

Minor Dissertation in Public International Law

**South Africa's Obligation under International
Law to Prosecute and Punish Perpetrators of
Gross Human Rights Violations and to
Provide Compensation for their Victims**

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I hereby declare that I have read and understood the regulations governing the submission of LLM in Public International Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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A. Introduction

Countries undergoing a transitional process face multiple problems and challenges. The process of transformation from a dictatorial, anti-democratic or authoritarian state into a constitutional democracy which respects the rule of law and the fundamental human rights of its citizens is a difficult and strenuous one. Often equipped with only limited financial resources, many newly elected, democratic governments find themselves confronted with a variety of urgent problems waiting to be resolved: the civil service and the judiciary need to be restructured or reformed, jobs must be created for the hundreds of thousands of unemployed, the economy must be put back on the right track and the poor have to be provided with housing, food and health care. While the extent and nature of these and other challenges naturally vary considerably, depending on the circumstances and the specific situation of the state concerned, there is one issue which has to be faced almost inevitably by every transitional society: the question of how to deal with its own troubled past.

Broadly speaking, there are three different approaches for dealing with a burdensome past. Firstly, there is the option to move on, to focus on the future and simply to forget the conflicts of the past. This option is generally characterised by a general amnesty for the perpetrators of the old regime, shielding those who committed atrocities and gross violations of human rights from any criminal prosecutions. Spain is probably the most prominent example for a country having chosen this way but amnesty laws have also been passed, *inter alia*, in Argentina, Brazil, Chile, Guatemala, Sierra Leone and Uruguay.¹

Secondly, there is the option to prosecute and punish gross human rights offenders and to hold accountable the members of the old regime. In Greece for instance, 18 Generals were convicted for high treason only months after the end of their military dictatorship.² Ethiopia is another example for a country having opted for this approach while Rwanda has decided to reappraise its gruesome past by a combination of international and national criminal prosecutions.³

Finally, there is the option to employ alternative mechanisms and procedures like truth commissions and other non-penal measures.⁴ This is, so to speak, the middle course between the two extremes of general amnesties and criminal prosecutions. Numerous truth commissions have been set up so far in

¹ Florian Kutz *Amnestie für politische Straftäter in Südafrika* (1999) 9-10.

² Ibid 6.

³ Ibid 6-7.

⁴ Vetting programmes to remove certain categories of office-holders from certain public or private offices have been primarily implemented in a number of Eastern European countries. See eg Herman Schwartz 'Lustration in Eastern Europe' in Neil Kritz (ed) *Transitional justice - how emerging democracies reckon with former regimes* vol 1 (1995) 461.

countries as different as Argentina, Chile, Guatemala, Timor-Leste, Morocco, Sierra Leone or South Africa, just to mention the most prominent examples. As divergent as these commissions in each of these different countries might have been, they all were established to investigate and verify past human rights violations, to give victims of grave human rights abuses a forum to tell their stories and to acknowledge officially what happened during certain dark and painful periods in their respective countries' histories.⁵ This option tries to strike a balance between the need to reappraise a country's past on the one hand and the necessity to preserve its still young and vulnerable democracy on the other.

While the first two of these options focus predominantly on the role of the perpetrator, the final option is traditionally rather a victim-centred approach.⁶ This is of particular importance since it is the victims whose rights and needs are usually the first to be forgotten in a transitional period. However, most countries

⁵ For a comprehensive overview of the earlier established truth commissions see Priscilla B Hayner 'Fifteen truth commissions - 1974 to 1994: a comparative study' (1994) 16 *Human Rights Quarterly* 597.

⁶ The South African Truth and Reconciliation Commission was the first commission with the authority to grant amnesty to perpetrators of gross human rights violations.

choose to combine elements of the different options by eg granting amnesty only for the less serious crimes while prosecuting the more serious offences⁷ or by granting a general amnesty on the one hand while simultaneously establishing a truth commission on the other.⁸

Which way a country finally chooses to go often depends on institutional and political constraints. In many cases it is a purely political decision, ie a mere question of power. However, transitional countries do not operate in a legal vacuum but are subject to international law as every other state, which imposes certain limitations and restraints on transitional countries' choices of how to come to terms with their past. These limitations revolve primarily around two major points: on the one hand states' obligation to prosecute and punish perpetrators of gross human rights violations and on the other hand states' duty to provide compensation for the victims of these offences.

South Africa chose not to prosecute its Apartheid criminals but also refused to grant a general, unconditional amnesty for the numerous crimes committed during the many years of conflict. Instead it opted for the establishment of a Truth and Reconciliation Commission (TRC) with a rather unique mandate. While the ability of the Commission to recommend reparation measures for victims of gross human rights abuses is still comparable with the competences of other truth commissions, its power to grant amnesty under certain, specifically defined conditions was at the time rather revolutionary. It is this power which differentiates the South African Truth and Reconciliation Commission from every previously established commission and makes it a model for future transitional processes. But it is also this power which has attracted the most criticism and has raised doubts, whether the South African transitional process was in compliance with international law.⁹

This thesis will explore and examine the different obligations and constraints international law imposes on countries in transition with regard to the question of criminal prosecutions and compensation, and apply the findings to the South African context. Following this introduction, it will provide a short overview of the South African transitional process, the creation of the TRC, its mandate and objectives and its specific provisions regarding the question of amnesty and victims compensation (B). Subsequently it will be determined whether international law - international treaties as well as customary international law - requires states to prosecute gross human rights offenders criminally (C) and / or to provide compensation for their victims (D). Given the importance and significance of the transitional process of South Africa in general and the South African Truth and Reconciliation Commission in particular as a potential model for transitional processes and truth commissions in other transitional contexts, it will finally be determined whether this model was in compliance with South Africa's international legal obligations (E).

⁷ Like in the cases of Sierra Leone and Timor-Leste. See eg Suzannah Linton 'Cambodia, East Timor and Sierra Leone: experiments in international justice' (2001) 12 *Crim L Forum* 185 at 219, 224, 231-232.

⁸ This way was chosen, *inter alia*, by Chile, Uruguay and El Salvador. See eg Kutz (note 1) 16.

⁹ John Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) 13 *S Afr J on Hum Rts* 258 at 260.

B. The South African Transitional Process

I. Background

*Huyse*¹⁰ suggests the existence of three different types of transitions - overthrow, reform and compromise. While the former type of transition could be observed in eg Argentina or Iran, where the forces of the opposition were strong and ultimately managed to topple the old order, in states like eg Hungary, Chile or Spain where the opposition was rather weak, governments finally undertook fundamental reforms by their own initiative. However in South Africa, the opposition and the national government were somewhat equally matched and thus unable to make the transition to democracy without each other.¹¹ The South African path to democracy was hence a process of compromise, negotiated by the two major political forces of the time, the African National Congress (ANC) on

¹⁰ Luc Huyse 'Justice after transitions: on the choices successor elites make in dealing with the past' in Kritz (note 4) 104 at 113.

¹¹ Jeremy Sarkin 'The Truth and Reconciliation Commission in South Africa' (1997) 23 *Commw L Bull* 528 at 528.

the one hand, and the National Party (NP) ie the South African government on the other. Under these circumstances, any radical or extreme approaches would have been ruled out from the beginning.

The question of how to deal with the past and in particular whether to grant amnesty to perpetrators of gross human rights violations of the Apartheid state was one of the most difficult issues the negotiating parties had to resolve. In a speech, delivered at a conference in Cape Town in June 1995, Dullah Omar, then Minister of Justice, confirmed the view of many South Africans that had an amnesty process not been agreed to, an agreement between the two parties on the process of transformation would not have been possible.¹² While the NP insisted on a general, unconditional amnesty, a majority in the ANC rejected this demand.¹³ A compromise was finally reached on 22 November 1993 when representatives of the government and the ANC drafted a postscript to the draft interim Constitution on the subject of amnesty.¹⁴ This postscript, generally termed the ‘postamble’, stresses the ‘need for understanding but not for vengeance, (...) for reparation but not retaliation, (...) for Ubuntu but not for victimisation’. Continuing, it states that

‘[i]n order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date (...) and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed’.

It is on the basis of this postamble that the South African Parliament in 1995 enacted the Promotion of National Unity and Reconciliation Act (PNURA) which gives effect to the postamble’s promise of amnesty, yet only under certain conditions. The Act is the foundation of the South African truth and reconciliation

¹² Dullah Omar in his opening address at the conference ‘Justice in Transition’ in Cape Town on 30 June 1995. Cited after Sarkin (note 11) at 529.

¹³ Kutz (note 1) 85. See also Dugard (note 9) at 258.

¹⁴ Kutz (note 1) 85.

process. It establishes the TRC and defines the details of the Commission's mandate, functions and powers. However, what makes it unique is that it incorporates the amnesty process into the truth commission process which was at the time a ground breaking experiment. This link between amnesty and truth became the distinctive feature of the South African TRC.

II. The South African Truth and Reconciliation Commission

The process of establishment of the South African Truth and Reconciliation Commission was characterised by a sense of transparency and openness. Right from the beginning it was decided to involve as many players as possible and numerous individuals and NGOs took advantage of this policy by submitting their proposals, recommendations and suggestions to the responsible authorities.¹⁵ After months of public debate, academic discussions, parliamentary hearings and conferences, the Promotion of National Unity and Reconciliation Act establishing the TRC was finally signed into law by then President Nelson Mandela on 19 July 1995.¹⁶

What followed was an equally open and transparent process for selecting the Commissioners. A specially appointed committee was tasked to short-list out of 299 nominations, 25 suitable candidates whose names were then presented to President Mandela and his Cabinet for final consideration. Mandela eventually selected 15 of those 25, added two new names and appointed Archbishop Desmond Tutu as the chairperson of the Commission.¹⁷ After this was officially gazetted, the Commission held its first meeting at Archbishop Tutu's residence at Bishops Court on 16 December 1995.¹⁸

During the process of its creation, three major controversies arose in relation to the Commission's mandate and functions. First, NGOs raised concerns

¹⁵ Alex Boraine *A country unmasked* (2000) 47.

¹⁶ Sarkin (note 11) at 530.

¹⁷ Boraine (note 15) 72-73. For a complete list of all 17 Commissioners see Sarkin (note 11) at 531.

¹⁸ Boraine (note 15) 73.

about the initial proposal that the Commission's hearings should be held behind closed doors.¹⁹ Many felt that the Commission could serve its purpose much better if its hearings were open to the public. It was eventually agreed that the Commission's hearings would be open in general but that *in camera* proceedings could be held where this was 'in the interest of justice'.²⁰

A second bone of contention was the cut-off date for acts which were eligible for amnesty.²¹ Some²² called for an extension of the cut-off date from 5 December 1993 to the date of President Mandela's inauguration on 10 May 1994 in order to include acts of pre-election violence into the amnesty process. While this demand was initially rejected, it was eventually agreed to by President Nelson Mandela at the end of 1996 and given effect by an amendment of the Constitution on 29 August 1997.²³

Finally, there was an argument about the criteria for acts associated with a political objective as enumerated in section 20 (3) PNURA.²⁴ Since only acts which met these criteria were eligible for amnesty, this issue was one of considerable importance. The most controversial criterion was probably the requirement of proportionality between the act and its political objective. However, despite fierce opposition, the criterion of proportionality eventually remained in the final bill.²⁵

1. Mandate and Objectives of the Commission

The objectives of the TRC are defined in section 3 (1) PNURA. Accordingly, the Commission's primary aim is 'to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'. In order to achieve this goal, the Commission must

- '(a) [establish] as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to [10 May 1994] (...);
- (b) [facilitate] the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of [the PNURA];
- (c) (...) [restore] the human and civil dignity of (...) victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;

¹⁹ Sarkin (note 11) at 530.

²⁰ PNURA 34 of 1995 s 33 (1) (a) and (b).

²¹ Sarkin (note 11) at 530. See also Kutz (note 1) 144-149.

²² Especially representatives of the Freedom Front and the Afrikaner Weerstandsbeweging. See Kutz (note 1) 146.

²³ Ibid 146-147.

²⁴ Sarkin (note 11) at 530.

²⁵ Ibid.

- (d) [compile] a report providing as comprehensive an account as possible of the activities and findings of the Commission (...) which contains recommendations of measures to prevent (...) future violations of human rights'.²⁶

Whereas the Commission's mandate *ratione temporis* is relatively wide and covers a period of more than 30 years, its mandate *ratione materiae* is narrowed down to only *gross* violations of human rights which are defined by the Act as any 'killing, abduction, torture or severe ill-treatment of any person or any attempt, conspiracy, incitement, instigation, command or procurement to commit [any of these acts] (...)'.²⁷ While this definition covers the most outrageous crimes and transgressions, it excludes many other Apartheid related injustices like the detention without trial of ten thousands of people or the forcible removal of roughly 15.5 million people from their homes and property.²⁸ This illustrates the Commission's limited competence with regard to an inquiry in the system of Apartheid as such and regarding acts which were legally authorised under the Apartheid order. As Dugard points out '[t]here [was] no attempt to bring within the ambit of the (...) enquiry acts that constituted a crime under international law but were not criminal under the law of Apartheid'.²⁹

The lifespan of the Commission was initially restricted to only 18 months. However, section 43 (1) PNURA provides for the possibility of an extension for another half a year. President Nelson Mandela made use of this possibility and extended the Commission's mandate until 14 December 1997.³⁰ Following an amendment of the PNURA, the Commission's lifespan was again extended until 31 July 1998.³¹ Eventually, in accordance with section 43 (2) of the Act, the Commission's final report was presented to President Mandela on 29 October 1998.³²

2. The Functioning of the Commission

The PNURA subdivides the TRC into three separate committees: the Committee on Human Rights Violations, the Committee on Amnesty and the Committee on Reparation and Rehabilitation.

a. The Committee on Human Rights Violations³³

The Committee on Human Rights Violations can be described as the heart of the TRC. Made up of 10 Commissioners and 10 external members, its main responsibility consisted of instituting inquiries, gathering information and evidences and recording allegations and complaints of gross human rights

²⁶ PNURA 34 of 1995 s 3 (1).

