights violations, declaration of violation by the a tribunal, apology, erecting monuments, naming streets after the victims, commemorating the day of the violation, establishment of funds, truth and reconciliation activities, searching mass graves, exhumation of disappeared people, identification of bodies exhumed and conducting proper burial are measures of satisfaction that address non-pecuniary damages.<sup>178</sup>

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<sup>176</sup> ILC, Articles on State Responsibility, Art. 36(a)

<sup>177</sup> Ibid, Art. 36(b)

<sup>178</sup> Basic Principles and Guidelines, para. 22

Courts may order collective reparation based on the nature and extent of the violation. In situations of mass human rights violations that targeted specific community or group collective compensation are relevant in addition to individual compensation. The IACtHR is innovative in this regard whereby it ordered the responsible State to devise a rehabilitation scheme for the community that was affected by human rights violations.<sup>179</sup> Hence, in those circumstances where the mass rehabilitation is awarded by a State, the aim is not monetary compensation or giving back the right violated *per se*, but rehabilitation and satisfaction of the community affected by the human rights violation. Collective rehabilitation measures are also motivated by circumstances where the violations had occurred due to the under-privileged conditions of the victims. The specific means of collective compensation can be better infrastructure, improved social service, and access to land for the affected community.

Whether they are collective or individual, those measures are aimed at restoring the dignity of the victim or the victims' next of kin. As the IACtHR reckoned in the *Street Children Case*<sup>180</sup> reparation has the effect of “*recovering the memory of the victims, re-establishing their reputation, consoling their next of kin or transmitting a message of official condemnation of the human rights violations in question and commitment to the efforts to ensure that they do not happen again*”<sup>181</sup>

In conclusion the regional and international tribunals discussed in this Chapter are demonstrations of the progress made in terms of addressing the consequences of human rights violation in different systems. Provided that mass and gross human rights violations require reform of the system that nurtured those violations, in addition to compensating the victims, the tribunals have devised innovative mechanisms. However those mechanisms are

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<sup>179</sup> IACtHR, *villagran-Morales et al v Guatemala*, Reparations and Costs

<sup>180</sup> *Ibid*, para. 84

<sup>181</sup> *Ibid*

not usually available in national legal systems whereby judicial activism is considered as violation of the constitutional order of separation of powers.

It is important to conclude the Chapter with some final notes. One is to note that these developments within the two human rights systems and the HRC with regard to reparation for human rights violations still face serious challenges: peace agreements, State immunity, and absence of self-executive international human rights law.<sup>182</sup>

Two is, the existence of material damage is not a *sine-quo-non* condition for reparation. The very presence of wrongful act makes reparation relevant, though the form of reparation may vary based on the type of the right violated, the extent of harm, the gravity of the wrongful act, and degree of the damage sustained by the victim. As PCIJ has already stated “*it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation*”<sup>183</sup>. That is why art 31(2) of the Articles on State Responsibility has posited that ‘injury’ to include but not to be limited to “*any damage, whether material or moral*”.<sup>184</sup>

This is also affirmed in the *Rainbow Warrior*<sup>185</sup> case where the Parties agreed that:

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<sup>182</sup> Emanuela-Chiara Gillard, *Reparation for violations of International Humanitarian Law*, 85 IRRC, 529, 537, (2003). Of these challenges, the last chapter discussed state immunity while the others are not discussed since they are not pertinent to the topic at hand.

<sup>183</sup> *Phosphates in Morocco, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 29*

<sup>184</sup> “*Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State*”, Articles on State Responsibility, Art. 31(2)

<sup>185</sup> *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, UNRIAA, vol. XX (Sales No. E/F.93.V.3), 110 (1990), quoted in Materials on State Responsibility, 208, para. 7

Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the Claimant State<sup>186</sup>.

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<sup>186</sup> Ibid, 266–267, paras. 107&109, quoted in Materials on State Responsibility, 208, para. 7

## **4 National Reparation Experiences**

This Chapter is about exploring the experiences of countries with regard to reparation of victims of mass human rights violations. Transitional justice accommodates different components among which is restorative justice that focuses on reparation of victims of previous dictatorship regimes. Restorative justice focuses on repairing the suffering of victims of previous human rights atrocities inflicted by the authoritarian regimes.

