

The Fight against Impunity under the International Covenant on Civil and Political Rights¹

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I. Introduction

There has been considerable discussion of the treatment of perpetrators of human rights violations throughout the last decades. Starting with the Nuremberg Trial individuals have been held accountable for the most serious atrocities by an international body.² While the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) relied on international and domestic prosecution alternatively the reliance on international prosecution failed due to the states' reluctance to establish an international tribunal.³ The past decade has evidenced a renaissance of the idea of international prosecution. The *ad hoc* Criminal Tribunals for the Former Yugoslavia and Rwanda⁴ as well as the Rome Statute of the International Criminal Court⁵ are clear examples of this trend. Despite this development, domestic prosecution of human rights offenders is still essential since international prosecution by the International Criminal Court is meant to complement it and, so far, is limited to the most serious human rights violations.⁶ Be-

² Agreement for setting up the Nuremberg Tribunal of 1945 between the United Kingdom, the United States, France, and Russia, *AJIL* 39 (1945), Suppl., 257.

³ Article VI of the Genocide Convention provides that perpetrators "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, A/RES/260 A (III) of 9 December 1948, UNTS Vol. 78 No. 1021 (hereinafter "Genocide Convention").

⁴ The Criminal Tribunal for the Former Yugoslavia was established by S/RES/827 (1993) of 25 May 1993 on the basis of Chapter VII of the UN Charter, and the Rwanda Tribunal was established by S/RES/955 (1994) of 8 November 1994.

⁵ Doc. A/CONF.183/9 (1998), reprinted in *ILM* 37 (1998), 999 et seq.

⁶ Pursuant to Article 5 para. 1 of the Rome Statute "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." The crime of genocide, crimes against humanity; war crimes and the crime of aggression as defined by the Statute are the crimes within the jurisdiction of the Court. The Statute of the International Tribunal for the Former Yugoslavia, contrary to the principle of complementarity of the Rome Statute (article 17 of the Statute), provides for concurrent jurisdiction with primacy of the International Tribunal over national courts (article 9). The jurisdiction of the Tribunal is limited to

sides, a number of states are not willing to ratify the Rome Statute which entered into force on 1 July 2002 and to subordinate themselves to an international criminal court. The United States, for example, though signing on 31 December 2000, recently announced that it does not intend to become a party to the Rome Statute.⁷ The major concerns raised are the lack of adequate checks and balances on powers of the prosecutor and judges, the dilution of the U.N. Security Council's authority over international criminal prosecutions, the reproach of third-party jurisdiction by the International Criminal Court⁸, the political risk evolving from deployment of US troops abroad and the fear that US servicemen could be investigated and prosecuted.⁹ Even if states are not willing to ratify the Rome Statute they are not free in dealing with human rights violators. They are bound by the international human rights treaties they have ratified, some of which explicitly set out specific domestic measures to be taken in dealing with human rights offenders.

Throughout the 20th century there has been a growing tendency in international human rights treaties to ask States parties for the domestic criminal prosecution of particularly serious human rights offences because punishment is deemed to be an effective measure to prevent cer-

grave breaches of the Geneva Conventions of 1949 (article 2), violations of the laws or customs of war (article 3), genocide (article 4) and crimes against humanity (article 5).

⁷ John Bolton the Under Secretary of State for Arms Control and International Security sent a letter to the UN Secretary General on 6 May 2002 stating that "the United States does not intend to become a party to the treaty", and that "[a]ccordingly, the United States has no legal obligation arising from its signature on December 31, 2000." Available under www.state.gov/r/pa/prs/ps/2002/9968.htm

⁸ Article 12 para. 2 preconditions the exercise of the Court's jurisdiction on its acceptance by the territorial state *or* state of nationality. The US delegation ascertained that both the territorial state and the state of nationality of the alleged perpetrator must have accepted the Court's jurisdiction as a precondition to its exercise, Doc. A/CONF.183/C.1/L.90 (1998).

⁹ For a detailed account of the objections to the ICC and a reply see M. Bergsmo, "Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council," *Nord. J. Int'l L.* 69 (2000), 87 et seq. For the objections and recent proposals by the United States in the PrepCom see R. Wedgwood, "The Irresolution of Rome", *Law & Contemp. Probs* 64 (2001), 193 et seq.

tain human rights violations.¹⁰ Examples of universal treaties asking for the criminalisation of certain human rights offenses are the Genocide Convention¹¹, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)¹², the Slavery Convention¹³, and its Supplementary Convention¹⁴, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others¹⁵, the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)¹⁶, the Geneva Conventions and the First Additional

¹⁰ The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in its Preamble declares that punishment is an important element in the prevention of war crimes and crimes against humanity. The Convention was adopted and opened for signature, ratification and accession by A/RES/2391 (XXIII) of 26 November 1968; entry into force 11 November 1970; UNTS Vol. 754 No. 10823.

¹¹ See note 3.

¹² Pursuant to Article 4 para. 1 “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law.” Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature A/RES/39/46 of 10 December 1984, Doc. A/39/51 (1984), reprinted in *ILM* 23 (1984), 1027 et seq., (hereinafter “Torture Convention”).

¹³ Article 6 of the Slavery Convention provides that “[t]hose of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions”, UNTS Vol. 212 No. 2861.

¹⁴ Article 3 para. 1 prescribes that certain acts, like the conveying of slaves to another country, shall be “a criminal offence under the laws of the States Parties” and that “persons convicted thereof shall be liable to very severe penalties”, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; adopted by a Conference of Plenipotentiaries convened by E/RES/608 (XXI) of 30 April 1956 and done at Geneva on 7 September 1956, UNTS Vol. 266 No. 3822.

¹⁵ The duty to punish offenders is provided for by arts 1 and 2. Convention approved by A/RES/317 (IV) of 2 December 1949, UNTS Vol. 96 No. 1342.