²⁷ PNURA 34 of 1995 s 1 (1) (ix) (a) and (b).

²⁸ Sarkin (note 11) at 532 Fn 24.

²⁹ Dugard (note 9) at 260.

³⁰ Kutz (note 1) 91.

³¹ Ibid.

³² Ibid 92.

³³ PNURA 34 of 1995 ss 12-15.

violations.³⁴ The Committee received a good deal of its information directly from the people who were encouraged by the media to come forward and to report on their experiences and sufferings during the time of Apartheid. In total, the Committee received some 20 000 statements which later formed the basis for the Commission's final report.³⁵

The centrepiece of the Committee's work was its public victim hearings programme, which commenced, under the watchful eyes of the international media, on 15 April 1996 in the city of East London. These hearings gave victims the possibility to 'tell their story, express their sufferings and be recognised as victims per se'.³⁶ More than 70 hearings - including theme and institutional hearings - were held during the lifespan of the Committee, giving some 2000 victims the chance to appear before the Committee in person.³⁷

b. The Committee on Amnesty³⁸

The Committee on Amnesty was the most controversial body of the TRC. Chaired by a high-ranking judge and staffed with up to 18 additional members,³⁹ its main task was to consider and to decide upon thousands of applications for amnesty for crimes and offences committed during the conflicts of the past. Many of these applications were filed by members of the security forces but some also came from members of Umkhonto we Sizwe, the armed wing of the ANC, and other liberation movements.⁴⁰ The cut-off date for applications was originally 15 December 1996 but was later extended to 10 May 1997.⁴¹

Section 20 (1) PNURA sets three essential requirements for amnesty to be granted. Firstly, the application must be in compliance with the requirements of the PNURA. Secondly, 'the act, omission or offence to which the application relates' must have been 'associated with a political objective [and] committed in the course of the conflicts of the past'. Finally, the applicant must have 'made a full disclosure of all relevant facts'. Whether a particular act, omission or offence was indeed associated with a political objective had to be decided by the Committee with reference to the criteria enumerated in subsection (3). The motives of the perpetrator, the context in which the crime took place, its legal and factual nature, its object or objectives, the fact, whether it was committed in the execution of an order as well as the relationship between the act, omission or offence and the political objective pursued, had thereby to be taken into account.

³⁴ PNURA 34 of 1995 s 14 (1) (a).

³⁵ Kutz (note 1) 95.

³⁶ Verane Castelnau 'South Africa's Truth and Reconciliation Commission: dispensing justice in a post-conflict situation'. Available at <http://www.weltpolitik.net/print/1491.html> (accessed 10 January 2007).

³⁷ Kutz (note 1) 95.

³⁸ PNURA 34 of 1995 ss 16-22.

³⁹ Kutz (note 1) 96. The Committee consisted originally of only two Commissioners and three external members. Yet, due to its high workload, additional members were assigned at the end of 1997.

⁴⁰ Truth and Reconciliation Commission of South Africa *Report* vol 5 (1998) 202-203.

⁴¹ Kutz (note 1) 96.

In contrast, acts committed out of personal malice, ill-will or spite or for the sake of personal gain were not eligible for amnesty.

The Committee could generally reach its decisions on the basis of written proceedings but was legally required to conduct a public hearing in cases of serious violations of human rights.⁴² The decisions of the Committee had to be taken by majority.⁴³ If the Committee was satisfied that the aforementioned requirements were fulfilled, it granted amnesty in accordance with section 20 (1) PNURA. If it was however convinced that the requirements of the PNURA were not met, it refused the application in accordance with section 21 PNURA.

In any case, the decisions of the Committee had drastic and far-reaching consequences. In the event of a positive decision, applicants were exempted from any criminal or civil liability in respect of the amnestied crimes, as were the bodies or organisations which might have stood behind them. This follows from section 20 (7) (a) PNURA which states that

‘[n]o person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence’.

In contrast, if the application was refused, applicants’ liability remained untouched. However, since section 31 (3) PNURA forbids the admissibility of ‘[a]ny incriminating answer or information obtained (...) from a questioning [by the Commission] as evidence against the person concerned in criminal proceedings in a court of law or before any body or institution established by or under any law’, those who had their application declined did not have to fear any adverse consequences resulting from their request.

Overall, the Committee granted amnesty to a total of 1160 people from 7094 applications.⁴⁴

c. The Committee on Reparation and Rehabilitation⁴⁵

Made up of five Commissioners and four external members, the Reparation and Rehabilitation Committee’s main responsibility was to make recommendations as to appropriate measures of reparation to victims of the conflicts of the past.⁴⁶ In order to determine victims’ needs and expectations, the Committee collected information and propositions from a variety of different sources, such as NGOs or academic institutions, and held consultative workshops

⁴² PNURA 34 of 1995 s 19 (3) (b).

⁴³ See Kutz (note 1) 97.

⁴⁴ Amnesty International and Human Rights Watch ‘Truth and justice: unfinished business in South Africa’. Available at <http://web.amnesty.org/library/Index/ENGAFR530012003?open&of=ENG-ZAF> (accessed 12 February 2007).

⁴⁵ PNURA 34 of 1995 ss 23-27.

⁴⁶ PNURA 34 of 1995 s 25 (1) (b) (i).

throughout the country.⁴⁷ The hearings of the Committee on Human Rights Violations which the Committee analysed thoroughly, supplied further information. However, victims were also able to address the Committee directly and to apply for reparation to be paid.⁴⁸

In pursuance of its mandate and task, the Committee proposed a variety of reparation measures, ranging from the payment of monetary compensation to the building of monuments or the renaming of places and streets. Acting on the basis of the Committee's propositions, the TRC in its final report⁴⁹ ultimately recommended five categories of reparation to be implemented by the government:

- Urgent interim reparations to assist people with urgent needs.⁵⁰
- Community rehabilitation programmes like the resettlement of displaced persons to encourage the healing of communities.
- Symbolic reparations like the expunging of criminal records to restore victims' and survivors' dignity.
- Institutional reforms to ensure that the crimes and violations of the past will not reoccur in future.
- Individual reparation grants to acknowledge individual victims' suffering.⁵¹

However, since the Commission's recommendations were of a non-binding character only, it remained in the discretion of the government whether and how it would implement the Commission's propositions. Although there was some early progress on many of the non-pecuniary measures, the pay out of the individual reparation grants was delayed for years. Only on 15 April 2003 President Thabo Mbeki announced a once-off reparation grant of 30 000 ZAR to each of the approximately 22 000 recognised victims⁵² - much less than the Commission had recommended. As of November 2004 some 400 million ZAR had been paid out to roughly 14 000 victims.⁵³

C. Obligations under International Law to Prosecute and Punish Perpetrators of Gross Human Rights Violations

⁴⁷ Warren Buford and Hugo van der Merwe 'Reparations in Southern Africa'. Available at <http://www.csvr.org.za/papers/papwbhv.htm> (accessed 12 February 2007).

⁴⁸ PNURA 34 of 1995 s 26 (1).

⁴⁹ Truth and Reconciliation Commission of South Africa (note 40) 175-176.

⁵⁰ Urgent interim reparation payments in the form of once-off payments started in June 1998 and ranged from about 2 000 ZAR to 7 500 ZAR *per capita*.

⁵¹ The Commission proposed the payment of financial grants of between 17 000 ZAR to 23 000 ZAR *per annum* over a six-year period. Based on an estimate of 22 000 eligible victims, the total costs of this policy would have amounted to roughly 2 864 400 000 ZAR. See Buford and van der Merwe (note 47).

⁵² Christelle Terreblanche 'Apartheid reparations committee to start work' *The Mercury* 2 June 2003 at 2.

⁵³ News 24 'Apartheid victims get payback'. Available at http://www.news24.com/News24/South_Africa/News/0,6119,2-7-1442_1615329,00.html (accessed 14 February 2007).

For states undergoing a transitional process, the question of how to deal with gross human rights offences of a prior regime is one of the most difficult and delicate decisions to take. Should perpetrators of the old regime be granted amnesty in order to ensure a smooth and peaceful transition and to stabilise the newly established yet still vulnerable democracy? And if so, should it be an unconditional, general amnesty or one which can only be granted on a case-by-case approach and only after certain conditions have been met? Or is it rather advisable to prosecute and punish the members of the old regime in order to prevent widespread impunity and lawlessness?

While it might be politically tempting to grant a general amnesty and thereby put an end to the past, it is debatable whether such an approach is in compliance with international law. While it is true that states are generally free to manage their internal affairs according to their own political convictions and assessments, this freedom might be restricted by international treaties and conventions a state has ratified and / or customary international law which, by its nature, is binding upon all states.⁵⁴

This section will elaborate on states' obligation under international law to prosecute and punish perpetrators of gross human rights offences. It will first examine the content and scope of this obligation under various international treaties (I) before it addresses the question of whether customary international law obliges states to prosecute and punish grave human rights violations (II).

I. International Treaties

1. The Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) entered into force on 12 January 1951. As of 12 December 2006 it has been ratified by 140 states.⁵⁵ South Africa acceded to the Convention on 10 December 1998.

⁵⁴ *North Sea Continental Shelf Cases (FRG v Denmark and The Netherlands)* [1969] ICJ Rep 3 at 39.

⁵⁵ United Nations Treaty Collection. Available at <http://untreaty.un.org> (accessed 12 December 2006).

Drafted in the wake of World War II, the Convention's primary aim is to prevent the crime of genocide by ensuring its prosecution and punishment. Accordingly, article I states 'that genocide, whether committed in time of peace or in time of war, is a crime under international law which [the contracting parties] undertake to prevent and punish'. Article IV stipulates explicitly that '[p]ersons committing genocide (...) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'. Article V further requires states 'to provide effective penalties for persons guilty of genocide' while article VI confirms that '[p]ersons charged with genocide (...) shall be tried by a competent tribunal of the State in the territory of which the act was committed (...)'. Since acts directed against a 'political group' are not covered by the Convention's definition of genocide,⁵⁶ its scope of application is relatively narrow.⁵⁷ Yet, where it is applicable, the Convention is unambiguous in its requirement to prosecute and punish the crime of genocide, thus ruling out any form of amnesty.

2. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) entered into force on 26 June 1987. As of 12 December 2006 it has been ratified by 144 states.⁵⁸ South Africa signed the Convention on 29 January 1993 and ratified it on 10 December 1998.

In the same way as the Genocide Convention, the Convention against Torture contains an unambiguous duty to prosecute and punish the acts it defines as criminal.⁵⁹ Article 4 imposes an obligation on state parties to 'ensure that all acts of torture are offences under (...) criminal law' and 'punishable by appropriate penalties which take into account their grave nature'. Article 7 (1) further requires states to either extradite an alleged torturer or to 'submit the case to [their] competent authorities for the purpose of prosecution'. Finally, by obliging states to establish universal jurisdiction over the crime of torture⁶⁰ the Convention seeks to ensure that no offender will have the possibility to escape the consequences of his or her crime and be safe from prosecution.⁶¹ The Convention against Torture therefore requires the contracting parties to prosecute and punish any act of torture, thus forbidding any form of amnesty for torturers.

3. The Geneva Conventions of 1949⁶² and their Additional Protocols of 1977⁶³

⁵⁶ Article II Genocide Convention.

⁵⁷ Diane F Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1990-1991) 100 *Yale LJ* 2537 at 2565.

⁵⁸ United Nations Treaty Collection (note 55).

⁵⁹ See Orentlicher (note 57) at 2566.

⁶⁰ Article 5 (2) Convention against Torture.

⁶¹ See Orentlicher (note 57) at 2567.

⁶² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva

The Geneva Conventions of 1949 are probably the only international treaties which are truly universally accepted. As of 12 December 2006 they have been ratified by 194 states while the Additional Protocols have been approved by 166 (Additional Protocol I) and 162 (Additional Protocol II) countries.⁶⁴ South Africa acceded to the Geneva Conventions on 31 March 1952 and to the Additional Protocols on 21 November 1995.

While each of the four Conventions apply to different fields of warfare, they contain identical obligations with regard to the prosecution of certain serious violations of humanitarian law. Each of the four Conventions contains specific enumerations of grave breaches - such as torture, inhuman treatment, or wilful killing - which are war crimes under international law and are thus to be criminally prosecuted. Article 49 (1) Geneva Convention I eg obliges state parties 'to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined by the Convention whereas section (2) provides for the obligation 'to bring such persons, regardless of their nationality, before [a competent court of law]'.⁶⁵ State parties to the Conventions are therefore under an 'absolute' and non-derogable duty to prosecute grave breaches of the Conventions and to punish those found guilty.⁶⁶

However, it must be noted that the provisions of the Geneva Conventions are only applicable in international armed conflicts⁶⁷ whereas non-international conflicts are covered by the rules and provisions of Additional Protocol II as well as by the minimum standard of the Convention's common article 3. Yet neither of these provision contains explicit penal obligations or addresses the question of individual responsibility as such. One might therefore assume that the obligation to prosecute grave violations of the Conventions in a criminal court of law only applies to crimes committed in the course of an *international* armed conflict.

However, some scholars interpret the Geneva Conventions in a wider sense⁶⁸ and argue that grave breaches of the Conventions can generally be 'committed against persons or property *protected by the Convention[s]*',⁶⁹ which in turn gives rise to the subsequent question of who exactly falls under the

Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV).

⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).

⁶⁴ International Committee of the Red Cross (ICRC). Available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (accessed 12 December 2006).

⁶⁵ See also article 50 Geneva Convention II; article 129 Geneva Convention III; article 146 Geneva Convention IV.

⁶⁶ See Michael Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemp Probs* 41 at 44.

⁶⁷ Common article 2 Geneva Conventions.

⁶⁸ See eg Jordan J Paust 'Applicability of international criminal laws to events in the former Yugoslavia' (1994) 9 *Am U J Int'l L & Pol'y* 499 at 511.

⁶⁹ See article 50 Geneva Convention I; article 51 Geneva Convention II; article 130 Geneva Convention III; article 147 Geneva Convention IV.