### **4.1 Introduction**

States adopt different approach in order to address the restorative justice needs of the victims as part of their transitional justice policy. Depending on the political history, funding and sociological situations of the country in transition, the transitional justice scheme of States under transition to democracy vary to greater extent. Though there is no one-size-fits-all formula of transitional justice that works for all States, the appropriateness of transitional justice initiatives are measured in terms of their contribution towards the promoting and ensuring the human rights of the victims and non-repetition of the similar human rights atrocities in the future.

The task in this chapter is to look at the restorative justice initiatives of different States across the span of history and place so as to draw a lesson as to their strategies to repair past human rights violations. The countries the thesis focuses on are Germany, South Africa and Rwanda. Germany is a pioneer in the experience of victim reparation, while South Africa and Rwanda are chosen for their unique experiences with regard to victim reparation.

The lesson to be drawn from these countries' reparation programs is that States in transition to democracy had adopted different reparation measures that focused on victims despite the

absence of binding human rights laws during the time of the commission of the atrocities<sup>187</sup>. Though the measures differ from one State to another, experiences show that States devised administrative and/or judicial reparation programs to amend the sufferings of the victims and to address past human rights atrocities.

#### 4.2 Holocaust Reparation: Germany

The holocaust reparation is different from the other countries since the violation was not limited to its own nationals but also for victims of foreign nationals. The holocaust (called 'shoah' in Hebrew) had commenced at the time of the coming to power of the Hitler continued until the end of the WWII in 1945.<sup>188</sup> In the unprecedented extermination campaign waged by the Nazis against the Jewry millions have been killed, held in concentration camps, and subjected to hard labor.<sup>189</sup> Based on numbers that emerged from the Nuremburg Trials, more than six million Jewry were killed during this period.<sup>190</sup>

After the war Jewish victims were displaced and became refugees in across Europe.<sup>191</sup> When the details of Hitler's 'final solution to the Jews question' were revealed to the world, it shocked not only the foreigners but also the Germans themselves. In order to address moral wrong of the atrocities the Luxemburg Treaty was signed between Germany and Israel in

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<sup>187</sup> This is the case for the holocaust reparation and apartheid reparations where neither Germany nor South Africa were state parties to the ICCR, Genocide Convention, or CAT during the commission of those atrocities, see <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

<sup>188</sup> <http://www.jewishvirtuallibrary.org/jsource/Holocaust/history.html> (last accessed on 12 October 2013)

<sup>189</sup> Ibid

<sup>190</sup> Ibid

<sup>191</sup> Menachem Z. Rosensaft and Joana D. Rosensaft, *The Early History of German-Jewish Reparations*, 25 Fordham Int'l L.J. 1, 1 (2001).

1952.<sup>192</sup> However the treaty took inspiration from the laws of the allied powers 1947 for restitution of 'ayranized' property<sup>193</sup>, and the 1949 law on compensation in the US Occupied Zones.<sup>194</sup> In addition, Germany had promised to the allied powers to adopt laws that facilitate with restitution of property without discrimination, with less evidential burden in case of loss of proofs, and appropriation of necessary funds to satisfy claims of restitution.<sup>195</sup>

The treaty outlined two categories of reparations. The first category deals with compensation of \$3billion which is payable to the State of Israel, over a period of 12 years commencing from 1953, for the damages to Jews resettled in Israel. The second reparation category had two schemes. The first scheme was about direct payment of compensation and making restitution for individual victims within Germany. The second scheme was about payment of DM450 million to Israel to transfer to the Claims Conference to cover the resettlement, and rehabilitation needs of victims of the Nazi Party as determined by the Claims Conference.<sup>196</sup>

According to the requirement of the second part of the Luxemburg Treaty the Federal Republic of Germany (FRG) enacted series of laws aimed at facilitating reparation for victims of holocaust. The first Federal law was passed in 1953 as the Federal Supplementary

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<sup>192</sup> The Reparations Agreement between Israel and West Germany, signed on September 10, 1952, and entered into force on March 27, 1953

<sup>193</sup> Property worth of \$250,000,000 was reclaimed from the American Zone alone, while proceeds of heirless property worth more than \$25,000,000 given to the State of Israel

<sup>194</sup> Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews after World War II; A Turning Point in the History of Reparations*, Pablo de Greiff (ed.), **The Handbook of Reparations**, 390, 392 (Oxford Scholarship Online, May-06)