¹⁶ Article IV requires domestic legislation “to punish persons guilty” of acts of apartheid. International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature and ratification by A/RES/3068 (XXVIII) of 30 November 1973, UNTS Vol. 1015 No. 14861.

Protocol.¹⁷ These provisions are mandatory for the States parties to the respective conventions.¹⁸ However, these treaties cover only crimes of a particularly serious nature, like torture, genocide, slavery, slave trade, traffic in persons, exploitation of prostitution and apartheid. Therefore, the question arises whether there is a more comprehensive duty to prosecute human rights violations in general apart from the ones specified in the above mentioned conventions. This shall be analyzed in the following, taking the example of the International Covenant on Civil and Political Rights.

The Covenant is the most comprehensive universal human rights treaty covering a broad range of civil and political rights.¹⁹ With a total

¹⁷ Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, UNTS Vol. 75 No. 970; article 50 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, UNTS Vol. 75 No. 971; article 129 Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, UNTS Vol. 75 No. 972; article 146 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS Vol. 75 No. 973; arts. 85, 86 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). These Articles provide in cases of international armed conflicts for a duty to enact criminal legislation and to bring perpetrators of “grave breaches” of the Conventions before domestic courts or to hand them over for trial to another State party concerned. But see article 6 para. 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Non-International Armed Conflicts (Protocol II) providing:

“At the end of hostilities, the authorities in power 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.”

¹⁸ Some of them are even considered to be part of customary international law. See D. F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *Yale L. J.* 100 (1991), 2537 et seq., (2582-2595); N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, 1995, 39 seq.; K. Ambos, *Straflosigkeit von Menschenrechtsverletzungen*, 1997, 176 seq.

¹⁹ International Covenant on Civil and Political Rights, done 16 December 1966, UNTS Vol. 999 No. 14668, *ILM* 6 (1967), 368 et seq. (hereinafter ICCPR or Covenant).

of 148 States parties²⁰ the Covenant is an instrument that is very comprehensive, not only as to its substantive, but also as to its territorial scope. The Covenant, therefore, is of particular interest with regard to the universal obligation of states to fight human rights violations in general. It may seem to be rather strange to ask whether a State party to the Covenant needs to punish individual offenders since the Covenant is primarily concerned with the protection of individuals against interference by the state. However, the Covenant is not limited to obligations of non-interference. As evidenced by article 2 para. 1 States parties are obliged to respect and ensure the Covenant rights. This also entails affirmative duties.²¹ While it is true that the Covenant as an international human rights instrument primarily sets up a preventive system, it also deals with the state obligations once a violation has occurred. Pursuant to article 2 para. 3 any person whose Covenant rights are violated shall have an effective remedy. But what does this say about the treatment of the individual violator? Is there an individual right of the victims to see their offenders prosecuted under the Covenant? If not, is there a duty of States parties to prosecute which is not matched by an individual right?

There is no explicit provision in the Covenant on the way perpetrators of human rights violations need to be dealt with. However, the meaning of the Covenant has been elaborated by the Human Rights Committee (HRC) in the reporting system, the individual communication system and a number of General Comments. The Human Rights Committee is the treaty body assigned with the supervision of the State party's compliance with the Covenant and its implementation.²² While the Committee's General Comment on article 7 of 1992 has been occasionally cited as favoring an outright duty to hold offenders responsible, the vast pronouncements of the Committee on this issue have not

²⁰ According to the Office of the UN High Commissioner for Human Rights there were 148 States parties to the ICCPR and 101 States parties to its First Optional Protocol as of 8 February 2002.

²¹ For a detailed analysis of the requirements for domestic implementation see A. Seibert-Fohr, "Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2", *Max Planck UNYB* 5 (2001), 399 et seq.

²² For a description of the HRC's functions and its legal nature, see below Chapter II.

been analyzed in depth as to the particular meaning and the legal basis of such a duty.²³ This is what this article wishes to elaborate.

After examining the question about the value of the Human Rights Committee's interpretation of the Covenant it will be shown that, so far, the Committee has denied an individual right of the victims to see their violators prosecuted. But this does not mean that there is no duty of the States parties to bring these violators to justice. The third part of this article will, therefore, elaborate exactly what holding offenders accountable means. Is it necessary to prosecute and punish perpetrators by imprisonment or are there other feasible sanctions? Another question to be discussed is whether there is a duty to prosecute all sorts of human rights violations under the Covenant or whether there are differences according to the gravity of the violation. The pronouncements of the Human Rights Committee will be analyzed in order to determine the legal basis for a duty to prosecute human rights violations and whether it is limited to public officials or extends to private perpetrators, too. As will be shown, the question whether States parties are under an obligation to prosecute human rights offenders ultimately depends on whether prosecution is viewed as a mandatory means to protect human rights without alternative. In order to demonstrate how States parties need to deal with human rights violations in detail not only prosecutorial duties but related duties, as the duty to investigate and to provide victims with compensation, will be described.

In the last part of this article the validity of amnesties for human rights violations, which is an institutionalized form of impunity, will be addressed. The obligations under the Covenant affected by the proclamation of an amnesty including the right to an effective remedy will be outlined in this part. There seems to be a conflict between the need for the restoration of peace and respect for human rights in the aftermath of a civil war and dictatorship on the one side and the duty to hold human rights offenders responsible on the other side. Therefore, the Human Rights Committee's pronouncements will be evaluated in order to determine whether there may be an exception from the duty to prosecute human rights violations for the sake of reconciliation.

²³ General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para.13. But see the analysis of C. Tomuschat, "The Duty to Prosecute International Crimes Committed by Individuals", in: H.J. Cremer, T. Giegerich, D. Richter, A. Zimmermann (Hrsg.), *Tradition und Weltoffenheit des Rechts*, Festschrift für Helmut Steinberger, 2002, 317 et seq., (322-324).