Convention's shield. While it is true that the Geneva Conventions unfold their protective measures primarily in the context of *international* armed conflicts, it is equally true that persons referred to under the Convention's common article 3 - ie actors of a non-international conflict - can also be regarded as *protected persons* under the Conventions.⁷⁰ According to this reading, grave breaches of the Conventions can also be committed in the course of a *non-international* armed conflict.

Yet, such an interpretation would contradict the Conventions' explicit definitions of protected persons⁷¹ and would further blur the distinction between international conflicts on the one and non-international conflicts on the other side which was clearly not the intention of the drafters of the Conventions. The fact that article 8 of the Rome Statute of the International Criminal Court (RS-ICC) still adheres to this differentiation⁷² shows that the international community is as yet not willing to renounce the legal distinction between these types of conflict. A more convincing interpretation can be found in the judgment of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadic*.⁷³ While holding that the grave breaches provisions of the Geneva Conventions apply to international armed conflicts only, the Court ruled that 'customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict'.⁷⁴ The International Criminal Tribunal for Rwanda (ICTR) confirmed this view by stating - while referring to the Conventions' common article 3 - that 'authors of such egregious violations must incur individual criminal responsibility for their deeds'.⁷⁵ Thus, serious violations of the Convention's common article 3 must also not go unpunished.

However, it has been argued that article 6 (5) Additional Protocol II might justify the granting of amnesty for serious violations of humanitarian law committed in the course of a non-international conflict.⁷⁶ According to this provision, states

'shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.

However, this assumption is based on a fundamental misunderstanding of article 6 (5) Additional Protocol II which must be read and interpreted in light of

⁷⁰ Paust (note 68) at 511.

⁷¹ See articles 13 Geneva Conventions I and II; articles 4 Geneva Conventions III and IV.

⁷² See article 8 (2) (a) and (b) RS-ICC on the one hand and article 8 (2) (c)-(f) RS-ICC on the other.

⁷³ *Prosecutor v Dusko Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction* No. IT-94-1-AR72 2 October 1995 (AC). Available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (accessed 13 February 2007).

⁷⁴ *Ibid* para 134.

⁷⁵ *Prosecutor v Jean-Paul Akayesu, Judgement* No. ICTR-96-4-T 2 September 1998. Available at <http://69.94.11.53/default.htm> (accessed 13 February 2007) para 616.

⁷⁶ See *Azapo v President of the Republic of South Africa* 1996 (4) SA 562 (CC) para 30.

the general rules and provisions of the four Geneva Conventions. The *ratio* behind article 6 (5) is not to ensure widespread impunity but to protect combatants of a non-international conflict from excessive criminal prosecution once the conflict has ended. It is important to stress that while combatants of an *international* armed conflict may not be punished for their acts of hostilities as long as they were in compliance with international humanitarian law, combatants of a *non-international*, internal conflict do not benefit from this privilege and ‘may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law’.⁷⁷ It is only and exclusively with regard to these specific circumstances that article 6 (5) Additional Protocol II is applicable. The *travaux préparatoires* of Additional Protocol II support this interpretation by pointing out ‘that [article 6 (5)] aims at encouraging amnesty (...) for those detained or punished for the mere fact of having participated in hostilities [but] does not aim at an amnesty for those having violated international humanitarian law’.⁷⁸ Article 6 (5) Additional Protocol II can thus not be consulted for justifying the granting of amnesty for violations of humanitarian law.

⁷⁷ See Douglass Cassel ‘Lessons from the Americas: guidelines for international responses to amnesties for atrocities’ (1996) 59 *Law & Contemp Probs* 197 at 218, citing a letter from Dr. Toni Pfanner, Head of the Legal Division of the ICRC.

⁷⁸ *Ibid.*

4. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) entered into force on 23 March 1976. As of 12 December 2006 it has been ratified by 160 states.⁷⁹ South Africa signed the Covenant on 3 October 1994 and ratified it on 10 December 1998.

Unlike the aforementioned treaties and conventions, the ICCPR does not contain an explicit provision requiring states to prosecute and punish any violations of the rights and freedoms enumerated by the Covenant. It thus does not seem to forbid the granting of amnesties, pardons or other forms of immunity. However, article 2 (3) (a) provides, that state parties to the Covenant ‘ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy’.

Some writers argue that the right to an effective remedy includes, on the side of the state, an obligation to investigate the violation and to prosecute the perpetrators.⁸⁰ They argue that states’ duty to ensure the rights provided in the Covenant implies states’ obligation to prosecute their violators.⁸¹ By falling short of this obligation, states would create and promote a culture of impunity, making it impossible to ensure adherence to and respect for human rights in general.⁸²

The jurisprudence of the Human Rights Committee, the monitoring body of the ICCPR, seems to support this position. In response to a communication regarding alleged acts of torture in Zaire, the Committee found that Zaire was ‘under an obligation to (...) conduct an inquiry into the circumstances of [the victim’s] torture, to punish those found guilty (...) and to take steps to ensure that similar violations do not occur in the future’.⁸³ In response to a similar communication regarding alleged incidents of extra-judicial executions in Surinam, the Committee urged the government ‘to take effective steps to investigate the killings [and] to bring to justice any persons found to be responsible for the death of the victims’.⁸⁴ And in *Almeida de Quinteros v Uruguay* the Committee urged the Uruguayan government to take effective steps to bring to justice any persons found responsible for the disappearance of the victim.⁸⁵ Finally, in General Comment No. 20 interpreting article 7 of the ICCPR,⁸⁶ the Committee states, that torturers must be held responsible and that

⁷⁹ United Nations Treaty Collection (note 55).

⁸⁰ Sherrie L Russel-Brown ‘Out of the crooked timber of humanity: the conflict between South Africa’s Truth and Reconciliation Commission and international human rights norms regarding „effective remedies“ (2002-2003) 26 *Hastings Int’l & Comp L Rev* 227 at 254-255.

⁸¹ Orentlicher (note 57) at 2575.

⁸² W Michael Reisman ‘Legal responses to genocide and other massive violations of human rights’ (1996) 59 *Law & Contemp Probs* 75 at 77.

⁸³ *Muteba v Zaire* Communication No 124/1982 (24 July 1984).

⁸⁴ *Baboeram-Adhin et al v Suriname* Communications Nos 146/1983 and 148-154/1983a (4 April 1985).

⁸⁵ Communication No 107/1981 (21 July 1983).

⁸⁶ Article 7 ICCPR provides for the right not to be subjected to torture or to other cruel, inhuman or degrading treatment of punishment.

amnesties in respect of acts of torture 'are generally incompatible with the duty of States to investigate such acts'.⁸⁷

However, the language employed by the Committee does not necessarily lead to the conclusion that states are under the obligation to prosecute gross human rights offenders *criminally*. Terms like 'to bring to justice' or 'to punish those found guilty' might also be interpreted differently.⁸⁸ Alternative measures such as dismissal from the military, cancelling pensions, banning the offender from public offices or requiring the payment of damages through civil proceedings or administrative fines might also be regarded as a form of punishment, serving justice.⁸⁹ And the 'general incompatibility' of amnesties covering acts of torture as stated by the Human Rights Committee in General Comment No. 20 implies that *some* forms of amnesties - like for example those granted by a truth commission after a full disclosure of the crimes committed - might be acceptable under the ICCPR.⁹⁰ The *travaux préparatoires* of the ICCPR further substantiate that delegates considered but ultimately rejected a proposal brought forward by the

⁸⁷ Committee on Human Rights *General Comment No 20* (10 March 1992).

⁸⁸ Scharf (note 66) at 49-50.

⁸⁹ *Ibid* at 50.

⁹⁰ *Ibid*. See also Emily W Schabacker 'Reconciliation or justice and ashes: amnesty commissions and the duty to punish human rights offenses' (1999) 12 *NY Int'l L Rev* 1 at 10.

delegation of the Philippines which would have required states to prosecute violations of the Covenant criminally.⁹¹ To insist upon reading in such a requirement would therefore flatly contravene the intention of the drafters.⁹²

However, having recourse to the preparatory work of a convention is just one - supplementary - means of interpretation of a treaty provision.⁹³ Even if one takes into account that the Committee's comments are of a non-binding nature ('soft law') only,⁹⁴ one cannot overlook the fact that 'an increasing number of commentators, as well as the state-parties themselves, seem to consider the Committee's comments as Covenant jurisprudence'⁹⁵ which at the least is most authoritative for clarifying content and scope of the Covenant's rights and duties. That states' obligations set forth in the Covenant could be given greater precision through subsequent interpretation was further clearly contemplated by the different delegations throughout the drafting process.⁹⁶ Against this background, the findings of the Committee are far from being irrelevant.

While it is true that expressions like 'to hold responsible' or 'to punish those found guilty' do not necessarily connote criminal prosecutions, it is reasonable to assume that this connotation exists with regard to the most serious crimes like torture, forced disappearances or extra-judicial killings. In view of the importance that the Committee has attached to the right of life and the right not to be subjected to torture or forced disappearances,⁹⁷ one simply cannot suppose that the Committee would regard mere disciplinary actions or administrative fines as a sufficient form of punishment for these most horrendous crimes. This view would further be in line with the requirements of the Convention against Torture the obligations of which the Committee certainly did not want to undermine. It further reflects the general principle of law that crime and sanction are interrelated and that the latter must be appropriate to the severity and gravity of the first.⁹⁸

Under this interpretation of the Committee's jurisprudence, the right to an effective remedy as enshrined in article 2 (3) (a) ICCPR does impose an obligation on state parties to prosecute at least the most severe offences mentioned above. In contrast, with regard to other less serious crimes, depending on the context and the specific situation, other forms of sanctions and conditional or even 'blanket' amnesties might be permissible.

5. The European Convention for the Protection of Human Rights and Fundamental Freedoms

⁹¹ See Orentlicher (note 57) at 2569-2571.

⁹² See Scharf (note 66) at 49.

⁹³ See articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

⁹⁴ David J Harris *Cases and materials on international law* 6ed (2004) 684.

⁹⁵ Scharf (note 66) at 49.

⁹⁶ Orentlicher (note 57) at 2571 Fn 143.

⁹⁷ *Ibid* at 2575.

⁹⁸ See eg UN General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, suggesting that criminal prosecutions would be appropriate with respect to torture, while disciplinary actions might be sufficient for less serious forms of ill-treatment, UN GA Res 3452 (XXX) (9 December 1975).

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entered into force on 3 September 1953. As of 14 December 2006 it has been ratified by all of the 46 Council of Europe's member states.⁹⁹

The ECHR does not contain an explicit obligation to prosecute and punish gross violations of its protected rights. However, article 1 commits state parties to 'secure to everyone within their jurisdiction the rights and freedoms defined' in the Convention which has been interpreted by the European Court of Human Rights as including an affirmative duty to remedy violations of the Convention's rights.¹⁰⁰ The Court has had comparatively few occasions to evaluate the role of criminal prosecutions in protecting the Convention's rights and has therefore addressed this issue only rarely: in *X and Y v Netherlands*¹⁰¹ for instance, the Court found the Dutch government in violation of the ECHR due to a gap in Dutch law that prevented a victim of rape from instituting criminal proceedings against her assailant. However, in *Ireland v United Kingdom*,¹⁰² the Court refrained from directing the UK to institute criminal proceedings against certain members of the security forces who were responsible for violations of the Convention's rights. These inconsistencies make it impossible to establish a general obligation to prosecute and punish gross human rights offences under the ECHR.

II. Customary International Law

Article 38 (1) (b) of the Statute of the International Court of Justice defines customary international law as 'international custom, as evidence of a general practice accepted as law'. In accordance with this traditional definition, it is widely agreed that custom is formed of two constituent elements:¹⁰³

- Firstly, there has to be a general, uniform, and consistent practice of states (*state practice*). While the practice in question does not have to be universally accepted, there has to be a long-term and widespread compliance by a considerable number of states.¹⁰⁴
- This practice has, secondly, to be accompanied by a sense of legal duty (*opinio juris*). States must believe that the practice in question is not merely an act of courtesy or morality, but rather derives from legal obligations, imposed by international law.¹⁰⁵

⁹⁹ Council of Europe. Available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=10&DF=12/14/2006&CL=ENG> (accessed 14 December 2006).

¹⁰⁰ Naomi Roht-Arriaza 'Sources in international treaties of an obligation to investigate, prosecute, and provide redress' in Naomi Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 24 at 32.

¹⁰¹ *X and Y v Netherlands* (1985) 8 EHRR 235. See also Orentlicher (note 57) at 2580.

¹⁰² *Ireland v United Kingdom* (1978) 2 EHRR 25.

¹⁰³ See eg Michael Byers 'Power, obligation, and customary international law' (2001) 11 *Duke J Comp & Int'l L* 81 at 83; Josef L Kunz 'The nature of customary international law' (1953) 47 *AJIL* 662 at 665.

¹⁰⁴ See eg Schabacker (note 90) at 15-16.

¹⁰⁵ Ian Brownlie *Principles of public international law* 4ed (1990) 8.

However, definitional uncertainties remain. When exactly eg is a practice general, consistent and uniform? And how many states must be convinced that a certain behaviour is legally required? Yet, the most significant uncertainty in this

regard is the question of delimitation of state practice and *opinio juris*, which shall be explored in more depth.

1. The Delimitation of State Practice and Opinio Juris

There is little agreement about the delimitation of state practice and *opinio juris*. While concrete physical acts - like the adoption of a law, the initiating of legal proceedings before a court of law, or the payment of compensation for victims of crime - are broadly agreed to be a form of state practice, commentators disagree about whether written or even oral acts - such as diplomatic or political statements, the explicit acquiescence to a UN General Assembly resolution or the ratification of an international convention - should also fall in this category.¹⁰⁶ The answer to this question has significant and far-reaching consequences since the proof of custom is a difficult undertaking which might either be facilitated or further complicated, depending on what view one chooses to take.