<sup>195</sup> Ibid, 393 citing Christian Pross, *Paying for the Past: The Struggle Over Reparations for the Surviving Victims of the Nazi Terror*, 20, (Baltimore, MD: Johns Hopkins University Press, 1998)

<sup>196</sup> Rosensaft & Rosensaft, *German-Jewish Reparations*, 3

Law for the Compensation of Victims of National Socialist Persecution<sup>197</sup> which provided for the compensation of the Jewish community of “*former German citizens, refugees and stateless persons*”.<sup>198</sup> The heads of damages for reparation were compensation for life,<sup>199</sup> compensation for health,<sup>200</sup> compensation for freedom,<sup>201</sup> compensation for property, assets, discriminatory taxes,<sup>202</sup> compensation for career or economic advancement,<sup>203</sup> and compensation for loss of life or pension insurance.<sup>204</sup>

However refugees from the former Soviet bloc were not able to benefit from this arrangement since the filing period ended in 1966.<sup>205</sup> Moreover the complicated bureaucratic procedure and victim unfriendly procedure of the indemnification procedure were also criticized.<sup>206</sup> In order to rectify these shortcomings the FRG came up with a new law in 1956. As per this law more group of victims were made eligible for reparations and the amount of compensation is increased for some heads of damages.<sup>207</sup> Germany modified the Federal reparation law for the second time in 1965 that eased the burden of proof for establishing harm and death with Nazi atrocities and enabled the previously adjudicated cases as per the new law.<sup>208</sup> Moreover the

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<sup>197</sup> Ibid, 403

<sup>198</sup> Ibid

<sup>199</sup> Ibid

<sup>200</sup> Ibid 404

<sup>201</sup> Ibid

<sup>202</sup> Ibid 405

<sup>203</sup> Ibid

<sup>204</sup> Ibid

<sup>205</sup> Ibid, 403, 405

<sup>206</sup> Ibid 405

<sup>207</sup> Ibid

<sup>208</sup> Ibid

new law, the Federal Compensation Final Law, raised the ceiling of compensation for education to DM 10,000.<sup>209</sup> However the new law failed to compensate, like the previous laws groups such as victims who remained in their native States though persecuted by Nazi officials, forced laborers, the antisocial,<sup>210</sup> communists, gypsies and communists.<sup>211</sup> Compensation for slave for forced labor was not recognized in the law though there was compensation for the 'jail like' condition of victims' confinement.<sup>212</sup> It is only after the creation of 'Hardship Fund' in 1980 that refugees from the Communist Bloc countries managed to get reparation since they failed to meet the 1965 deadline to file application.<sup>213</sup> As per this arrangement Germany paid each holocaust survivor a lump-sum onetime payment of DM 5,000.

In general Germany had paid \$61.5 billion in reparations out of which \$37.5 billion goes to individual compensation as per the German compensation laws.<sup>214</sup> Though the Holocaust reparation faced shortcomings for the under inclusive scheme and cold bureaucratic process it is one of the biggest reparation scheme in the history of reparations.<sup>215</sup> The reparation though it won't rectify the horrendous experience of the victims it contributes in ameliorating the harsh consequences of the violence and grief they suffered. Moreover it is emblematic of the moral character of the wrongdoing on the part of the State of Germany. As the then Chancellor of Germany spoke to the parliament "...*unspeakable crimes were committed in*

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<sup>209</sup> Ibid, 406

<sup>210</sup> Ibid, the term antisocial refers to commercial sex workers, beggars and vagabonds

<sup>211</sup> Ibid

<sup>212</sup> Ibid, 408

<sup>213</sup> Ibid, 409

<sup>214</sup> Ibid

<sup>215</sup> Ibid

*the name of the German people, which create a duty of moral and material reparations”*,<sup>216</sup>

the reparation endeavors of Germany are recognition of the holocaust responsibility which is as important as the restitution and compensation schemes implemented.

### **4.3 Apartheid Reparation: South Africa**

The human rights situation in South Africa went for decades commencing from the adoption of Apartheid laws in 1948. Those laws made race to determine the social, political and economic life of South African citizens. They sanctioned inter-racial marriage and limited the accessibility of jobs as per race or created white only jobs. In 1950 a law was adopted that requires racial profiling the population, whereby every citizen is required to carry an identification card that shows his/her race, white, black or colored. Colored is a person who is neither black or white racially that puts the mixed and Asians in one category.<sup>217</sup> Hence race becomes everything that defines once residence, education, social status and professional life.