II. The Legal Value of the Human Rights Committee's Interpretation of the Covenant

Since there has been a variety of statements of the Human Rights Committee on the issue of impunity it is interesting to evaluate their significance and legal value *vis a vis* States parties. Whether the pronouncements of the HRC are authoritative interpretations of the International Covenant on Civil and Political Rights has been disputed.²⁴ While it is true that the Committee is not a court such as exist in the European and Inter-American human rights systems, it has at least quasi-judicial functions. It monitors the State parties' observance of their obligations under the Covenant.²⁵ The Committee is charged with the study of state reports and with the issuance of reports and General Comments pursuant to article 40 of the Covenant. The Human Rights Committee uses General Comments to elaborate on State party obligations pursuant to specific articles of the Covenant.²⁶ As one author observed "[t]he fact that the general comments contain interpretations by the Committee as a whole which are adopted by consensus and are addressed to all States parties, gives the general comments great authority."²⁷ Additionally, Concluding Observations are country specific documents analyzing a particular state practice under the Covenant and pointing to positive aspects and to principal subjects of concern, including recommendations.²⁸ While they address country specific circumstances they often give insight as to the exigencies under the Covenant and as to the specific meaning of single Covenant provisions.²⁹

²⁴ See M.P. Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?," *Tex. Int'l. L. J.* 31 (1996), 26 et seq.

²⁵ E. Klein, "General Comments – Zu einem eher unbekanntem Instrument des Menschenrechtsschutzes," in: J. Ibsen/ E. Schmidt-Jorzig, *Recht-Staat-Gemeinwohl: Festschrift für Dieter Rauschnig*, 2001, 301 et seq., (302).

²⁶ See the Committee's views on the purpose of General Comments, Doc. HRI/GEN/1/Rev.3, 2 et seq. (1997).

²⁷ I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee*, 1999, 300.

²⁸ For a detailed account of the reporting system, Boerefijn, see above.

²⁹ This will be shown in the analytic part of this article. See also the analysis of Concluding Observations in Seibert-Fohr, see note 21.

Under the Optional Protocol, the Committee exercises quasi-judicial functions in the consideration of individual communications. In order to fulfill its obligation to forward its views to the State party concerned and to the individual pursuant to article 5 para. 4 of the First Optional Protocol the Committee needs to apply the Covenant to the factual situation complained of and comment on the contents of the communication.³⁰ Accordingly, the Committee in its views addresses questions of law and decides whether a violation of the Covenant has occurred.³¹ In order to fulfill these tasks the Committee needs to interpret and give life to the Covenant.³² How can the Committee be characterized as a body established to monitor compliance with the treaty³³ without acknowledging its authority to interpret the Covenant and to make assertions as to the State parties' compliance with the Covenant? According to Judge Buergenthal, former member of the Committee, the Committee "can and should discharge some of the normative functions ... a tribunal would perform, particularly when adopting general comments and rendering decisions on individual communications."³⁴

The Committee's competence to interpret the Covenant stems from the system set up by the Covenant. Without some authoritative status the whole monitoring system set up by the Covenant would be considerably weakened. As the Committee pointed out in its General Comment on reservations:

"[t]he Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's com-

³⁰ According to Buergenthal the use of the word "views" in article 5 para. 4 of the Optional Protocol is designed to indicate that they are "advisory rather than obligatory in character." T. Buergenthal, "The U.N. Human Rights Committee," *Max Planck UNYB* 5 (2001), 341 et seq., (397).

³¹ For a detailed outline of the communication procedure, see M. Nowak, *U.N. Covenant on Civil and Political Rights*, 1993, 647 et seq.

³² Professor Buergenthal argues: "After all, by ratifying the Optional Protocol the States parties have recognized the competence of the Committee to determine whether a state has violated a right guaranteed in the Covenant. ... A Committee determination that a state has violated a right guaranteed in the Covenant therefore enjoys a normative and institutional legitimacy that carries with it a justifiable expectation of compliance," Buergenthal, see note 30, 397.

³³ Scharf, see note 24, 26; Klein, see note 25, 302.

³⁴ Buergenthal, see note 30, 396.

petence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.”³⁵

This assertion did not go uncriticized. The United States in its Observations on this General Comment held that the Covenant scheme “does not impose on States parties an obligation to give effect to the Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant.”³⁶ The United Kingdom, however, acknowledged that while the General Comments “are not legally binding” they “nevertheless command great respect.”³⁷

While it has been repeatedly stressed that the views of the Committee are not legally binding under international law³⁸ the following has to be observed: since the Covenant sets up legally binding obligations, the pronouncements of the Committee charged with the interpretation of the Covenant cannot be denied any significance. At least, the observations expressed by the Committee must not be entirely disregarded but taken into due consideration by the States parties.³⁹ Accordingly, the General Assembly of the United Nations recently urged the States parties “to take duly into account, in implementing the provisions of the International Covenants on Human Rights, the recommendations and observations made during the consideration of their reports by the Human Rights Committee” and appealed to other bodies dealing with human rights questions “to respect those uniform standards, as expressed in the general comments of the Committees.”⁴⁰ As long as the pronouncements are within the range of interpretation without creating new legal obligations for the States parties, the interpretation derives its

³⁵ General Comment No. 24 (52) on Reservation, HRI/GEN/1/Rev.2, 42, para. 11 (1994).

³⁶ Observations by the United States of America on General Comment No. 24 (52) relating to reservations (1995), reprinted in *HRLJ* 16 (1995), 422 et seq.

³⁷ The United Kingdom further held that “[t]here is a qualitative distinction between decisions judicially arrived at after full legal argument and determinations made without the benefit of a judicial process,” Observations by the United Kingdom on General Comment No. 24 relating to reservations (1995), [1994-95] HRC Report, GAOR Suppl. No. 40 (Doc. A/50/40), Vol. 1, paras 1, 12, reprinted in *HRLJ* 16 (1995), 424 et seq.