The implications of this controversy may be observed with regard to the issue of criminal prosecutions of grave human rights offenders: some writers argue that the status of ratification of the aforementioned international treaties is nearly universal and that state practice - if measured by the status of ratification - may well be considered as general, uniform and consistent in the above mentioned sense.¹⁰⁷ This standpoint seems to find support in the *North Sea Continental Shelf Cases* judgement of the International Court of Justice (ICJ) which reads that a treaty provision may well become a general rule of international law when there is 'a very widespread and representative participation in the convention'.¹⁰⁸ Yet, others argue that the ratification of international treaties must rather be regarded as an expression of *opinio juris*,¹⁰⁹ and that state practice - if measured exclusively by concrete physical acts¹¹⁰ - is rather sparse than widespread and consistent in this field of law.¹¹¹ Against this background, the issue of delimitation becomes one of utmost importance.

The problem of delimitation stems mainly from the fact that states are legal entities which can express their 'thoughts' and 'views' only through their organs and representatives ie through diplomatic statements, announcements, etc. However, by giving a political statement or announcing a certain position, a state official - be it a politician, a diplomat or some other civil servant - performs necessarily also a physical act which - while expressing an opinion - can equally be regarded as an act of state practice. Thus, strictly speaking, under this reading, state practice and *opinio juris* are quasi congruent.

Yet, such an interpretation would render the element of state practice meaningless and would reduce it to nothing more than a simple mirror of *opinio*

¹⁰⁶ See eg Mark E Villiger *Customary international law and treaties* 2ed (1997) 17.

¹⁰⁷ See eg Schabacker (note 90) at 20.

¹⁰⁸ *North Sea Continental Shelf Cases (FRG v Denmark and The Netherlands)* (note 54) at 43.

¹⁰⁹ See Wolff Heintschel von Heinegg 'Die weiteren Quellen des Völkerrechts' in Knut Ipsen (ed) *Völkerrecht* 5ed (2004) 210 at 220-221.

¹¹⁰ Such as criminal proceedings and prosecutions.

¹¹¹ Scharf (note 66) at 57.

juris. The proof of *opinio juris* would almost inevitably entail the evidence of a sufficient practice of states without having to take into account states' actual conduct on the ground. This could, however, lead to a dangerous division between the development of the law on the one and states' behaviour on the other side. Yet, when law and reality drift too far apart, legal rules and provisions run the risk of becoming ineffective and eventually invalid. The distinction between the two elements should therefore be maintained.

A preferable interpretation would therefore be to differentiate between state practice in a broader and in a narrower sense of the term. In the wider sense of the term, state practice could be *any* possible act or omission, including any oral or written statement or other written acts. However, since for the purpose of establishing a rule of customary international law, a given practice must be accompanied by the conviction of its legal requirement (*opinio juris*), in the narrower sense of the term only those acts or omissions should be considered as legitimate forms of state practice, which in fact are theoretically and practically *able* to be accompanied by this conviction. It is this narrower sense of the term on which the delimitation of state practice and *opinio juris* should be based.

Yet, when one wants to qualify diplomatic or political statements, the acquiescence to UN General Assembly resolutions or the ratification of international treaties as legitimate forms of state practice, where is the legal norm which would require such a conduct? It is difficult to think of any legal rule which would require a state to issue a certain statement, to rule in favour of a certain resolution or to accede to or ratify a particular international treaty. Rather, these acts are done out of political considerations and not because states feel obliged to act in this particular way.

A simple example might highlight these considerations. With regard to the question, whether eg torture is a crime under international law, one may examine the treatment of prisoners, national legislation prohibiting the use of torture or criminal investigations into alleged acts of torture as legitimate forms of state practice. In contrast, *opinio juris* may be deduced from diplomatic or political statements condemning the use of torture as violating international law or from the status of ratification of the Convention against Torture or other relevant international conventions. The fact, however, that the Convention against Torture has now been ratified by 144 of the world's 194 states,¹¹² cannot be quoted as evidence of a sufficiently general, uniform and consistent practice of states, since no state is legally required to sign, ratify or accede to the Convention.

Accordingly, for the purpose of establishing a rule of customary international law, mere oral or written statements or acts can only be considered as an expression of *opinio juris*. State practice, in contrast, must be found in states' behaviour on the ground ie in concrete physical acts.

¹¹² See supra C. I. 2.

2. State Practice

If only concrete physical acts may be considered as providing evidence in favour or against the existence of a certain practice of states, one has to look at criminal investigations, prosecutions and trials in order to determine whether customary international law requires states to prosecute and punish gross human rights offences. A particular emphasis must thereby be placed on the practice of those states which only recently emerged from times of unrest, civil strife or authoritarian rule.¹¹³

a. Examples of Positive State Practice

State practice in favour of the existence of an obligation to prosecute may be found in virtually all parts of the world. In Europe, for instance, after the end of World War II, France, Belgium and the Netherlands tried hundred of thousands of Nazi-collaborators for their crimes committed during German occupation.¹¹⁴ Germany itself tried many of the former guards of the Auschwitz concentration camp in the so-called Frankfurter Auschwitz trials,¹¹⁵ although it has to be admitted that many other Nazi-perpetrators did not have to face criminal prosecutions. As has been mentioned above, Greece tried and convicted several of the leaders who ruled the country in the 1960s and 1970s only months after its transition to democracy,¹¹⁶ whereas in Bosnia and Herzegovina and Kosovo, internationalised hybrid courts, composed of international and national judges and staff, still investigate and prosecute the serious violations of humanitarian law committed during the Balkan wars of the 1990s, which are not dealt with by the ICTY in The Hague.¹¹⁷

In Africa, it is Rwanda, Sierra Leone and Ethiopia which are the front-runners in the fight against impunity. Rwanda, for instance, tries its genocide suspects not only before the ICTR but also before its national criminal courts and before newly created, community based so-called *Gacaca* courts.¹¹⁸ Sierra Leone, in contrast, was the first state which set up an internationalised hybrid court for trying certain perpetrators of international crimes committed during its recent civil

¹¹³ That special attention has to be paid to the practice of those states, which have a particular interest in or which are particularly affected by a certain subject matter, has been repeatedly acknowledged by the ICJ. See eg *North Sea Continental Shelf Cases* (note 54) at 43. See also *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 226 at 263 where the Court paid special attention to the practice of the nuclear powers.

¹¹⁴ Huyse (note 10) at 105.

¹¹⁵ See eg Gerhard Werle *Auschwitz vor Gericht. Völkermord und bundesdeutsche Strafjustiz* (1995).

¹¹⁶ Kutz (note 1) 6.

¹¹⁷ See Project on International Courts and Tribunals, available at <http://www.pict-pecti.org/> (accessed 12 February 2007), for a general overview of internationalised hybrid courts. The recent handing over of several high-profile suspects such as former Croatian army general Ante Gotovina to the ICTY is a further encouraging development in the fight against impunity which might be cited in this regard.

¹¹⁸ See eg Jeremy Sarkin 'The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the *gacaca* courts in dealing with the genocide' (2001) 45, 2 *Journal of African Law* 143.

war.¹¹⁹ And in Ethiopia, the trials of former senior government officials, including former President Mengistu Hailemariam on charges of genocide, torture and other serious crimes are still in progress.¹²⁰

In South America, progress can be reported from Argentina and Chile where far-reaching amnesty laws have been repeatedly challenged and partly overturned. In Argentina, the so-called 'Full Stop and Due Obedience Laws' have been declared null and void, whereas in Chile former President Augusto Pinochet was stripped of his legal immunity and placed under house arrest shortly before his death in December 2006.¹²¹ Former Peruvian President Alberto Fujimori is currently awaiting his extradition to Peru after his arrest in Chile in November 2005 on charges of murder, forced disappearance and torture,¹²² while former Argentine President Isabel Peron now faces extradition from Spain after two international arrest warrants were issued earlier this year by the Argentine judiciary.¹²³

In Asia, lastly, internationalised hybrid courts in Timor-Leste and in the Kingdom of Cambodia are looking into past human rights abuses in their respective states.¹²⁴

b. Examples of Negative State Practice

However, examples of a negative practice of states are at least equally widespread and impossible to overlook. Several states - like eg Guatemala, El Salvador, Haiti, Uruguay, Brazil, Peru, Bahrain, Lebanon or Senegal - have enacted far-reaching amnesty laws which shield offenders of serious human rights violations from criminal prosecution.¹²⁵ In Turkey, Uzbekistan and elsewhere in the region, impunity for human rights violations remain a pressing problem as is the case in many countries of the Middle East.¹²⁶ In Russia, crimes, committed in

¹¹⁹ Former Liberian President Charles Ghankay Taylor is probably the most prominent detainee of the Special Court for Sierra Leone. He is currently awaiting his trial in the prison facilities of the ICTY in The Hague.

¹²⁰ See Amnesty International 'Report 2006 - Ethiopia'. Available at <http://web.amnesty.org/report2006/eth-summary-eng> (accessed 13 February 2007). Former President Mengistu Hailemariam can only be tried in his absence since he enjoys asylum in Zimbabwe.

¹²¹ Amnesty International 'Report 2006 - Regional overview - Americas'. Available at <http://web.amnesty.org/report2006/2am-summary-eng> (accessed 13 February 2007).

¹²² Ibid.

¹²³ Reuters 'Second Argentine judge orders Isabel Peron arrested'. Available at <http://today.reuters.co.uk/news/CrisesArticle.aspx?storyId=N23303612&WTmodLoc=World-R5-Alertnet-5> (accessed 12 February 2007).

¹²⁴ See eg Linton (note 7).

¹²⁵ Michael Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court' (1999) 32 *Cornell Int'l L J* 507 at 507. See also Redress *Reparation for torture - a survey of law and practice in thirty selected countries* (2003). Available at <http://www.redress.org/publications/AuditReportText.pdf> (accessed 14 February 2007) 41-43. Amnesty International 'Report 2006 - Regional overview - Africa'. Available at <http://web.amnesty.org/report2006/2af-summary-eng> (accessed 13 February 2007).

¹²⁶ Amnesty International 'Report 2006 - Regional overview - Europe/Central Asia'. Available at <http://web.amnesty.org/report2006/2eu-summary-eng> (accessed 13 February 2007). Redress (note 125) 43.

the context of the Chechen War, are rarely investigated or prosecuted¹²⁷ and in Sudan, authorities do little to address the current situation of impunity in the region of Darfur.¹²⁸ And while Uganda has already granted amnesty to the leaders and fighters of the rebel Lord's Resistance Army,¹²⁹ further amnesty laws can be expected to be adopted in Algeria,¹³⁰ Afghanistan¹³¹ and Colombia.¹³²

3. Opinio Juris

Unlike the proof of a consistent practice of states, *opinio juris* is rather easy to establish. As has been mentioned above,¹³³ *opinio juris* can be deduced from a variety of different acts such as, *inter alia*, diplomatic or political statements, votes in the UN General Assembly or other UN organs, explanations, statements or votes in other international organisations as well as from the status of ratification of international treaties and conventions. Given the fact that the four Geneva Conventions are now universally accepted and that all of the other aforementioned universally applicable treaties are ratified by at least three quarters of the international community as a whole, one may well argue that states have expressed their commitment to prosecute and punish gross human rights violations on a sufficiently wide scale.

4. Assessment

What conclusions can be drawn from these findings? There is certainly sufficient *opinio juris* for the emergence of a customary international norm which would oblige states to investigate, prosecute and punish grave violations of human rights. Yet, it remains debatable, whether state practice is sufficiently general, uniform and consistent in this field of law. While the aforementioned examples of a positive practice of states should not lightly be swept aside, it is impossible to overlook that impunity for gross human rights violations still persists in many states of the world and that state practice in this field of law is rather heterogeneous than uniform. Hence, while the emergence of a custom based obligation to prosecute should not be ruled out for the future, customary international law in its present state does not contain such a duty.

D. Obligations under International Law to Provide Compensation for Victims of Gross Human Rights Violations

¹²⁷ Amnesty International (note 126).

¹²⁸ Amnesty International (note 125).

¹²⁹ See Manisuli Ssenyonjo 'Accountability of non-state actors in Uganda for war crimes and human rights violations: between amnesty and the International Criminal Court' (2005) 10 *J Conflict & Security L* 405 at 407.

¹³⁰ Amnesty International 'Report 2006 - Regional overview - Middle East/North Africa'. Available at <http://web.amnesty.org/report2006/2md-summary-eng> (accessed 13 February 2007).

¹³¹ International Center for Transitional Justice 'President Karzai must resist parliament's attempt at self-amnesty'. Available at <http://www.ictj.org/en/news/press/release/1122.html> (accessed 12 February 2007).

¹³² Amnesty International (note 121).

¹³³ See supra C. II. 1.

In the aftermath of a military conflict or other widespread violations of internationally recognised human rights, the international community as a whole as well as the states concerned tend to focus predominantly on the role of the perpetrators of gross human rights offences. As has been shown above, this is, in general, not only desirable but rather required by various international human rights treaties as well as international humanitarian law. However, to deal with the perpetrators is only one side of the coin and indeed international law is not just concerned with the prosecution and punishment of the offenders but also with the rights and needs of their victims. Numerous international treaties contain specific provisions regarding victims' rights of reparation and / or compensation and 'soft law' like the 1985 UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹³⁴ or the recently adopted 2006 UN General Assembly resolution on 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 Law¹³⁵ (UN Basic Principles and Guidelines) has further contributed to the development of victims' rights in recent years.

This section will elaborate on states' obligation under international law to provide compensation for victims of gross human rights offences. It will first seek to clarify the rather confusing terminology in the field of victims' rights (I). Subsequently, it will examine the content and scope of victims' rights of

¹³⁴ UN A/RES/40/34 (29 November 1985).

¹³⁵ UN A/RES/60/147 (21 March 2006).

compensation under various international treaties (II). Finally, it will turn to the question whether customary international law requires states to provide compensation for violations of the most fundamental human rights (III).

I. Terminology

There are common misconceptions with regard to the terminology in the field of victims' rights. Terms like 'effective remedy', 'reparation', 'compensation', 'restitution', 'satisfaction' or 'rehabilitation' are often used in an interchangeable way without any clear distinction. Following the terminology of the 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,¹³⁶ a victim's right to remedies includes the 'right to (...)