The white dominated government enacted series of other laws purported to ensure the continuity of the apartheid system. In 1951 the government came up with a Bantu law that apportions every black people to one of the four homelands as per their ancestry.<sup>218</sup> Hence the black people belong to these homelands but not the South Africa. Moving from one homeland to another requires passes and not observing it entails serious punishments.

In 1953 the white National Party government adopted two laws that tightened the grip of repression of the white government. The Public Safety Act<sup>219</sup> empowered the government to declare state of emergency as long as 156 days so that blacks can be detained for six months

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<sup>216</sup> Ibid, 394

<sup>217</sup> South Africa, Population Registration Act No. 30 of 1950

<sup>218</sup> South Africa, Bantu Authorities Act, Act No 68 of 1951

<sup>219</sup> South Africa, Public Safety Act, 1953

without a court warrant and usually in inhuman conditions. Moreover, most of the imprisoned persons had died due to the horrible conditions of their incarceration. Hence series of resistance and uprisings ensued in South Africa led by the African National Congress (ANC) that resulted in the imprisonment of the leader, Nelson Mandela.<sup>220</sup> To sustain this policy of racial discrimination the government had to resort to violence and repression, whereby gross human rights violations took place such as murder, torture, inhuman treatment, forced disappearance and rape.<sup>221</sup>

When decades of apartheid era came to an end in 1990s, the transition was negotiated between the ruling party and the ANC. As part of the deal to pave the way to cede power to a democratically elected government and end apartheid, they agreed to establish a Truth and Reconciliation Commission (TRC) sanctioned by Promotion of National Unity and Reconciliation Act.<sup>222</sup> The whole process of enacting this Act needed “*genuine political compromise and the parties' respective sacrifices shaped the context in which the TRC operated.*”<sup>223</sup>

One notable nature of the TRC is that it staged an opportunity for perpetrators and victims. It is advantageous for the perpetrators as it gives them amnesty by telling the truth, while the victims could find out the truth with regard to the violation that happened to them or their

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<sup>220</sup> Julian Simcock, *Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission*, 47 *Stan. J. Int'l L.* 239, 243, (2011)

<sup>221</sup> *Ibid*

<sup>222</sup> South Africa, Promotion of National Unity and Reconciliation Act 34, 19 July 1995, available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (Last accessed on 30 October, 2013)

<sup>223</sup> Simcock, *Unfinished Business: Reconciling Reparation Litigation*, 239. Moreover the writer claims that the decision to establish the Truth and Reconciliation and give amnesty to the perpetrators is more of a political compromise rather than a reflection of popular will.

close family members. Hence the TRC was purported to facilitate reconciliation among the South African without resorting to retributive and punitive judicial process that may further deepen the cleavage among the already polarized community. The African conception of *ubuntu* which is also included in the epilogue of the Interim Constitution South Africa is a contributing factor to downplay the role of criminal investigation and prosecution in lieu of reconciliation and truth telling in the transition program.<sup>224</sup> The epilogue states that “*there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimization*”.<sup>225</sup>

With regard to economic reparation, the TRC was never intended to address the civil claims of the victims. As the commission was committed to reconciliation and excavation of the truth the reparation of victims was not part of the main deal in the process of negotiating the TRC. Moreover the absence of provision on reparation in the original document does not preclude the victims from pursuing civil reparation through judicial process.<sup>226</sup> Rather the Commission was “*a pathway by which to achieve forgiveness while also ensuring that victims were provided a degree of truth and the opportunity for reparations.*”<sup>227</sup> Though the Commission lacks authority, it is composed of a Committee on Reparation and Rehabilitation that has a power to recommend interim reparation for victims.<sup>228</sup>

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<sup>224</sup> Constitution of The Republic of South Africa, Act 200 of 1993, Epilogue; Available at <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/> (Last accessed on 25 November, 2013)

<sup>225</sup> Ibid

<sup>226</sup> Ibid

<sup>227</sup> Ibid

<sup>228</sup> South Africa, Promotion of National Unity and Reconciliation Act 34, Art. 25 (1995)

The TRC heard 21,000 witnesses among which 2000 of them happened in public hearings.<sup>229</sup> As per the provisions of the Act the TRC has made recommendations to the State regarding specific reparations measures to be implemented by the State in collaboration with the Civil Societies.<sup>230</sup> Among these is the payment of between R17, 029 and R23,230 for the victims annually for six years, establishment of a reparation trust fund, and imposition of one time wealth tax on domestic businesses<sup>231</sup>