³⁸ Nowak, see note 31, 710; Klein, see note 25, 307.

³⁹ Klein, see note 25, 308.

⁴⁰ A/RES/56/144 of 6 February 2002, para. 13.

legal value from the Covenant provisions themselves. Admittedly, the line between interpretation and developing new legal standards is fluid and difficult to determine. But this cannot be used as a blank argument against the interpreting powers of the Committee.

Since the Committee is the only body charged with the interpretation of the Covenant and the observation of its domestic implementation and since it is constituted by experts, it is hard to deny that the interpretations given by the Committee are authoritative interpretations of the Covenant. This is especially true since the Committee is construed as an independent organ of experts which "shall serve in their personal capacity"⁴¹ performing their functions impartially and independent of their home countries.⁴² This suggests that the Committee be at least close to a quasi-judicial body rather than a political body.⁴³ Unifying the expertise of persons "of high moral character and recognized competence in the field of human rights"⁴⁴ the Committee is particularly well placed to give authoritative interpretations of the Covenant. That the Committee is not limited to advisory functions but has decision-making powers is presupposed by article 39 para. 2, subpara. b laying down the principle of majority vote. This provision explicitly refers to "Decisions of the Committee."⁴⁵

There seems to be some evidence in the practice of the States parties as to the nature of the Committee's pronouncements. State representatives have repeatedly stated that the work of the Committee has played an important role at the national level.⁴⁶ For example, Senegal reported the elimination of restrictions on the right to leave the country "fol-

⁴¹ See article 28, para. 3.

⁴² See article 38. The Committee has adopted guidelines to enhance the independence of its members.

⁴³ Nowak calls the Committee a "quasi-judicial organ". Nowak, see note 31, 507. For further references as to the qualification of the Human Rights Committee, see *ibid.*, there note 4. There have been differences between members of the Committee as to its nature and purpose. See D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 1996, 54.

⁴⁴ See article 28 para. 2. According to this provision consideration shall also "being given to the usefulness of the participation of some persons having legal experience."

⁴⁵ To abrogate any binding effect of the Committee pronouncements would run counter to the meaning of the term decision.

⁴⁶ McGoldrick, see note 43, 504.

lowing the Committee's discussion of the initial report.⁴⁷ New Zealand reported the revocation of a regulation which could require inmates to attend services of worship as a consequence of the Committee's observations on New Zealand's report.⁴⁸ The Committee's observations on Mongolia's initial report initiated the revision of the country's penal code.⁴⁹ If the Concluding Observations and General Comments of the Committee lacked any significance it would seem questionable why the majority of States parties are at least trying to comply with the interpretations and recommendations of the Committee.⁵⁰

To sum it up, while there is some dispute as to the legal nature of the Committee's views, General Comments and Concluding Observations, it cannot be denied that these pronouncements provide for interpretations of the Covenant which are of some significance for the State parties. This is why this articles gives special attention to these pronouncements in finding the answer to the question how States parties need to deal with human rights offenders.

III. Duty to Prosecute under the Covenant

1. Individual Right to Demand Prosecution?

Since there is no explicit provision providing for a duty to prosecute human rights offenders the question arises whether such an obligation can be derived from the substantive rights provided for by the Covenant. An individual right of the victims against a State party to bring their offenders to justice would be the most far-reaching basis for a duty to prosecute which could be the subject of an individual communication.

Several provisions of the Covenant have been cited by individuals in the communication system as providing for a legal basis against impu-

⁴⁷ Doc. CCPR/C/SR.721, para. 8 (1987).

⁴⁸ Doc. CCPR/C/37/Add.8, para. 47 (1988).

⁴⁹ Doc. CCPR/C/SR.658, para. 25 (1986). For further examples see C. A. Cohn, "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights", *HRQ* 13 (1991), 298 et seq.

⁵⁰ For example, Japan changed its legislation on nationality after the Human Rights Committee's criticism that children of male Japanese enjoyed preferential treatment over children of female Japanese.

nity. The most prominent provisions are the right to a fair trial (article 14 para. 1), the exception to the prohibition of retroactive criminal laws for crimes under customary international law (article 15 para. 2) and the right to an effective remedy (article 2 para. 3), which will be analyzed in the following.

In *H.C.M.A. v. The Netherlands* the author of the communication alleged a violation of article 14 para. 1 of the Covenant, because he had been unable to prosecute a police officer who allegedly had assaulted him.⁵¹ The relevant passage of the provision reads:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The author of the communication asserted “that the right to test the decision of whether or not to prosecute somebody by a competent, independent and impartial tribunal established by law is a right enshrined in article 14 of the Covenant, and that there is also a right, in a suit at law.”⁵² According to him “the right to demand prosecution of this officer is protected by article 14 of the Covenant.”⁵³ Similarly, the authors of Communication No. 717/1996 (*Acuna Inostroza et al.*) ascertained that the application of the Chilean amnesty law No. 2.191 of 1978 violated article 14 of the Covenant because the victims and their families were neither afforded access on equal terms to the courts nor afforded the right to a fair and impartial hearing.⁵⁴ However, the Human Rights Committee rejected this position without going into the meaning of article 14.⁵⁵

⁵¹ Communication No. 213/1986, HRC Report, GAOR Suppl. No. 40 (Doc. A/44/40), 267, 270, para. 5.3 (1989).

⁵² *Ibid.*, 270, para. 5.3.

⁵³ *Ibid.*, 272, para. 9.3.

⁵⁴ Communication No. 717/1996 (1999), Doc. CCPR/C/66/D/717/1996, para. 3.3 (1999).

⁵⁵ The Committee held “that the Covenant does not provide for the right to see another person criminally prosecuted.” Communication No. 213/1986, HRC Report, GAOR Suppl. No. 40 (Doc. A/44/40), 267, 273, para. 11.6 (1989). See also *Rodríguez v. Uruguay*, Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 6.4 (1994); *S.E. v. Argentina*, Communication No. 275/1988 (1990), HRC Report, GAOR Suppl. No. 40 (Doc. A/45/40), Annex X.J, para. 5.5, (1990).