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms'.¹³⁷

According to this definition, 'remedy' is the most general term used with regard to victim's rights. It refers to the substance of relief (b), to the procedure through which this can be obtained (a) and to the relevant information needed to exercise these rights effectively (c). However, the term 'remedy' is sometimes also used in a stricter sense of the word, referring just to the procedural means - to the effective access to justice - by which a right can be enforced.¹³⁸

In contrast, the term 'reparation' refers only to the substance of relief ie to what the victim seeks to obtain. This may comprise, in accordance with principles

¹³⁶ For a closer examination of the UN Basic Principles and Guidelines see *infra* D. III.

¹³⁷ Principle 11.

¹³⁸ See eg Christian Tomuschat 'Reparation for victims of grave human rights violations' (2002) 10 *Tul J Int'l & Comp L* 157 at 168.

15 to 23, a variety of different forms such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

‘Restitution’ should, as far as possible, ‘restore the victim to the original situation before the (...) [violation] (...) occurred’.¹³⁹ This may include, *inter alia*, the restoration of liberty, identity or citizenship, the return to one’s place of residence or the restoration of employment or return of property.¹⁴⁰

‘Compensation’ is to be understood as ‘financial compensation’ which ‘should be provided for any economically assessable damage’¹⁴¹ resulting from a specific violation of one’s rights, such as, *inter alia*, physical or mental harm, material damages and loss of earnings, moral damages or lost opportunities, including employment or education.

Measures of ‘rehabilitation’ should include psychological and medical care as well as legal and social services.¹⁴²

Acts of ‘satisfaction’ may include, *inter alia*, measures like the disclosure of the truth, the restoration of the dignity of the victims, public apologies including the acknowledgement of the facts and the acceptance of responsibility, or judicial sanctions against offenders and perpetrators.¹⁴³

‘Guarantees of non-repetition’ finally might comprise measures to strengthen the independence of the judiciary, to ensure an effective civilian control of the security forces or to promote mechanisms for preventing and monitoring social conflicts.¹⁴⁴

It should be stressed that *any* of these measures constitute reparations in the sense of the UN Basic Principles and Guidelines. However, since reparations ‘should be proportional to the gravity of the violations and the harm suffered’,¹⁴⁵ it depends on the specific circumstances of each case, which form of reparation must in fact be provided. While an official apology or psychological or medical care can be important and meaningful acts, it is financial compensation which matters most and which is probably the most helpful and welcomed form of reparation for many of the often impoverished victims. In cases of particularly gruesome and gross violations of the most fundamental human rights, financial compensation might also be the only appropriate and proportional form of reparation.

II. International Treaties

1. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

¹³⁹ Principle 19.

¹⁴⁰ Ibid.

¹⁴¹ Principle 20.

¹⁴² Principle 21.

¹⁴³ Principle 22.

¹⁴⁴ Principle 23.

¹⁴⁵ Principle 15.

The Convention against Torture provides explicitly for states' obligation to ensure torture victims' right to obtain adequate compensation for their suffering. According to article 14 (1), states are obliged to

'ensure in [their] legal system[s] that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation'.

It must be noted that article 14 (1) only refers to 'an act of torture' as defined in article 1 (1) of the Convention and does not seem to cover other forms of cruel, inhuman or degrading treatment or punishment in the sense of article 16 (1). Furthermore, article 16 (1), while specifically referring to articles 10, 11, 12 and 13, does not refer to the obligations contained in article 14, thus seemingly restricting the scope of applicability of article 14 (1) to acts of torture only. However, in *Hajrizi Dzemajl et al v Yugoslavia*,¹⁴⁶ the Committee against Torture found that 'article 14 of the Convention does not mean that the state party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision'. The Committee thus extended the scope of applicability of article 14 considerably. While the 'views' of the Committee are legally not binding,¹⁴⁷ they provide interpretation for the Convention's rules and provisions and are therefore most authoritative for clarifying content and scope of the Convention's rights and obligations.

However, article 14 (1) does not contain a direct right for victims of torture to obtain adequate compensation. It just requires states to ensure that their legal systems allow for compensation to be paid. The Committee against Torture has stressed this point in a number of its findings by recommending that states legally recognise the right of victims to fair and adequate compensation¹⁴⁸ or establish compensation funds for victims of torture or other forms of ill-treatment.¹⁴⁹

2. The Geneva Conventions of 1949 and their Additional Protocols of 1977

The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain a number of articles relating to the provision of compensation. Article 51 Geneva Convention I eg states that '[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches [of these Conventions]'.¹⁵⁰ Article 91 Additional Protocol I stipulates that '[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall,

¹⁴⁶ Communication No 161/2000 (2 December 2002).

¹⁴⁷ See Harris (note 94) 765.

¹⁴⁸ Concluding observations of the Committee against Torture: Paraguay A/55/44 (10 May 2000).

¹⁴⁹ Concluding observations of the Committee against Torture: Cuba A/53/44 (21 November 1997).

¹⁵⁰ See also article 52 Geneva Convention II; article 131 Geneva Convention III; article 148 Geneva Convention IV.

if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’.

Yet, whether these obligations exist vis-à-vis the individual itself or rather vis-à-vis the injured state remains an open question. The wording of the relevant articles gives little information in this regard. However, the majority of national courts do not recognize an individual right to compensation under international humanitarian law.¹⁵¹ It is true that eg under the UN Compensation Commission or the Eritrea-Ethiopia Claims Commission such individual rights exist,¹⁵² but this should not be misunderstood as confirmation of the existence of a general individual right to compensation under international humanitarian law. Even *Schwager*, who argues strongly for the existence of such a right, admits that the existing individual rights under these Commission’s statutes do not flow directly from international humanitarian law but have been conferred upon the individual by the respective Commission’s founding documents.¹⁵³ Under present international law, states’ obligation to provide compensation for violations of international humanitarian law is thus only owed to the injured state, not to the injured individual. An individual right to financial compensation under the Geneva Conventions and / or their Additional Protocols can therefore not be established.

3. The International Covenant on Civil and Political Rights

The ICCPR contains a number of articles providing for reparations and / or compensation for victims of human rights abuses. Firstly, as mentioned above,

¹⁵¹ See Elke Schwager ‘The right to compensation for victims of an armed conflict’ (2005) 4 *Chinese J Int’l L* 417 at 423-424.

¹⁵² *Ibid* at 425-427.

¹⁵³ *Ibid* at 426-427. A further argument against the existence of an individual right to compensation under international humanitarian law can be taken from the wording of article 78 Geneva Convention III and articles 52, 101 Geneva Convention IV which grant rights to individuals *expressis verbis* in unequivocal language. Yet, given the fact that the wording of article 51 Geneva Convention I, article 91 Additional Protocol I and the other relevant articles (note 150) are much more vague and ambiguous, an *argumentum e contrario* may lead to the conclusion that *these* norms and provisions do not contain any individual rights but only relate to the rights of states.

article 2 (3) (a) obliges state parties to provide for an effective remedy for any violation of rights or freedoms recognised by the Covenant. More specifically, article 9 (5) gives ‘anyone who has been the victim of unlawful arrest or detention (...) an enforceable right to compensation’. Article 14 (6) finally stipulates that anyone who has been a victim of a miscarriage of justice ‘shall be compensated according to law’.

For the purpose of the present study, the most relevant provision is article 2 (3) (a) ICCPR. The case law of the Human Rights Committee - especially those views dealing with articles 6 (right to life) and 7 (right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment) - is again most enlightening for purposes of the interpretation and understanding of this rule.

In *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v Uruguay*,¹⁵⁴ the Committee was of the view ‘that there are serious reasons to believe that the ultimate violation of article 6 has been perpetrated’ and urged the Uruguayan government ‘to bring to justice any persons found to be responsible for [Eduardo Bleier’s] death, disappearance or ill-treatment and to pay compensation to him or his family for any injury which he had suffered’. In *Lilo Miango v Zaire*,¹⁵⁵ the Committee equally found a violation of articles 6 and 7 of the Covenant and called on the Zairian authorities ‘to pay compensation to [the victims] family’. In another case against Uruguay,¹⁵⁶ the Committee held that article 7 of the Covenant had been violated and concluded that the state of Uruguay ‘is under an obligation to provide [the victim] with effective remedies and, in particular, with compensation for physical and mental injury and suffering’ and in *Juana Peñarrieta, Maria Pura de Toro, et al v Bolivia*,¹⁵⁷ the Committee, having established a violation of article 7, regarded Bolivia as being ‘under an obligation, in accordance with the provisions of article 2 of the Covenant, (...) to grant [the victims] compensation’.

These cases are only some illustrative examples of the Human Rights Committee’s extensive jurisprudence.¹⁵⁸ However, they show quite clearly the Committee’s interpretation of victims’ right to an effective remedy as being enshrined in article 2 (3) (a) and the Committee’s standpoint with regard to financial compensation, at least in cases of grave human rights abuses such as murder or torture. One can thus draw the conclusion that article 2 (3) (a) ICCPR obliges state parties to provide reparations for victims of human rights abuses, which should include compensation at least in cases of particularly gross violations.

4. The International Convention on the Elimination of All Forms of Racial Discrimination

¹⁵⁴ Communication No 30/1978 (29 March 1982).

¹⁵⁵ Communication No 194/1985 (27 October 1987).

¹⁵⁶ *Antonio Viana Acosta v Uruguay* Communication No 110/1981 (29 March 1984).

¹⁵⁷ Communication No 176/1984 (2 November 1987).

¹⁵⁸ Further examples can be found in Theo van Boven *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* UN Doc E/CN.4/Sub.2/1993/8 (2 July 1993) paras 50-59.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) entered into force on 4 January 1969. As of 12 December 2006 it has been ratified by 173 states.¹⁵⁹ South Africa signed the Convention on 3 October 1994 and ratified it on 10 December 1998.

For the purpose of this thesis, article 6 is the most relevant provision. It obliges state parties to ‘assure to everyone within their jurisdiction effective protection and remedies (...) against any acts of racial discrimination which violate his / her human rights and fundamental freedoms contrary to this Convention, as well as the right to seek (...) just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination’.

While article 6 thus acknowledges the right to ‘adequate reparation or satisfaction’, it does not contain any references to the question of financial compensation. However, the Committee on the Elimination of Racial Discrimination states in its General Recommendation No. 26 that the punishment

¹⁵⁹ United Nations Treaty Collection (note 55).

of the perpetrator of the discrimination is not necessarily enough to secure the victims' rights contained in article 6 and urges 'the courts and other competent authorities [to] consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate'.¹⁶⁰ Following this stance, in *Mohammed Hassan Gelle v Denmark*¹⁶¹ the Committee recommended 'adequate compensation for the moral injury' suffered by the petitioner and in *Dragan Durmic v Serbia and Montenegro*¹⁶² the Committee advised to provide 'just and adequate compensation commensurate with the moral damage [of the petitioner]'.

However, it must be noted that the wording of these texts is weak. General Recommendation No. 26 only requires states to 'consider' the awarding of financial compensation and in both Communications the Committee only 'recommends' to provide adequate compensation. Terms like 'to be obliged' or 'being under an obligation' as used for instance by the Human Rights Committee or the Committee against Torture¹⁶³ have carefully been avoided. It seems that in the view of the Committee, while regarding the payment of compensation as desirable, there is yet no strict obligation in this respect. While article 6 thus obliges states to provide 'adequate reparation or satisfaction for any damage suffered', it does not contain the obligation to compensate victims of racial discrimination financially.

5. The European Convention for the Protection of Human Rights and Fundamental Freedoms

Like the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a range of provisions providing for reparations and / or compensation for victims of human rights abuses. According to article 5 (5), victims of an unlawful arrest or detention 'shall have an enforceable right to compensation'. Article 13 provides for an effective remedy for '[e]veryone whose rights and freedoms as set forth in [the] Convention [has been] violated'. Article 41 finally states that '[i]f the Court finds that there has been a violation of the Convention (...), 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'.

The European Court of Human Rights has awarded 'just satisfaction' in well over 100 cases¹⁶⁴ in which *restitutio in integrum* were either impossible because of the nature of the breach or where the internal law of the state concerned did not allow for it. Unlike its meaning in general international law, in the context of the ECHR the term 'just satisfaction' has been interpreted in a more comprehensive sense and may include pecuniary compensation as well as

¹⁶⁰ Committee on the Elimination of Racial Discrimination *General Recommendation No 26* (24 March 2000).

¹⁶¹ Communication No 34/2004 (15 March 2006).

¹⁶² Communication No 29/2003 (8 March 2006).

¹⁶³ See supra D. II. 1. and D. II. 3.

¹⁶⁴ van Boven (note 158) para 81.

compensation for non-pecuniary damages.¹⁶⁵ However, in some cases, the Court found that a favourable decision on the merits were in itself just satisfaction in the sense of article 41 and that a further award of financial compensation was therefore not appropriate.¹⁶⁶ While the Court therefore considers itself *competent* to award compensation, it enjoys - as can be deduced from the adjective 'just' and the term 'if necessary' - 'a certain *discretion* in the exercise of [this] power'.¹⁶⁷ Given these discretionary powers, it is debatable whether the individual has a right to 'just satisfaction' *prior* to the Court's judgement. Yet once the judgement has been delivered, the existence of this right is indisputable.¹⁶⁸

In practice, however, this distinction is of little relevance at least for the most severe violations of the Convention's rights, since the Court - despite its margin of discretion - has seldom denied victims' claims for compensation in cases of *serious* human rights infringements. A cursory review of the Court's relevant decisions reveals that financial compensation has been granted in almost all of these particular cases with awards ranging between 10 000 £ to 30 000 £ for non-pecuniary damages only.¹⁶⁹ The Court has frequently stressed that it makes its assessments on an equitable basis, thus taking into account specific circumstances such as eg the gravity or the seriousness of the violation in question.¹⁷⁰ Against this background one might well argue that - at least in cases of *serious* violations of human rights - article 41 contains a true and comprehensive right to 'just satisfaction' in the form of financial compensation even prior to the Court's decision. This right is vested in the individuals themselves and directed against the offending state with the individual as the right- and the state as the duty-holder. States' corresponding obligation to afford 'just satisfaction' is therefore not - at least not primarily - an obligation towards the other contracting parties but is owed to the injured individual.¹⁷¹ It is this shift in the role of the right-holder which differentiates the ECHR's reparation regime from those of the aforementioned treaties and conventions.¹⁷²

6. The American Convention on Human Rights

The American Convention on Human Rights (ACHR) entered into force on 18 July 1978. As of 13 December 2006 it has been ratified by 24 of the 35 member states of the Organization of American States.¹⁷³

¹⁶⁵ Ibid. See also Matti Pellonpää 'Individual reparation claims under the European Convention on Human Rights' in Albrecht Randelzhofer and Christian Tomuschat (eds) *State responsibility and the individual* (1999) 109 at 112.