The South African government has fully adopted the findings and recommendations of the Commissions and apologized in the name of the State to the victims of the Apartheid human rights violations.<sup>232</sup> The State has also taken measures to provide victims who testified to the TRC with reparations. As per the Regulations Regarding Reparation to Victims of 2003<sup>233</sup> the government had provided for the payment of one time reparation payment to victims and their next of kin, R30, 000 per person.<sup>234</sup> According to this compensation scheme, as of 2007, the government has paid R 510 million for 16,837 victims.<sup>235</sup>

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<sup>229</sup> USIP, Truth Commission: South Africa, available at <http://www.usip.org/publications/truth-commission-south-africa>, (Last accessed on Oct 15, 2013)

<sup>230</sup> Truth and Reconciliation Commission of South Africa Report, 726, (March 2003), Available at [http://www.info.gov.za/otherdocs/2003/trc/5\\_7.pdf](http://www.info.gov.za/otherdocs/2003/trc/5_7.pdf) (Last accessed on 12 November, 2013)

<sup>231</sup> Ibid, 726-27, Simcock, *Unfinished Business: Reconciling Reparation Litigation*, 247

<sup>232</sup> UIPS, Truth Commission South Africa; However, Thabo Mbeki expressed that the ANC has ‘serious reservations’ about the work of the TRC. See also Erin Daly, *Reparations in South Africa: a Cautionary Tale*, 33 U. Mem. L. Rev., 367, 384, (2003)

<sup>233</sup> South Africa, Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 Of 1995): Regulations Regarding Reparation to Victims), available at [http://www.justice.gov.za/Trc/legal/20031112-gg25695\\_nn1660.pdf](http://www.justice.gov.za/Trc/legal/20031112-gg25695_nn1660.pdf), (Last accessed on 10 October, 2013)

<sup>234</sup> Ibid Art. 3

<sup>235</sup> Simcock, *Unfinished Business: Reconciling Reparation Litigation*, 247

Despite all these the transition process has faced serious criticisms since it addressed only victims of serious human rights violations as defined in the TRC Act<sup>236</sup>. The Act provides that the TRC shall look into gross human rights violations of the apartheid officials which are defined as “the killing, abduction, torture or severe ill-treatment of any person; or any attempt, conspiracy, incitement, instigation, command or procurement to commit”<sup>237</sup> those acts. Hence it left out those victims whose rights violations wouldn’t fall within the definition of ‘gross’ within the meaning of the Act. Millions of the black population has suffered “forced removals to arid and overcrowded land; the...legal restrictions from birth to death; ...oppressive labor conditions; ...educational deprivations; and ... social stigmatization.”<sup>238</sup> This is a glaring injustice since most perpetrators were able to get amnesty and their victims were not able to get the requisite reparation as per the recommendations of the TRC. Though the punishment of the perpetrators will not put money in their pocket, the fact that they still toil in poverty as a result of the atrocities they suffered in the hands of the perpetrators makes the feeling of injustice more acute. As Daly noted, the amnesty was supposed to work hand in hand with proper reparation to the victims that didn’t materialize yet.<sup>239</sup> The other problem with the South African reparation mechanism is the partial implementation of recommendations of the TRC. For instance the once-off wealth tax recommended by the TRC had not been implemented and nor do the payment of compensation for victims and their family six consecutive years. The other problem that was observed is still a matter of contention is the lack of accountability among businesses that benefitted from low cost of labor due to the apartheid in South Africa. Though their degree of culpability in the whole

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<sup>236</sup> Ibid

<sup>237</sup> South Africa, Promotion of National Unity and Reconciliation Act, Art 1& 3

<sup>238</sup> Erin Daly, *Reparations in South Africa: a Cautionary Tale*, 33 U. Mem. L. Rev., 367, 373, (2003)

<sup>239</sup> Ibid, 379-80

policy of apartheid is a matter of future investigation, South African Companies were beneficiaries in terms of increasing their margin of benefit due to the low mobility of black population, low salary scale of black workers and forced labor.<sup>240</sup>