Article 14 provides that once criminal charges are made, an independent and impartial tribunal is in charge of the “determination of [the] criminal charge.” This part of the provision entails merely the right of the *accused* — not of the victim — in criminal proceedings because “everyone shall be entitled to a fair and public hearing” “[i]n determination of any criminal charge *against him*” (emphasis added). But there is no individual right of the victim to institute criminal proceedings against the offenders. Moreover the second part of the provision regarding the determination of the rights and obligations does not provide for such a right. Criminal charges do not qualify as “rights and obligations” which need to be determined “in a suit at law” pursuant to article 14 para. 1. In criminal proceedings it is not the right of the victim, such as a claim for compensation, which is at issue, but the demand of the state for punishment because of the offense committed against society.⁵⁶

Article 15 para. 2 also does not provide for a prohibition of impunity. This provision was cited by the authors of Communication No. 717/1996 who argued that the refusal of Chile to bring to justice those responsible for the executions in the “Banos de Chihuido” incident violated article 15 para. 2 of the Covenant, because criminal acts had been pardoned.⁵⁷ However, this article only clarifies that the prohibition of retroactive criminal laws does not prejudice the trial and punishment for criminal acts according to the general principles of law. It is merely permissive leaving the door open for prosecution of such criminal acts without making it mandatory.

The question arises whether a duty to prosecute perpetrators of human rights violations can be derived from the right to an effective remedy guaranteed by article 2 para. 3 which provides:

“Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwith-

⁵⁶ Even if the punishment has among others the effect of furnishing satisfaction to the victim, the redress to the person injured is the objective of civil litigation. The meaning of article 14 for the right to demand prosecution needs to be distinguished from its exigencies in case of an amnesty, see below Chapter IV. 1.a.

⁵⁷ They further ascertained that the failure to investigate the victims’ deaths amounted to a violation of article 16, i.e. a failure to recognize the victims as persons before the law. Communication No. 717/1996 (1999), Doc. CCPR/C/66/D/717/1996, paras 3.2, 3.4 (1999).

standing that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

The proposal of the Philippines and Japan that criminal prosecution of state organs that commit human rights violations be expressly recognized as an example for an effective remedy did not meet the necessary majority during the drafting of article 2 para. 3.⁵⁸ Remedy ordinarily means the enforcement of a right or the redress of an injury.⁵⁹ It is questionable whether the right to a remedy entails an individual right of a victim to compel the state to the deprivation of the offender's personal liberty. Besides, the question arises whether the punishment of an offender is needed to enforce the violated right and whether punishment provides redress for the injury. The Human Rights Committee requires, for a remedy to be effective, that the adverse effects of the violation have ceased.⁶⁰ The emphasis is on rehabilitation of the victim as the following statement of the Human Rights Committee in its General Comment on article 7 of 1992 shows “States may not deprive individuals of the right to an effective remedy, including compensation and such *full rehabilitation* as may be possible.”(emphasis added)

In case of summary executions, for example, the past wrong cannot be rectified. In this case the finding of a violation and the grant of compensation is all that can be done to remedy the past wrong. Subpara. (b) of article 2 para. 3 providing that everyone claiming a remedy shall have his rights “determined” by a competent authority clarifies that the determination of the rights violated is what an effective remedy requires.

⁵⁸ Docs. E/CN.4/365 (Philippines), A/C.3/L.1166 (Japan).

⁵⁹ Black's Law Dictionary, 1996, 536.

⁶⁰ In *Mbenge v. Zaire* the Committee criticized that the adverse effects of the death sentences violating arts 6 para. 2 and 14 para. 3 of the Covenant against the victim could not be deemed to have ceased and therefore held that the victim had not been provided with an effective remedy in accordance with article 2 para. 3 of the Covenant. See Selected Decisions under the Optional Protocol, Vol. 2, CCPR/C/OP/2, 76, para. 18 (1990).

Admittedly, the punishment of an offender establishes that the victim had a right which was violated and thereby indirectly re-establishes the validity of the right retrospectively. However, the finding of a violation may also do this. The payment of compensation, though not sufficient to make up for the past wrong — which may not be possible —, is sometimes the utmost that can be done to provide redress of the injury. Whether the punishment of an offender provides for better redress is doubtful.

Turning again to the interpretation of article 2 para. 3 by the HRC, one has to observe that most of the Human Rights Committee's pronouncements suggest that punishment is not required as an element of an effective remedy. In a number of views on individual communications it held "that the Covenant does not provide for the right to see another person criminally prosecuted."⁶¹ In *Blanco v. Nicaragua* the Committee considered that the mere examination of the author's allegations "could be seen as a remedy under article 2, para. 3, of the Covenant."⁶² Hence, it may be sufficient under this provision to investigate human rights violations without punishing the perpetrators. Accordingly, in *Rodríguez v. Uruguay* the Committee held that the victim was entitled under article 2 para. 3 (a) to an effective remedy and therefore urged the State party "(a) to carry out an official investigation into the author's allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; (b) to grant appropriate compensation to Mr. Rodríguez; and (c) to ensure that similar violations do not occur in the future."⁶³

Consequently, these are the essentials in order to be in compliance with the exigencies under article 2 para. 3 of the Covenant: An aggrieved individual must at least have the opportunity to present the reasons which make him believe that the executive act complained of violates his human right. Further, there needs to be an official investiga-

⁶¹ Communication No. 213/1986, HRC Report, GAOR Suppl. No. 40 (Doc. A/44/40), 273, para. 11.6. (1989). See also *Rodríguez v. Uruguay*, Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 6.4 (1994); *S.E. v. Argentina*, Communication No. 275/1988 (1990), HRC Report, GAOR Suppl. No. 40 (Doc. A/45/40), Annex X.J., para. 5.5, (1990).