¹⁶⁶ Arthur Henry Robertson and John Graham Merrills *Human rights in Europe* 3ed (1993) 314.

¹⁶⁷ *Guzzardi v Italy* (1981) 3 EHRR 333 para 114.

¹⁶⁸ Riccardo Pisillo-Mazzeschi 'International obligations to provide for reparation claims?' in Randelzhofer and Tomuschat (note 165) 149 at 169.

¹⁶⁹ See eg *Tas v Turkey* (2001) 33 EHRR 325 (20 000 £ respectively 10 000 £); *Aydin v Turkey* (1998) 25 EHRR 251 (25 000 £); *Aksoy v Turkey* (1997) 23 EHRR 553 (24 000 £); *Z and Others v United Kingdom* (2002) 34 EHRR 97 (32 000 £).

¹⁷⁰ Pellonpää (note 165) at 123.

¹⁷¹ Ibid at 110.

¹⁷² See infra D. II. 6. for a more detailed elaboration on this issue.

¹⁷³ Organization of American States. Available at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DIL/treaties_and_agreements.htm (accessed 13 December 2006).

The American Convention on Human Rights contains equally far reaching provisions regarding victims' rights to compensation for gross human rights abuses. For the purpose of the present study, the most important of these provisions is article 63 (1) which enjoins the Inter-American Court of Human Rights to 'rule, if appropriate, that the consequences of the measure or situation that constituted the breach of [rights or freedoms protected by the Convention shall] be remedied and that fair compensation [shall] be paid to the injured party'. Judgements stipulating 'compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state' in accordance with article 68 (2) of the Convention.

In its landmark *Velásquez Rodríguez* case¹⁷⁴ the Inter-American Court of Human Rights interpreted these provisions and the obligations contained in article 1 (1) of the Convention in a most comprehensive manner. Taking into account article 63 (1), the Court held that, as a consequence of states' obligation 'to respect the rights and freedoms recognized [by the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms',¹⁷⁵ 'States must prevent, investigate and punish any violations of [these] rights (...) and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations'.¹⁷⁶ Referring to the *Factory at Chorzów* case,¹⁷⁷ the Court deemed that '[it] is a principle of international law that every violation of an international obligation which results in harm creates a duty to make adequate reparation [and that] [c]ompensation (...) is the most usual way of doing so'.¹⁷⁸ The Court thus embarked on a very victim-friendly course and deliberately chose to disregard its margin of discretion¹⁷⁹ in regards to the awarding of compensation. However, the Court stopped short of awarding punitive damages, stating that the term 'fair compensation' as referred to in article 63 (1) is of a compensatory nature.¹⁸⁰

It is however surprising that the Court based at least parts of its reasoning on the *Factory at Chorzów* case. After all - as will be shown below - this case does not relate to any individual rights but deals exclusively with *states'* right to compensation for internationally wrongful acts. Nevertheless, it has been repeatedly referred to as supporting the existence of an *individual* right to

Trinidad and Tobago denounced its ratification on 26 May 1998. Canada and the United States are not parties to the Convention.

¹⁷⁴ *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Merits)* [1988] Inter-American Court of Human Rights (Ser C) No 4 and *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Compensation)* [1989] Inter-American Court of Human Rights (Ser C) No 7.

¹⁷⁵ Article 1 (1) ACHR.

¹⁷⁶ *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Merits)* (note 174) para 166.

¹⁷⁷ *Chorzów Factory (Germany v Poland) (Jurisdiction)* [1927] PCIJ (Ser A) No 9 at 21 and *Chorzów Factory (Germany v Poland) (Merits)* [1928] PCIJ (Ser A) No 17 at 29.

¹⁷⁸ *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Compensation)* (note 174) para 25.

¹⁷⁹ Similar to article 41 ECHR, this margin of discretion can be deduced from the term 'if appropriate' in article 63 (1) ACHR.

¹⁸⁰ *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Compensation)* (note 174) paras 37-39.

compensation for gross human rights abuses under international law.¹⁸¹ Most recently for instance, the ICJ, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, after referring to the judgement on the merits, concluded that

‘Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from *any natural or legal person* for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the *persons* in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, *all natural or legal persons* having suffered any form of material damage as a result of the wall’s construction’.¹⁸²

However, while it is true that the *Factory at Chorzów* case laid down some fundamental principles with regard to the law of reparation, it does not say at any point that states are under a legal obligation to provide compensation to their own nationals or indeed to any individual in cases where they might have suffered harm at the hands of public authorities.¹⁸³ In contrast, the Court stated quite clearly ‘that the object of the German application can only be to obtain reparation due to a wrong suffered by Germany in her [own] capacity (...)’¹⁸⁴ and confirmed the view of the agent for the German government that ‘[t]he present dispute is (...) a dispute between governments and nothing but a dispute between governments’.¹⁸⁵ The *Factory at Chorzów* case might therefore be consulted as an authority for compensation claims on an inter-state level but not for the existence of an *individual* right to compensation under international law.

However, there is one passage in the judgment which could be of considerable value although it seems to be repeatedly overlooked. After having concluded that the present case only deals with the rights and obligations of states, the Court continued that ‘[i]nternational law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State’.¹⁸⁶ In other words, if states agree that individuals shall have a direct right of compensation for violations of international law, they might grant such rights according to their corresponding intentions. Numerous international agreements conferring direct rights upon individuals have been concluded since.¹⁸⁷

But is the ACHR such a direct-rights-granting treaty? The wording of the Convention seems to suggest this assumption. Many of its articles start with the

¹⁸¹ See eg W Michael Reisman ‘Compensation for human rights violations: the practice of the past decade in the Americas’ in Randelzhofer and Tomuschat (note 165) 63 at 80, stating that ‘*Chorzow* has become a mantra which is evocative but imprecise’.

¹⁸² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 198.

¹⁸³ Tomuschat (note 138) at 166.

¹⁸⁴ *Chorzów Factory (Germany v Poland) (Merits)* (note 177) at 26.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid* at 28.

¹⁸⁷ See Albrecht Randelzhofer ‘The legal position of the individual under present international law’ in Randelzhofer and Tomuschat (note 165) 231 at 235-240 for a non-exhaustive enumeration.

phrase '[e]very person has the right to (...)'¹⁸⁸ whereby 'person' has to be understood as 'every human being'.¹⁸⁹ In contrast, where the Convention refers to the state parties, it does so *expressis verbis*.¹⁹⁰ However, it is interesting to note that article 63 ACHR is the only provision in the entire Convention which uses the ambiguous term 'injured party' which leaves some room to manoeuvre for further interpretation: are only states 'injured parties' in the sense of article 63 or can individuals also be subsumed under this indeterminate term?

The Inter-American Court of Human Rights has interpreted article 63 ACHR in the latter sense without giving any explanations for its finding.¹⁹¹ However, two good reasons support the interpretation of the Court:

The first derives from the wording of article 63 (1) (1) itself which states that the Court, in the event of a violation of a right or freedom protected by the Convention, 'shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated'. Yet, since the rights and freedoms ensured by the Convention are individual rights and individual freedoms which can only be enjoyed by individual persons, only they can be 'the injured party' in the sense of article 63 (1) (1). It thus appears to be only logical to interpret the term 'injured party' as used in article 63 (1) (2) in the same way.

The second reason in support of the Court's interpretation relates to the Convention's most effective implementation. 'Ordinary' international treaties are usually enforced by states in whose interest the respective agreements were made. However, international human rights conventions are concluded in the interest of the *people*, who are the primary beneficiaries of the conventions' rights and freedoms. Accordingly, states' willingness to enforce these kinds of conventions is less pronounced than it is with regard to 'conventional' international treaties, since it is not *their* rights and interests that are primarily at stake.

In contrast, if the individual beneficiaries are able to defend their rights and interests themselves and to claim compensation in their own right, violations of the ACHR are much more likely to be taken up and brought to the Court's attention. After all, the prospect of receiving compensation oneself is a much stronger incentive for initiating legal action than the prospect that some foreign states might be granted compensation for one's own suffering. It further does not seem to be in compliance with the concept and nature of compensation in general,

¹⁸⁸ See eg articles 3, 4 (1), 5 (1), 7 (1), 8 (1), 10 ACHR. Similar formulations can be found eg in articles 4 (6), 8 (2), 11 (1) and (3), 12 (1), 13 (1) ACHR.

¹⁸⁹ Article 1 (2) ACHR.

¹⁹⁰ See eg article 27 (1), 28 (1), 29 (a), 45 (1).

¹⁹¹ *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Merits)* (note 174) paras 192-194.

if states may receive compensation for violations of rights and freedoms of which they are not the primary beneficiaries.

Accordingly, similar to the legal position under the ECHR, a state's duty to provide 'fair compensation' is again primarily owed to the *injured individual* rather than to the individual's state of origin or to the other contracting parties, which gives the individual at least a partial legal personality under the ACHR.¹⁹²

7. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) entered into force on 21 October 1986. As of 23 June 2006 it has been ratified by all of the African Union's 53 member states.¹⁹³ South Africa signed and ratified the Charter on 9 July 1996.

The African Charter on Human and Peoples' Rights provides for a right to 'adequate compensation' in article 21 (1) and (2). According to this provision '[a]ll peoples shall freely dispose of their wealth and natural resources' and '[in] no case shall a people be deprived of it'. 'In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'. So far, the African Commission on Human and Peoples' Rights had to adjudicate only once on this provision. In *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*¹⁹⁴ the Commission found the Nigerian policy to grant multinational companies the right to exploit oil in the Ogoniland to be in violation of article 21 and appealed to the Nigerian government to ensure adequate compensation to the victims.

It should however be noted that article 21 of the African Charter does not contain any *individual* rights but rather rights of *peoples*. Yet, without giving any further explanation, the Commission recommended the payment of compensation also in cases where *individual* rights have been infringed. In *John K. Modise v Botswana*¹⁹⁵ for instance, the Commission found Botswana in violation of various articles of the African Charter and consequently urged the Botswana government 'to take appropriate measures to recognise Mr. John Modise as its citizen by descent and [to] compensate him adequately for the violations of his rights occasioned'. In *Law Office of Ghazi Suleiman v Sudan*¹⁹⁶ the Commission requested 'the Government of Sudan to duly compensate the victims' who were tortured in detention. And in a case against Burkina Faso,¹⁹⁷ the Commission recommended the Republic of Burkina Faso to '[compensate] the victims of the human rights violations stated in the complaint'.

¹⁹² Pisillo-Mazzeschi (note 168) at 170.

¹⁹³ African Union. Available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (accessed 13 December 2006).

¹⁹⁴ Communication No 155/96 (October 2001).

¹⁹⁵ Communication No 97/93 (October / November 2000).

¹⁹⁶ Communications Nos 222/98 and 229/99 (May 2003).

¹⁹⁷ *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* Communication No 204/97 (April / May 2001).

It must be stressed that apart from article 21 there is no other explicit provision in the African Charter providing for financial compensation of victims of human rights abuses. The Commission further never expressly revealed on what legal basis it recommends state parties to pay compensation to victims of such offences. But if one looks at the wording of articles 1¹⁹⁸ and 2¹⁹⁹ of the African Charter on Human and Peoples' Rights and compares it with the wording of article 1 of the American Convention of Human Rights,²⁰⁰ the similarities are striking. Accordingly, in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*²⁰¹ the Commission held that article 1 of the African Charter not only requires states to 'recognise the rights, duties and freedoms enshrined in the Charter, [but] also [to] commit themselves to respect them and to take measures to give effect to them. (...) [Failure] to ensure respect of the[se]

¹⁹⁸ 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them'.

¹⁹⁹ 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter (...)'.
²⁰⁰ 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms (...)'.
²⁰¹ Communication No 204/97 (April / May 2001).

rights (...) constitutes a violation of the Charter'. Both treaties therefore oblige states to 'respect' and 'ensure the exercise' of their respective rights and freedoms. Given the fact that the Inter-American Court of Human Rights in its *Velásquez Rodríguez* case deduced from this obligation that states must 'provide compensation as warranted for damages resulting from the violation',²⁰² one might assume that the Commission - while not stating this explicitly - grounds its recommendations regarding *individual* victims' compensation on the jurisprudence of the Inter-American Court of Human Rights.

Yet, this is just an assumption which cannot conceal the remaining legal uncertainties. As long as the Commission does not clarify the legal basis for its award of compensation and given the Committee's so far sparse jurisprudence, it would be premature to speak - apart from the *peoples'* right of article 21 - of a true and real obligation to provide financial compensation for victims of human rights abuses under the African Charter.

III. Customary International Law

As has been shown, various international treaties oblige state parties to provide financial compensation for victims of gross human rights abuses. However, since treaties can generally not create any obligations for non-state parties but are only able to bind those states which have consented to them,²⁰³ one cannot speak of a truly universal obligation unless customary international law provides for similar rules and duties.

As has been mentioned above, a rule of customary international law requires for its emergence, state practice and *opinio juris*. Although it has been emphasised that the rules and obligations contained in the UN Basic Principles and Guidelines 'do not entail new international or domestic legal obligations',²⁰⁴ ie only reflect existing customary international law, this might be a rather misleading formulation. While it is true that the consensus orientated drafting process of the UN Basic Principles and Guidelines resulted in a draft which finally enjoyed broad sympathies on the international stage,²⁰⁵ this fact alone can hardly justify the assumption that the text in its entirety is an expression of pre-existing customary

²⁰² *Velásquez Rodríguez Case (Velásquez Rodríguez v Honduras) (Merits)* (note 174) para 166.

²⁰³ Articles 34 and 35 VCLT.