#### 4.4 Genocide Reparation: Rwanda

Even if the exact number of casualties in Rwandan 1993 Genocide is not known reports usually put the numbers between 800,000 and 1,000,000.<sup>241</sup> The 1994 is the culmination of centuries' long conflict between the two major ethnic groups populating State. Many writers ascribe the causes of the Rwandan Genocide to multiple of factors in addition to the ethnic animosity between the Tutsi and Hutu ethnic groups such as colonial manipulation of ethnic differences, land overcrowding, and geo-political location of the Country.<sup>242</sup>

After the end of the Genocide when the Rwandese Patriotic Front (RPF) army took control of the country, the incumbent government made it clear that the culture of impunity will no more be tolerated despite the insistence of foreign donors to replicate the South African experience of truth and reconciliation in Rwanda.<sup>243</sup>

Hence the Rwandan Government in cooperation with the international community has ensured the investigation and prosecution of the perpetrators of the genocide in the ICTY,

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<sup>240</sup> Simcock, *Unfinished Business: Reconciling Reparation Litigation*, 250

<sup>241</sup> Megan M. Westberg, *Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR*, 59 Kan. L. Rev. 331, 331 (2011)

<sup>242</sup> Catharine Newbury, *Background to Genocide: Rwanda*, 23 Issue: A Journal of Opinion, 12, 16 (1995); Yael Weitz, *Rwandan Genocide: Taking Notes from the Holocaust Reparations Movement*, 15 Cardozo Journal of Law and Gender, 357, 358-59, (2009)

<sup>243</sup> Peter Uvin, *The Gacaca Tribunals in Rwanda, (case study)*, David Bloomfield & Teresa Barnes and Luc Huyse (Eds.) **Reconciliation after Violent Conflict, (IDEA, Handbook Series)** 116, 116 (2003)

domestic ordinary courts and 'gacaca' (justice on the grass) courts. As of November 2013, 75 criminal cases are entertained in the ICTR,<sup>244</sup> in addition to those prosecuted in domestic courts of foreign States.<sup>245</sup> Moreover as of November 2013, 100,000 suspects are charged for crimes of genocide.<sup>246</sup> However reparation for the victims is non-existent in the ICTR since the jurisdiction of the Court is limited to criminal prosecution only.<sup>247</sup>

The Rwandan government has established '*Fonds National pour l'Assistance aux Rescapés du Génocide*', (FARG).<sup>248</sup> The FARG supports the needy survivors of the genocide in provision of education, health, and housing services. The government of Rwanda avails 6% of its annual budget to finance the FARG.<sup>249</sup> However this fund for assistance of survivors does not cover compensation of damages to the victims of the Genocide. In terms of general restorative justice measures the government has built monuments and memorials for victims of the Genocide throughout the country whereby the survivors and the nation as a whole commemorate the Genocide.<sup>250</sup>

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<sup>244</sup> See Website of the Tribunal at <http://www.unicttr.org/Cases/StatusofCases/tabid/204/Default.aspx> (Last accessed on 20 November 2013)

<sup>245</sup> African Rights & REDRESS, Extraditing Genocide Suspects from Europe to Rwanda- Issues and Challenges, September 2008, 52-60; Available at [http://www.redress.org/downloads/country-reports/Extradition\\_Report\\_Final\\_Version\\_Sept\\_08.pdf](http://www.redress.org/downloads/country-reports/Extradition_Report_Final_Version_Sept_08.pdf) (Last Accessed on 27 November, 2013)

<sup>246</sup> See <http://www.gov.rw/justice-reconciliation>

<sup>247</sup> See Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994), Annex, Art 1

<sup>248</sup> It is established by the Government of Rwanda to support genocide survivors by Law No 02/98 of which was repealed by Law No 69/2008 (OG. NA Special of 15/04/2009).

<sup>249</sup> See <http://www.farg.gov.rw/index.php?id=28>

<sup>250</sup> See <http://genocidememorials.cga.harvard.edu/data.html>

Victims were able to participate as ‘*party civile*’ in the criminal proceedings against perpetrators since 1996 to 2000 as per Organic Law of Rwanda.<sup>251</sup> Hence the victims filed for compensation almost in two-thirds of the cases relating to the genocide perpetrators seen in the domestic courts and half of them managed to get compensation awards against the perpetrators and the State as jointly liable.<sup>252</sup> However the modality for assessment of compensation in the decisions of the Specialized Courts was far from clear from their judgments though they were generous in their earliest decisions.<sup>253</sup> For instance, after trial of 4000 perpetrators the Courts awarded close to \$100 million for material losses and moral damage.<sup>254</sup>