⁶² Communication No. 328/1988, Doc. CCPR/C/51/D/328/1988, para. 9.2 (1994).

⁶³ Communication No. 322/1988, Doc. CCPR/C/51/D/322/1988, para. 14 (1994).

tion, an identification of persons responsible, compensation for victims and the prevention of future violations.⁶⁴

However, the views expressed by the Committee expressed in *Bautista de Arellana v. Colombia* seem to go one step further as to the exigencies for an effective remedy in case of serious human rights violations. Here the Committee held that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, para. 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.”⁶⁵

In this case the victim’s family had already been granted compensation by an administrative tribunal. The Committee in addition urged the State party “to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista.”⁶⁶

Though the Committee did not explicitly base this call on article 2 para. 3 the assertion that purely disciplinary and administrative remedies do not suffice as an adequate remedy could be taken as an indication that the Committee requires the punishment for particularly serious violations of human rights as an effective remedy pursuant to article 2 para. 3.

Similarly, some Committee members seem to favor a criminal prosecution as an element of an effective remedy. The reason was given by Mrs. Medina Quiroga, a member of the Committee, when she pointed out that “[i]n the case of Chile, for example, only criminal prosecution had proved effective; failing that, there would have been no hope of initiating successful civil proceedings.”⁶⁷ Thus, the criminal prosecution of human rights offenders may be necessary in cases where compensation cannot be achieved without a prior official investigation in order to provide for an effective remedy. But this does not necessarily mean that it is indispensable for an effective remedy, especially if a determination of the facts can be achieved otherwise. The Committee has not given up its assertion that the Covenant does not provide for a right to see some-

⁶⁴ Related duties are discussed in detail in Chapter III. 6.

⁶⁵ Doc. CCPR/C/55/D/563/1993, para. 8.2 (1995).

⁶⁶ *Ibid.*, at para. 10.

⁶⁷ Summary record of the 1398th Mtg.: Haiti, Doc. CCPR/C/SR.1398 (1995). Another reason could be the rehabilitation of victims, which may be achieved through the prosecution of perpetrators of human rights violations.

one prosecuted. This holding is hard to reconcile with a duty to prosecute serious human rights violations derived from the guarantee of an effective remedy. It is difficult to argue that a duty to prosecute serious human rights violations can be derived from the objective content of article 2 para. 3 which concerns only state obligations without accepting a corresponding individual right.

In any case, the HRC has repeatedly denied an individual right to see someone prosecuted. In *Bautista de Arellana v. Colombia* it merely urged the State party to expedite the criminal proceedings without acknowledging a corresponding individual right by the victims. Furthermore, the drafting history suggests that article 2 para. 3 was not intended to provide for such a right.

2. State party Obligation to Prosecute

From the beginning the Human Rights Committee has held repeatedly that States parties are under an obligation *to bring perpetrators of human rights violations to justice*.⁶⁸ In an early disappearance case the Committee urged the Uruguayan Government “to bring to justice any persons found to be responsible for [the victim’s] death, disappearance or ill-treatment.”⁶⁹ In 1994 the Committee in *Mianga v. Zaire* held that “[t]he State party should investigate the events complained of and bring to justice those held responsible for the author’s treatment.”⁷⁰ In its Concluding Observation on Nepal the Committee recommended that

⁶⁸ See *Barbato v. Uruguay*, Communication No. 84/1981, HRC Report, GAOR Suppl. No. 40 (Doc. A/38/40), 124, (124), para. 11 (1983); *Quinteros v. Uruguay*, Communication No. 107/1981, Selected Decisions under the Optional Protocol, Vol. 2, CCPR/C/OP/2, 138 et seq., (143), para. 15 (1983); *Baboeram et al. v. Suriname*, Communications Nos. 146/1983, 148 to 154/1983, *ibid.*, 172 et seq., (176 para. 16); *Miango Muiyo v. Zaire*, Communication No. 194/1985, HRC Report, GAOR Suppl. No. 40 (Doc. A/43/40), 218, para. 11 (1988).

⁶⁹ *Bleier v. Uruguay*, Communication No. R. 7/30 (1978), HRC Report, GAOR Suppl. No. 40 (Doc. A/37/40), 130, para. 15 (1982). In *Tshitenge Muteba v. Zaire* the Committee was of the view that the State party was under an obligation “to punish those found guilty of torture.” Communication No. 124/1982 (1983), HRC Report, GAOR Suppl. No. 40 (Doc. A/39/40), 182, para. 13 (1984).

⁷⁰ *Isidore Kanana Tshiongo a Minanga v. Zaire*, Communication No. 366/1989, Doc. CCPR/C/49/D/366/1989, para. 7 (1993).

cases of summary and arbitrary executions, enforced or involuntary disappearances, torture and arbitrary or unlawful detention committed by members of the army, security or other forces “be systematically investigated in order to bring those suspected of having committed such acts before the courts.”⁷¹ While these cases concern mainly the protection of the right to life (article 6), the prohibition of torture (article 7), and the protection of liberty and security (article 9), a similar holding was given in the case of violations of the right of detainees to be treated with humanity and dignity (article 10) and of the right to be tried with undue delay (article 14 para. 3 Subpara.(c) of the Covenant).⁷² Recently, the Committee more generally asked States parties to bring persons accused of human rights violations to justice.⁷³

The term “bring to justice” is rather vague and raises the question whether this requires criminal prosecution and imprisonment. In some instances the Committee has given some latitude as to how a perpetrator should be brought to justice. In *Thomas v. Jamaica* the Committee ascertaining a violation of arts 7 and 10 para. 1 merely stated that “[t]he State party is under an obligation to investigate the allegations made by the author *with a view to instituting as appropriate criminal or other procedures* against those found responsible” (emphasis added).⁷⁴ Similarly, in *Joaquín Herrera Rubio et al. v. Colombia* the Committee was of the view that the State party was under an obligation “in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that Mr. Herrera Rubino has suffered and further to investigate said violations, *to take action thereon as appropriate* and to take steps to ensure that similar violations do not occur in the future.”(emphasis added)⁷⁵ In its General Comment on article 20

⁷¹ Doc. CCPR/C/79/Add. 42, para. 16 (1994).