²⁰⁴ Preambular paragraph 7 of the UN Basic Principles and Guidelines.

²⁰⁵ The UN Basic Principles and Guidelines are based on Theo van Boven's study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (note 158) which was prepared on request of the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities. Van Boven presented a first draft in 1997 which was subsequently circulated among interested states and organisations. Based on the comments received, M Cherif Bassiouni prepared a second draft which was presented to the Commission on Human Rights in April 2000. In April 2005, the Commission on Human Rights approved a revised version of this second draft with a 40/0/13 majority. After some 20 years of work, in March 2006, the UN General Assembly eventually adopted the UN Basic Principles and Guidelines (note 135) by consensus. For a more detailed description of the drafting history see M Cherif Bassiouni 'International recognition of victims' rights' (2006) 6 *Hum Rts L Rev* 203 at 247-250.

rules.²⁰⁶ A close examination of states' practice and their corresponding explanations and justifications in respect of victims' rights of compensation is therefore unavoidable. Before this can be done, some observations must however be made with regard to the law of state responsibility which provides for the scope of states' responsibilities for violations of international law outside a specific treaty regime.

1. The Law of State Responsibility

The law of state responsibility consists mainly of customary rules and principles since there is no comprehensive international convention regulating the rights and duties of states in the event of an internationally wrongful act. Although in 2001 the International Law Commission adopted a set of Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC-Draft Articles), these norms are still just a draft without legal force in a proper sense. However, despite this fact, they might serve as a helpful legal guidance, since they entail - at least in parts and apart from some progressive legal developments - a codification

²⁰⁶ See eg Bassiouni (note 205) at 250 Fn 249 who states that 'the comments of various Member States indicate that the controversy surrounding the interpretation of the scope of the document still exists'.

of existing customary rules.²⁰⁷ Whether or not states decide to convert them into a fully-fledged international convention remains to be seen. In any case, they are most likely to provide the basis for future judicial decisions and state practice.²⁰⁸

The law of state responsibility comes into play when a state is in violation of its international legal obligations, ie commits an internationally wrongful act. When a certain conduct, attributable to a certain state, is in breach of this state's international commitments, this state is under a legal 'obligation

- (a) [t]o cease that act, if it is continuing;²⁰⁹
- (b) [t]o offer appropriate assurances and guarantees of non-repetition (...);²¹⁰
- (c) and 'to make full reparation for the injury caused by the [conduct in question]'.²¹¹

Accordingly, when a state is in breach of its international obligations to respect and ensure the free and full exercise of internationally recognised human rights - whether these are based on international treaties or rooted in customary international law - it is legally responsible for this violation and obliged to make reparation for the injury caused.

While this is not the place for a general discussion of content and scope of international human rights under customary international law, it must be noted that the overwhelming majority of practitioners, scholars and courts agree about the customary nature of the most basic human rights, such as the freedom from '(a) genocide, (b) slavery or slave trade, (c) (...) murder or [forced] disappearance (...), (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights'.²¹² Most even regard these rights as being part of the exclusive category of peremptory norms and provisions from which no derogation can be permitted.²¹³ These most fundamental human rights are therefore binding upon *all* states no matter which international conventions they might or might not have ratified. A state which, as a matter of state policy, encourages, practises or condones any of

²⁰⁷ Harris (note 94) 504. An earlier version of the ILC-Draft Articles have already been cited by the ICJ. See eg *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7 at 40-41. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (note 182) at 195.

²⁰⁸ Harris (note 94) 505.

²⁰⁹ Article 30 ILC-Draft Articles.

²¹⁰ *Ibid.*

²¹¹ Article 31 ILC-Draft Articles.

²¹² *Rest. 3rd, Restatement of the foreign relations law of the United States*, § 702. Note that the restatement's enumeration is a rather conservative list and that some scholars would enclose additional rights like the right of self-determination, the right to equality before the law or the prohibition of retroactive penal measures. See Harris (note 94) 777-778 for an overview of different opinions. The restatement's enumeration might thus be regarded as the lowest common denominator.

²¹³ *Rest. 3rd, Restatement of the foreign relations law of the United States*, § 702, note 11. For a generally recognised definition of the concept of peremptory norms see article 53 VCLT.

these acts is thus in violation of its international obligations and responsible in the aforementioned sense.

But towards whom does this responsibility exist? Historically, only states were subjects of international law while individuals - with few exceptions in the area of humanitarian law - were regarded as objects, not capable of bearing any rights or duties.²¹⁴ This means that even though an individual might have been the direct victim of a certain violation or offence,²¹⁵ it was the victim's state of nationality which was deemed injured under international law. Accordingly, responsibility for internationally wrongful acts existed only vis-à-vis the injured state or states and thus exclusively on an inter state level.²¹⁶ Article 33 (1) of the ILCs Draft Articles codifies this doctrine by stating that

'[t]he obligations of the responsible State (...) may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach'.

However, as can be seen by the inclusion of the phrase 'or to the international community as a whole', there seems to be a shift towards a broader concept of state responsibility. In fact, this phrase reflects recent legal developments which were set in motion by the ICJs judgment in the *Barcelona Traction* case.²¹⁷ Here, the Court ruled that

'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. (...) [T]hey are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.²¹⁸

What can be deduced from this finding? By introducing the legal concept of obligations *erga omnes*, the Court stressed that some obligations are of such paramount importance that their observance is owed to the international community as a whole. A violation of such a duty must consequently be considered as an offence which affects the international legal order in its entirety and not just the directly injured state. Thus, *every* member of the international community - every single state - may have the right and interest to take action against the offending state in order to protect the international legal order.²¹⁹

Van Boven seems to take the matter even further. By stating 'that the obligations resulting from [a state's] responsibility for breaches of international

²¹⁴ Bassiouni (note 205) at 212. See also Volker Epping 'Völkerrechtssubjekte' in Ipsen (note 109) 55 at 95.

²¹⁵ For example in cases of violations of customary international norms with regard to the treatment of aliens.

²¹⁶ van Boven (note 158) para 42.

²¹⁷ *Barcelona Traction, Light and Power Company, Ltd. (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3.

²¹⁸ Ibid at 32.

²¹⁹ See Theodor Meron *Human rights and humanitarian norms as customary law* (1989) 191.

human rights law entail corresponding rights on the part of individual persons (...) who are victims of those breaches',²²⁰ he seems to suggest that even individuals have the right to invoke the principles of state responsibility in cases of violations of their fundamental rights and freedoms. It is now recognised that individual persons have at least partial legal capacity in some fields of international law²²¹ but is this sufficient to confer upon them the right to invoke the international responsibility of states without the intermediation of a state on their own account? The judgment of the ICJ does not address this question and the ILCs Draft Articles are silent on this point. However, article 33 (2), referring to the regulatory content of section (1), states that

'[t]his (...) is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.

The ILC thus acknowledged the *possibility* that individual persons or entities other than a state might be able to invoke the international responsibility of a state, while leaving it open whether and under what circumstances such a right exists. It therefore depends on the specific primary obligation - ie the violated right or duty - and on state practice and *opinio juris* 'whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account'.²²² The law of state responsibility itself is silent on this matter.

2. State Practice and Opinio Juris

a. State Practice

While victims' rights of compensation under various international treaties and conventions have been discussed above, it remains to be examined whether there is a sufficiently uniform and consistent practice of states to support the emergence of such rights under customary international law. As has been mentioned above, special attention needs to be paid to the practice of those states which have a particular interest in or which are particularly affected by the question of financial compensations.²²³

²²⁰ van Boven (note 158) para 45.

²²¹ Epping (note 214) at 96-97. Karl Doehring *Völkerrecht* (1999) 110. Randelzhofer (note 187) at 232.

²²² International Law Commission *Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) 234-235. Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 25 January 2007).

²²³ *North Sea Continental Shelf Cases* (note 54) at 43. See also *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* (note 113) at 263.

α. Examples of Positive State Practice

Most Southern American states have established some form of mechanism for granting compensation to victims of gross human rights abuses. In Argentina, Act No. 23,466 grants a non-contributory pension to relatives of persons who disappeared during the time of military rule while Act No. 24,411 provides for the granting of compensation with regard to persons who died as a result of maltreatment by the military or other security forces.²²⁴ In Chile, following a recommendation of the National Commission on Truth and Reconciliation, victims recognised by the Commission receive monthly allowances equivalent to about 350 US\$ to 490 US\$ as well as a lump sum compensation equivalent to the amount of a yearly allowance.²²⁵ Venezuela and Uruguay acknowledge victims' rights to compensation in their respective Constitutions²²⁶ while Mexico and Paraguay provide compensation through their criminal justice systems.²²⁷

In Asia, India and Sri Lanka are the front-runners in the field of victims' rights. Their respective Supreme Courts have developed a rather impressive jurisprudence which enables victims to obtain compensation more easily.²²⁸ In Bangladesh, South Korea and Japan, compensation for unlawful acts committed by public officials can be claimed as a constitutional right.²²⁹ China gives victims of torture or other grave violations of human rights a right to compensation under its 1994 State Compensation Act²³⁰ while in Nepal the 1996 Torture Compensation Act provides for the compensation of anybody tortured in detention.²³¹

In Europe, most legal systems provide for the compensation of victims of crime. The decree of the Supreme Council of the Republic of Belarus grants victims of political repression in the 1920s - 1980s restitution, compensation and other forms of benefits.²³² In Sweden, compensation can be claimed for any loss of life or personal injury caused by a wrongful act in the course of the exercise of public authority under the Tort Liability Act.²³³ Croatia, Romania, France and Greece provide compensation through their criminal justice systems²³⁴ while Germany compensates victims of Nazi persecution through its Final Federal Compensation Law.²³⁵ Finally, in Africa, relevant state practice can be found, *inter alia*, in Namibia, Cameroon, Mauritius, Morocco and Uganda. Morocco eg

²²⁴ Commission on Human Rights *Question of the human rights of all persons subjected to any form of detention or imprisonment* UN Doc E/CN.4/1996/29 (27 November 1995).

²²⁵ *Ibid.*

²²⁶ Katharine Shirey 'The duty to compensate victims of torture under customary international law' (2004) 14 *SPG Int'l Legal Persp* 30 at 33.

²²⁷ *Ibid.*

²²⁸ Redress (note 125) 43.

²²⁹ Shirey (note 226) at 33.

²³⁰ Commission on Human Rights (note 224).

²³¹ Asian Human Rights Commission 'The right against torture is an absolute one'. Available at <http://www.ahrchk.net/pub/mainfile.php/torture3/37/> (accessed 13 February 2007).

²³² Commission on Human Rights *The administration of justice and the human rights of detainees* UN Doc E/CN.4/Sub.2/1995/17 (11 May 1995).

²³³ Commission on Human Rights (note 224).

²³⁴ Shirey (note 226) at 33.

²³⁵ van Boven (note 158) paras 107-111.

provides for the payment of compensation under its Code of Criminal Procedure and its Code of Obligations and Contracts.²³⁶ Mauritius allows for compensation claims under articles 1382 and 1384 of its Civil Code.²³⁷ Cameroon has only recently paid compensation to an unlawfully arrested journalist who had been tortured in detention,²³⁸ while in Uganda, the national Human Rights Commission has the authority to order the payment of compensation to victims of human rights abuses.²³⁹

β. Examples of Negative State Practice

While the aforementioned examples of state practice are encouraging developments towards the emergence of a customary obligation to provide victims of gross human rights abuses with adequate compensation, it is impossible to overlook the wealth of contradictory practice in other parts of the world. Some countries like the Ukraine or the Central African Republic do not seem to have any compensation laws at all.²⁴⁰ But even where relevant legislature has been put in place most laws are either inadequate or insufficiently implemented: in states like eg Indonesia, Uzbekistan, Russia or Peru, awards seem to be the exception rather than the rule²⁴¹ whereas Iranian law grants compensation only to persons of the Muslim faith.²⁴² Israel appears to be reluctant to pay compensation to certain Palestinians²⁴³ while Turkey still seems to struggle to fulfil the reparation related requirements of the judgments of the European Court of Human Rights.²⁴⁴

In addition, even some of the positive examples mentioned above have their major flaws and shortcomings. The Nepalese Torture Compensation Act has been proven rather ineffective and the amounts awarded have been low.²⁴⁵ In Belarus, measures of reparation are reserved to victims of political persecution of the 1920s - 1980s only, and China's limited definition of torture restricts the scope of application of its State Compensation Act considerably.²⁴⁶ State practice in this field of law can therefore only be described as heterogeneous.

b. Opinio Juris

In contrast, *opinio juris* is rather easy to establish. In pursuance to the definition developed above,²⁴⁷ *opinio juris* can be found, *inter alia*, in diplomatic or political statements, votes in the UN General Assembly or other UN organs, in

²³⁶ Commission on Human Rights *Question of the human rights of all persons subjected to any form of detention or imprisonment* UN Doc E/CN.4/1996/29/Add.1 (4 January 1996).

²³⁷ Commission on Human Rights (note 224).

²³⁸ Reporters without borders 'Cameroon - annual report 2002'. Available at http://www.rsf.org/article.php3?id_article=1725 (accessed 14 February 2007).

²³⁹ See article 53 (2) Constitution of the Republic of Uganda, 1995.

²⁴⁰ Shirey (note 226) at 33.

²⁴¹ Ibid. See also Redress (note 125) 43-44.

²⁴² Shirey (note 226) at 33.

²⁴³ Ibid.

²⁴⁴ Redress (note 125) 44.

²⁴⁵ Ibid 43.

²⁴⁶ Shirey (note 226) at 33.