However the reparation awards of the courts were able to be enforced neither against the perpetrators nor the government due to the indigence of the perpetrators, or unavailability of government fund.<sup>255</sup> Moreover after the adoption of a law that established the *gacaca* courts in 2000 the ability of claimants to claim compensation from the State is hindered since the

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<sup>251</sup> Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Organic Law No. 08/96 of 30 August 1996, Article 29 (1), (2), (3), ANNEX 3 states that “*the ordinary rules governing denunciations, complaints and civil actions are applicable to cases before the specialized chambers*”

<sup>252</sup> Redress, Right to Reparation for Survivors: Recommendations for Reparations for Survivors of the 1994 Genocide against Tutsi, para 13-15 (*discussion paper*, October 2012) Available at [http://www.redress.org/downloads/country-reports/121031right\\_to\\_rep.pdf](http://www.redress.org/downloads/country-reports/121031right_to_rep.pdf) (Last accessed on 22 November, 2013)

<sup>253</sup> Ibid, para 13

<sup>254</sup> Ibid, citing International Crisis Group, Africa Report No 30, 7 June 2001, p.33, at <http://www.crisisgroup.org/~media/Files/africa/central-africa/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.pdf>.

<sup>255</sup> Ibid, para 16

law declared that civil claims against the State as inadmissible.<sup>256</sup> Since the provision is applicable retroactively, it affects the enforcement of previous judgments of Courts against the State for compensation of victims. With regard to claims for compensation in criminal cases pending before the *gacaca* Courts, the claimants can file civil cases for material and bodily losses but not for moral damages.<sup>257</sup> Moreover according to the provision of this law, the decisions of the *gacaca* on material and bodily losses shall be forwarded to the Compensation Fund to the Victims of Genocide and the Fund is expected to “*fix the modalities for granting compensation*”.<sup>258</sup> However the Compensation Fund speculated in the Organic Law that established the *gacaca* courts has not yet materialized and the victims have not yet collected the reparation despite having court judgments.<sup>259</sup>

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<sup>256</sup> Setting up Gacaca Jurisdictions and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994, Organic Law No 40/2000, Art 91

<sup>257</sup> Ibid, Art 90

<sup>258</sup> Ibid, Art 90, Annex 4. In another law adopted in 2004 (Establishing the organization, competence and functioning of *gacaca* courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, Organic Law No 16/2004, Art 75, Annex 5) it is provided that other forms of reparation of victims will be dealt in specific laws.

<sup>259</sup> Redress, Right to Reparation for Survivors, para 28 (There was a draft law for the Compensation Fund that circulated for the feedback of civil societies but that has not yet been adopted)

## Conclusion

As evidenced in experiences of different States, transition to democracy dictates addressing past atrocities through reparation. Reparation to victims is usually implemented through administrative or judicial mechanism, or a mix of them.<sup>260</sup> The administrative mechanism involves provision of compensation and rehabilitation services to the victims through administrative outlets. It may also involve restitution of property through administrative organs of the State whenever possible. Usually this mechanism involves payment of lump-sum amount to the victims. The experience of Germany and South Africa fits administrative implementation reparation though in the case of Germany claimants were entitled to appeal to a court of law if dissatisfied with the decision of the administrative body. The advantage of this approach is that it provides victims with more accessible reparation since the requirements to get the retribution are not as stringent as judicial alternative where stringent procedural and evidential requirements are applied. This is especially advantageous where the victims have difficulty proving their cases due to loss of evidences and economic difficulty to engage competent legal service. Moreover as symbolic gesture of the State that recognizes the harms done to the victims it redresses the moral of the victims and helps them to reintegrate with the community. The disadvantage of this approach is the amount of compensation may not be sufficient compared to the loss they suffered.

The other approach is judicial remedy. The judicial approach provides the victims with opportunity to claim reparation for the damages they sustained. The good side of this approach is it enables the victims to get compensation more or less equivalent to the losses and harms they suffered. Moreover a judicial proceeding gives the victim the forum to speak

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<sup>260</sup> Jaime E. Malamud-Goti and Lucas Sebastián Grosman, *Reparations and Civil Litigation*, Pablo de Greiff (ed.) **The Handbook of Reparations**, 540, 541 (2006)

their story of sufferings in public and face to face with the perpetrators which is not the case in administrative approaches. However as said before this is subject to their success to prove their case in judicial organs which may not be the case always. The other disadvantage is the very nature of judicial proceedings embattles the claimant and the defendant rather than reconciling them.<sup>261</sup> The Rwandan experience to victim reparation falls within this approach, though the proposed Compensation Fund law inserts an administrative element to it.