⁷² *Bozize v. Central African Republic*, Communication No. 428/1990, Doc. CCPR/C/50/D/428/1990, para. 7 (1994); *Hylton v. Jamaica*, Communication No. 407/1990, Doc. CCPR/C/51/D/407/1990, para. 11.1 (1994).

⁷³ Concluding Observations on Mexico, Doc. CCPR/C/79/Add.109, para. 9 (1999).

⁷⁴ Communication No. 321/1988, Doc. CCPR/C/49/D/321/1988, para. 11 (1993).

⁷⁵ Communication No. 161/1983 (1987), HRC Report, GAOR Suppl. No. 40 (Doc. A/43/40), 190, para. 12 (1988). See also *Nqalula Mpandanjila et al. v. Zaire*, Communication No. 138/1983 (1986), HRC Report, GAOR Suppl. No. 40 (Doc. A/41/40), 121, para. 10 (1986). In its Comments on Argentina the Committee urged the State party to fully investigate and “to take action

which requires prohibition of propaganda for war and of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, the Committee elaborated that there should be a law providing for an *appropriate sanction*.⁷⁶ Speaking of appropriate procedures or sanctions and leaving the choice between criminal and other procedures to the State party the Committee allowed some discretion. Which procedures, other than criminal, may be appropriate, was unfortunately not specified by the Committee.

However, in a number of cases the Human Rights Committee explicitly asked for the *punishment* of perpetrators for certain human rights violations. In its General Comment on article 6 of 1982 the Committee considered that “States parties should take measures ... [to] *punish* deprivation of life *by criminal act*” (emphasis added).⁷⁷ In its General Comment on article 7 of 1992 the Committee stressed that “[t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”⁷⁸ What was meant by holding responsible, namely criminal punishment, was specified when the Committee asked the States parties to indicate in their reports “provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts.”⁷⁹ In *Bautista de Arellana v. Colombia* the Committee stressed that though there was no right for individuals to require that the State criminally prosecutes another person, “the State party is under a duty ... to prosecute criminally, try and punish those held responsible” for violations such as forced disappearances and violations of the right to life.⁸⁰ This clearly indicates that there is an objective duty to punish which is not matched by a corresponding individual right. The duty to punish offenders has been stressed mainly with regard to extra-judicial and summary executions, disappearances, cases of torture, ill-treatment, and arbitrary arrest and detention.⁸¹

on the findings,” Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 16 (1995).

⁷⁶ General Comment 11 on Article 20 (1983), HRI/GEN/1/Rev.1, 12, para. 2.

⁷⁷ General Comment 6 on Article 6 (1982), HRI/GEN/1/Rev.1, 6, para. 3.

⁷⁸ General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para. 13.

⁷⁹ Ibid.

⁸⁰ Doc. CCPR/C/55/D/563/1993, para. 8.6 (1995). The punishment of extra-judicial executions was asked for by the Human Rights Committee in its Comments on Niger, Doc. CCPR/C/79/Add.17, para. 7 (1993).

⁸¹ Comments on Nigeria, Doc. CCPR/C/79/Add.65, para. 32 (1996). See also Comments on Senegal, Doc. CCPR/C/79/Add.10, para. 5 (1992). Regard-

However, in its Comments on El Salvador of 1994 the Committee went a step further and recommended that *all past human rights violations* should be thoroughly investigated, the offenders punished and the victims compensated.⁸²

3. Legal Basis for a Duty to Prosecute

Turning to the legal basis for the duty to prosecute human rights violations the following pronouncements of the Human Rights Committee should be observed. In a number of cases the Committee derived this duty from article 2 in conjunction with the substantive article violated. For example, in its first Comment on article 7 (meanwhile replaced by Comment No. 20) the Committee derived the duty to hold responsible those found guilty from article 7 read together with article 2.⁸³ In cases where the Committee held that the State party was under an obligation to investigate and to take action thereon as appropriate, this duty was explicitly derived from the provisions of article 2 of the Covenant.⁸⁴ Similarly, the failure to punish persons responsible for offences was criticized as contrary to article 2 of the Covenant.⁸⁵

The interpretation of article 2 as requiring the punishment of human rights violations has been criticized as inconsistent with the understanding of the Covenant's drafters.⁸⁶ However, the drafters merely rejected the proposal that criminal prosecution be expressly recognized as an example of an effective remedy pursuant to article 2 para. 3.⁸⁷ Thereby, they did not rule out that the punishment was necessary to en-

ing the punishment of arbitrary deprivation of life and abusive treatment of persons deprived of their liberty, and violations of the right to a fair trial, see Comments on Yemen, Doc. CCPR/C/79/Add.51, para. 13 (1995).

⁸² Comments on El Salvador, Doc. CCPR/C/79/Add.34, para. 13 (1994). However, not every human rights violation requires criminal prosecution. For the feasible sanction see Chapter III. 4.

⁸³ General Comment 6 on Article 7 (1982), HRI/GEN/1/Rev.1, 7-8, para. 1.

⁸⁴ *Nqalula Mpandanjila et al. v. Zaire*, Communication No. 138/1983 (1986), HRC Report, GAOR Suppl. No. 40 (Doc. A/41/40), 121, para. 10 (1986).

⁸⁵ Concluding Observations on Peru, Doc. CCPR/CO/70/PER, para. 9 (2000).

⁸⁶ Scharf, see note 24, 26.