²⁴⁷ See supra C. II. 1.

explanations, statements or votes in other international organisations as well as in international treaties and conventions. Given the fact that the four Geneva Conventions are now universally accepted and that all of the aforementioned universally applicable treaties are ratified by at least three quarters of the international community as a whole, one may well argue that states have expressed their commitment to provide compensation to victims of serious human rights violations on a sufficiently wide scale. The fact that the UN General Assembly adopted the UN Basic Principles and Guidelines by consensus is a further significant argument in support for this assumption.²⁴⁸

c. Assessment

What conclusions can be drawn from these findings? There is certainly sufficient *opinio juris* in support of the existence of a customary obligation to provide victims of gross human rights abuses with financial compensation. But is there also a general, uniform and consistent practice of states? It seems, as if there is a fairly large discrepancy between national legislation on the one hand and the actual practice ie the implementation of these laws on the other. The latter, however, must be given greater significance, since it reflects states' true behaviour on the ground more accurately. Hence, given the fact that some states have not enacted any compensation laws at all and that existing laws and regulations are often insufficiently implemented, state practice is neither general, nor uniform and consistent in this field of law. One can thus only draw the conclusion that customary international law - at least in its present state - might possibly contain an obligation to provide some form of reparation for gross human rights abuses. However, it does not oblige states to provide financial compensation to victims of gross human rights violations.

E. South Africa's Compliance with International Legal Obligations

After having examined the state of international law with regard to the questions of prosecution and compensation, it remains to be seen whether the South African transitional process was in compliance with the country's international legal obligations. Given the importance and significance of the transitional process of South Africa in general and the South African Truth and Reconciliation Commission in particular as a potential model for transitional

²⁴⁸ The widespread ratification of the ECHR and the ACHR is further important evidence for the existence of *opinio juris* at least in Europe and the Americas.

processes and truth commissions in other transitional contexts, this is not only important with regard to South Africa itself but also with regard to the question, whether the South African transitional model might be 'exported' and lawfully employed in other parts of the world.

I. Customary International Law

As has been shown, customary law in its present state does not contain any legal obligations with regard to the matters of prosecution or compensation for serious violations of human rights. While such obligations might now be well in the process of emergence, they certainly did not exist in the second half of the 1990s when South Africa had to decide upon how to deal with its burdensome past. No violation can therefore be established with regard to South Africa's duties and obligations under customary international law.

II. International Treaties

Somehow more complex is the legal situation with regard to the international treaties and conventions South Africa has ratified. Although the four Geneva Conventions were the only relevant international treaties which were binding upon South Africa under the Apartheid rule, at least some of the other aforementioned international conventions might be of significance too, since they were all signed, ratified or acceded to during the period of transition.

1. The Geneva Conventions of 1949

As has been said, the four Geneva Conventions were the only relevant international treaties binding upon South Africa during the Apartheid rule. This might have been the reason why they were also the only international norms and provisions²⁴⁹ which were examined more closely by the Constitutional Court of South Africa, in its ruling on the constitutionality of section 20 (7) of the PNURA.²⁵⁰ Although this judgement - from the perspective of international law - was rather disappointing, it was correct in its assessment that 'it is doubtful whether the Geneva Conventions (...) apply at all to the situation in which this country found itself during the years of the conflict [of the past]'.²⁵¹

In order to find an answer to this question, one needs to differentiate between the South African internal conflict on the one and the various cross-border activities of the South African security forces on the other side. While the applicability of international humanitarian law in relation to the former might be disputable, there can be little doubt that with regard to the latter, the Geneva Conventions were fully applicable. Although South Africa never declared war against its front-line states,²⁵² its invasion into Angola and its military activities in

²⁴⁹ Apart from Additional Protocols I and II.

²⁵⁰ See *Azapo v President of the Republic of South Africa* (note 76) paras 24-32.

²⁵¹ Ibid para 29.

²⁵² Gunnar Theissen *Amnesty for Apartheid crimes? The South African Truth and Reconciliation Commission and international law* (1998) LLM Dissertation, University of the Western Cape at 29. An official declaration of war is indeed not required for the Geneva Conventions to apply.

Mozambique and Namibia do clearly qualify as international armed conflicts in accordance with the Conventions common article 2.²⁵³ Thus, acts like the attack on the Kassinga refugee camp in Angola where the use of fragmentation bombs killed and maimed indiscriminately,²⁵⁴ and other crimes which might be subsumed under the grave breaches provisions of the Geneva Conventions²⁵⁵ had to be investigated, prosecuted and punished. Hence, section 20 (7) PNURA clearly violates South Africa's legal obligations under international humanitarian law.

In contrast, with regard to the internal confrontation inside South Africa's borders, the situation is far more ambiguous. The decisive question is here, whether this conflict can rightfully be considered as a non-international armed conflict in the sense of the Conventions common article 3. While the Geneva Conventions do not provide for a positive definition of the term 'non-international armed conflict', article 1 (2) Additional Protocol II provides for a negative delimitation by stating that '[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.

The question is now, whether the situation in South Africa should either be considered as a non-international armed conflict or whether it should be subsumed under the definition of article 1 (2) Additional Protocol II. In the early days of the struggle, the situation was largely characterised by demonstrations, passive resistance and sporadic acts of violence, which did not reach the threshold of violence of article 1 (2) Additional Protocol II. However, at the latest after the declaration of the state of emergency in 1985, the situation became more violent and chaotic and appeared to increasingly move towards a fully-fledged military confrontation.²⁵⁶ The South African national government considered itself to be at war and the country to be subjected to a 'total onslaught', which had to be countered by decisive anti-revolutionary warfare.²⁵⁷ Therefore, at least after the declaration of the state of emergency, South Africa's internal strife resembled largely a non-international armed conflict in the sense of the Conventions' common article 3. Accordingly, South Africa was under a legal obligation to prosecute and punish any violation of the prohibitions of the Conventions' common article 3 committed during the state of emergency from 1985 to 1990.²⁵⁸

Common article 2 stipulates unequivocally that 'any other armed conflict which may arise between two or more of the High Contracting Parties' may open the Conventions' scope of application.

²⁵³ Ibid.

²⁵⁴ Ibid at 30. See also Truth and Reconciliation Commission of South Africa *Report* vol 2 (1998) 46-55. The South African Defence Force (SADF) bombed the camp despite its prior knowledge of the presence of civilians. More than 450 women and children were killed. The SADF further failed to protect and care for the wounded and some - irrespective of their status as combatants or civilians - seemed to have been shot randomly.

²⁵⁵ Like the abduction and torture of Angolan citizens and South West African refugees at the Oshakati military base or the extra-judicial killings and summary executions of captured enemy combatants by the special operations unit *Koevoet*. See Truth and Reconciliation Commission of South Africa (note 254) 64-77. See also Eugene de Kock *A long night's damage: working for the Apartheid state* (1998) 72-74, who describes how a captured enemy combatant was thrown from a helicopter at a height of 10 000 feet.

²⁵⁶ Theissen (note 252) at 39.

²⁵⁷ Ibid.

²⁵⁸ Like eg the torture and murder of Stanza Bopape on 12 June 1988 at a police station in

Thus, section 20 (7) PNURA is also in violation of South Africa's international legal obligations in relation to its conflict at home.

2. Non-Retroactivity of International Treaties

Like any juridical norm, international treaties cannot apply retroactively.²⁵⁹ Article 28 VCLT states clearly that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'. Since none of the previously examined international treaties and conventions - with the exception of the four Geneva Conventions - applied to South Africa during the Apartheid rule, no rights or obligations may be derived from them directly in respect of any act or omission committed during this period.

Yet, subsequent to South Africa's ratification or accession,²⁶⁰ these treaties' rights and obligations as determined *supra* became binding upon South Africa from this time on. It is therefore a question of the respective conventions' applicability *ratione temporis* whether the duty to prosecute serious violations of human rights only applies to those crimes committed *after* the date of South Africa's ratification or accession²⁶¹ or also to acts or offences committed *prior* to this date.²⁶²

On the one hand one could argue that the conventional obligations to prevent the occurrence of torture, murder or other gross violations of human rights must be separated from the conventional obligation to prosecute and punish such acts. States' failure to comply with the latter constitutes a violation of international law in itself, even though the original crime might have been committed prior to the respective conventions' entry into force.²⁶³ According to this view, South Africa was and is still under a legal obligation to prosecute and punish even those crimes and offences committed *prior* to the critical date, ie crimes and offences committed under Apartheid rule.

However, this stand would lead to the somewhat awkward result that a state could be obliged by international treaties or conventions to investigate and prosecute gross violations of human rights which might have been committed decades before these conventions' entry into force. Yet, even if the acts in question might have constituted international crimes under customary international law, the *obligation to prosecute* cannot be derived from custom but

Johannesburg, the murder of Joe Tsele, a United Democratic Front activist, at his home in Bophuthatswana on 6 May 1987, the abduction and subsequent killing of Jackson Maake, Andrew Makupe and Harold Sefolo by members of the security forces in 1986 / 1987 or the murder of Stanley Bhila, an Umkhonto we Sizwe activist, on 22 February 1987. See Truth and Reconciliation Commission of South Africa (note 254) 212-214, 232-233, 238-241.

²⁵⁹ See eg *Ambatielos Case (Greece v United Kingdom)* [1952] ICJ Rep 28 at 40.

²⁶⁰ See *supra* C. I. 1.-4. and D. II. 4. and 7. for the dates of South Africa's ratification or accession.

²⁶¹ Subsequently referred to as 'the critical date'.

²⁶² The same may be asked with regard to the duty to provide financial compensation to the victims of serious human rights abuses.

²⁶³ Theissen (note 252) at 18-19.

only from *treaty-based* international law.²⁶⁴ However, the wording of the different international treaties does not allow for their retroactive applicability. Article 2 (3) (a) ICCPR eg can only be invoked in conjunction with other articles of the Covenant and implies that an effective remedy must only be provided subsequent to a violation of one of *the Covenant's rights*.²⁶⁵ Yet, when the acts which could have constituted such violations occurred prior to the date of the Covenant's entry into force, they might have been in violation of other international norms but not of one of *the Covenant's rights* and freedoms. Similar considerations apply to the other international treaties mentioned above and the Human Rights Committee²⁶⁶ as well as the Committee against Torture²⁶⁷ have confirmed this view in several of their findings.

Thus, due to their inapplicability *ratione temporis*, apart from the Geneva Conventions, none of the aforementioned international treaties and conventions imposes any legal obligations upon South Africa with regard to any act or omission committed prior to their ratification or accession by the South African state.

3. Article 18 Vienna Convention on the Law of Treaties

Although a state may express its consent to be bound by a treaty by signature,²⁶⁸ most multilateral treaties require a formal act of ratification for their entry into force. However, this does not mean that signing an international treaty is meaningless. In contrast, article 18 VCLT obliges states 'to refrain from acts which would defeat the object and purpose of a treaty when (...) it has signed the treaty (...) until it shall have made its intention clear not to become a party to the treaty'. This obligation does now appear to be generally accepted.²⁶⁹

South Africa signed the Convention against Torture on 29 January 1993 and the ICCPR on 3 October 1994 but ratified both treaties only on 10 December 1998. In the meantime, however, it became legally obliged not to frustrate the object and purpose of these two international conventions. Yet, the granting of amnesty for serious human rights violators and the yearlong reluctance to pay any compensation to their victims seems to stand in flat contradiction to the Conventions' rights and obligations.²⁷⁰ It thus appears that South Africa's compensation and prosecution policies 'defeated' the object and purpose of these two international treaties.

However, it must be noted that the object or purpose of a given international convention can only be 'defeated' by those acts or omissions which

²⁶⁴ This is so because there is no obligation under customary international law to prosecute and punish gross violations of human rights. See supra E. I.

²⁶⁵ *S. E. v Argentina* Communication No 275/1988 (4 April 1990).

²⁶⁶ Ibid.

²⁶⁷ See eg *O. R., M. M. and M. S. v Argentina* Communications Nos 1/1988, 2/1988 and 3/1988 (23 November 1989).

²⁶⁸ See articles 11 and 12 VCLT.

²⁶⁹ International Law Commission *Draft Articles on the Law of Treaties with commentaries* (1966) 211-213. Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (accessed 25 January 2007).

²⁷⁰ See supra C. I. 2., C. I. 4., D. II. 1. and D. II. 3.

would have constituted a violation of the said convention if committed *subsequent* to the convention's entry into force. Otherwise, one would have the peculiar result that a certain act or omission could be in violation of a state's international legal obligations *prior* to the ratification of a given international treaty, although the same conduct would have been legal if committed *after* the treaty's entry into force. Yet, signing an international treaty is nothing more than a preliminary stage which cannot entail more far-reaching international obligations than the act of ratification itself. Hence, nothing which would be in compliance with the norms and provisions of a given international convention *subsequent* to its entry into force can possibly 'defeat' the object or purpose of the same convention *prior* to this date. Accordingly, since South Africa's prosecution and compensation policies did not violate its international legal obligations *subsequent* to the above mentioned international treaties' entry into force,²⁷¹ they could not 'defeat' the object and purpose of these conventions either. Hence, no violation of article 18 VCLT can therefore be established.

F. Conclusion

The South African TRC contributed significantly to South Africa's comparatively peaceful and successful transition into democracy. Giving victims a forum to tell their stories and granting amnesty to the perpetrators of the conflict of the past, was South Africa's unique way of trying to restore national unity, to dispense justice and to promote trust and reconciliation between its different racial communities. Despite its flaws and shortcomings, which are inevitable for a process of this dimension, South Africa's transitional process was a story of success and achievement, which is rightfully regarded as an encouraging and positive example for transitional societies in other parts of the world.

Yet, from an international legal point of view, it can only receive mixed assessments:

With regard to the issue of providing financial compensation to the victims of serious violations of human rights, South Africa did not infringe its international legal obligations: primarily because neither customary nor conventional international law imposed such obligations upon the South African state. Secondly, even if there had been such an obligation, financial compensation to victims was eventually provided - despite it being too little, too late.

However, the granting of amnesty, for serious violations of the Geneva Convention's common article 3 and for grave breaches of the Geneva Conventions committed in the context of South Africa's international armed conflicts in Angola, Namibia or Mozambique, was not in compliance with the country's international legal obligations. In so far, South Africa's transitional process must be criticised.

Although this is the only point where an infringement of international law could be established, one must bear in mind that South Africa's situation under

²⁷¹ See supra E. II. 2.

international law during the time of Apartheid was rather unique. Today, there is probably not a single state which has not ratified at least one of the aforementioned universally or regionally applicable treaties containing further obligations with regard to the issues of prosecution or compensation for serious human rights violations. This must be kept in mind when 'exporting' the South African model to other transitional societies.

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