However there is neither administrative nor judicial mechanism to claim compensation in Ethiopia. Hence challenges of enforcing reparation for victims of the Derg crimes abound though some prospects are there to be maximized.

The rights of the victims of crimes to civil redress is recognized in the Civil Code but cannot be enforced due to the period of limitation to bring civil claims in the national courts. However the FDRE Constitution of 1994 provides that there shall not be period of limitation crimes relating to genocide, crimes against humanity and war crimes<sup>262</sup>. Hence it is possible to argue that if the constitution provides that the criminal liability of the perpetrators of those crimes cannot be limited by period of limitation, the same goes to civil liabilities that arise from those crimes. It is clear that criminal liability has more strenuous consequences than civil liability. If the period of limitation is indefinite for criminal prosecution, then, for the stronger reason, it shall remain indefinite for civil liability which has only economic impact on the perpetrators or the State, which benefits the victim by redressing the damages they sustained due to the crimes and facilitates their reconciliation and integration to the society.

The other conclusion that comes out of this thesis is that the Ethiopian State has international responsibility to remedy the human rights violations of the past regime to the extent that the

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<sup>261</sup> Ibid, 544

<sup>262</sup> FDRE Constitution, Art 28

Derg crimes violate the customary human rights laws. As discussed in the second Chapter, Derg crimes such as arbitrary deprivation of liberty, murder, torture and inhuman treatment, and crimes against humanity have attained customary international laws. And some of the crimes are violations of *jus cogens* norms.

As evinced in the experience of the countries to victim reparation, neither Germany nor South Africa<sup>263</sup> were party to the human rights Covenants at the time of the commission of the Holocaust the Apartheid crimes. However those countries have chosen to engage in reparation of the victims due to the morally wrong nature of the crimes. The Ethiopian State as a member of community of States and as a State in transition to democracy shall take a lesson from the experiences of these countries. The initiatives of Rwanda are much progressive compared to the Ethiopian experience where by the State established a Fund to support the neediest Genocide survivors in provision basic social services such as education, health and housing.

The other important feature observed in the reparation endeavors is the importance of victims, their associations, and scholars to maintaining the discourse alive despite the States' hesitations to provide reparation to the victims. In Holocaust reparations the Jewish associations have played important role in advocating for reparation of the victims and the disbursement of the funds to the victims dispersed all over the world.<sup>264</sup> In Rwanda and South Africa, scholars and victims associations are still engaged in reparation advocacies and

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<sup>263</sup> Virtually there was not international human rights system during the holocaust while South Africa ratified the ICCPR, CAT, and the Genocide Convention after the end of the Apartheid regime. See Ágnes Peresztegi, *Reparation for Holocaust-Era Human Rights Violations*, available <http://web.ceu.hu/jewishstudies/yb03/13peresztegi.pdf> (Last accessed on 15 May 2013)

<sup>264</sup> Peter Van Der Auweraert, *Holocaust Reparation Claims Fifty Years After: The Swiss Banks Litigation*, 71 *Nordic Journal of International Law*, 557, 557-558, (2002)

discourses, which is not the case in the case of the victims and the academia in Ethiopia. Hence, the absence of enforcement mechanism for these human rights violations must not be a disincentive for the victims to claim reparation.

In General victims of Derg crimes were not able to get reparation due to administrative and legal impediments to enforce their rights. In addition to the failure of the national legal system to provide remedies to the violation of human rights of the victims the inherent deficiency of the human international human rights systems is visible. Though States are the primary duty-bearers for implementation of human rights within their jurisdictions, in situations where there is flagrant violation of human rights like the Derg crimes the international human rights has system had failed to intervene so as to protect the victims and facilitate their reparation. In situations like the Derg crimes, the State that was active in the mass human rights violations failed to assume subsequent responsibility to address the damages on victims. Hence those situations are demonstrations of the standard setting role of international human rights laws not accompanied by enforcement mechanisms is nothing more than empty rhetoric, at least for the victims, in the face of violations of human rights that attained *jus cogens* norms in international law.

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