⁸⁷ Doc. E/CN.4/SR.195 (1950).

sure respect for human rights pursuant to article 2 paras 2 and 3.⁸⁸ These are the provisions which have been cited repeatedly as the legal basis for the duty to punish perpetrators of human rights violations.⁸⁹ The underlying idea is that the punishment of human rights violators is the measure necessary “to respect and ensure” the Covenant rights pursuant to article 2 para. 1 and the measure necessary “to give effect to the rights” pursuant to article 2 para. 2. It is based on the premise that impunity is an obstacle to the undertaking to further the respect of human rights.⁹⁰ As the Committee in its Comments on Argentina’s second periodic report elaborated, “respect for human rights may be weakened by impunity for perpetrators of human rights violations.”⁹¹ A state of impunity according to the Committee “encourages further violations of Covenant rights.”⁹² The punishment of offenders, therefore, is asked for because of its deterrent effect in order to prevent future human rights violations.⁹³ At the same time prosecution is deemed to be necessary for the re-establishment of peace in society, which is essential for the enjoyment of human rights. This is why the Committee in its Comments on Burundi criticized the *de facto* impunity as an “obstacle[s] to the restoration of lasting peace.”⁹⁴

The Committee, at the same time, has clarified that punishment is needed as a measure of implementation pursuant to article 2 para. 2. For example, in its Comments on Colombia of 1997 the Government was urged to adopt punitive measures against acts of child murder to ensure

⁸⁸ For a detailed analysis of the drafting history see Orentlicher, see note 18, 2569-2571.

⁸⁹ An alternative ground could be seen in article 2 para. 3. So far the HRC has only once given an indication that the duty to prosecute could be derived from article 2 para. 3, that is in *Bautista de Arellana v. Colombia*. Doc. CCPR/C/55/D/563/1993, paras 8.2, 10 (1995). For the interpretation of this provision, see above.

⁹⁰ Concluding Observations on Sri Lanka, Doc. CCPR/C/79/Add.56, para. 15 (1995).

⁹¹ Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995). The cited laws were repealed in 1998.

⁹² Comments on Nigeria, Doc. CCPR/C/79/Add.65, para. 32 (1996). In *Rodríguez v. Uruguay* the Committee noted with concern that impunity may give rise to further grave human rights violations. Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 2.4 (1994).

⁹³ Summary records of the 1365th Mtg., Morocco, Doc. CCPR/C/SR.1365, para. 54 (1994).

⁹⁴ Comments on Burundi, Doc. CCPR/C/79/Add.41, para. 4 (1994).

full implementation of article 24.⁹⁵ In its Comments on Paraguay the Committee commended “the State party, in accordance with article 2 para. 2 of the Covenant, for its efforts to bring to justice perpetrators of past human rights abuses.”⁹⁶ Similarly, the Committee recommended in the case of Yemen “that the State party endeavor to bring to justice perpetrators of human rights abuses, in accordance with article 2 (2) of the Covenant.”⁹⁷

Professor Buergenthal, former member of the Committee, went a step further. Considering Peru’s third periodic report he warned that impunity by the authorities constitutes a “retroactive ratification of the offences committed.”⁹⁸ Similarly, according to the Committee’s Chairman, the Peruvian authorities had made themselves accomplices of the acts by promulgating the amnesty laws.⁹⁹ Taking this further, impunity could be considered as a violation of the substantive rights in the first place. However, the denial by the Committee of an individual right to require that the state criminally prosecutes another person points in another direction.

Ascertaining a duty of the States parties to punish human rights offenders without acknowledging a corresponding individual right of the victims to claim prosecution may seem to be awkward on first sight. Usually, State obligations under the Covenant are matched by corresponding individual rights. However, the Covenant also creates objective duties independent of individual rights. For example, though the States parties are obliged to submit periodical reports to the Human Rights Committee, there is no individual right which could be claimed in case of non-submission of a report. Article 2 paras 1 and 2 with the obligation to respect, ensure and implement the Covenant rights goes further than the particular rights. It requires also acts of general human rights protection, which are not related to a specific individual but to society as a whole.¹⁰⁰ Similarly, in the case of prosecution of human

⁹⁵ Concluding Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 42 (1997).

⁹⁶ Comments on Paraguay, Doc. CCPR/C/79/Add.48, para. 25 (1995).

⁹⁷ Comments on Yemen, Doc. CCPR/C/79/Add.51, para. 19 (1995).

⁹⁸ Summary record of the 1519th Mtg., Peru, Doc. CCPR/C/SR.1519, para. 44 (1997).

⁹⁹ Summary record of the 1520th Mtg., Peru, Doc. CCPR/C/SR.1520, para. 31 (1996).

¹⁰⁰ The Human Rights Committee has derived from article 2 para. 2 the obligation to make the Covenant directly applicable, to accord to it a status su-

rights offenders, the goal of the Committee is a general protection of human rights, namely prevention of future violations through deterrence and re-establishment of peace in society. The reason for requiring prosecution is not retaliation or restitution for the particular victim. Therefore, it is consistent to frame the duty to prosecute as an objective duty of general human rights protection based on article 2 paras 1 and 2 rather than as a duty derived from para. 3 which focuses on the remedies of the victim and which is framed to establish an individual right.

4. Feasible Sanctions

Not every human rights violation requires criminal prosecution. The terms “hold responsible” and “bring to justice” leave room for a variety of sanctions, and punishment does not necessarily mean criminal penalties.¹⁰¹ While the demand to punish the deprivation of life, torture and other serious human rights violations seems to contemplate a criminal punishment, the requirement that offenders of all human rights violations should be punished indicates that punishment is understood in a broader sense. In certain cases, like interference with freedom of expression or freedom of movement, the finding of a violation and an admonition or other disciplinary measure may be sufficient. It has to be kept in mind that imprisonment affects the human rights of the offenders so that a balancing act becomes necessary.

The scope of punishment informs the way perpetrators of human rights violations need to be punished. According to the Human Rights Committee, the sanction should be grave enough to effectively deter future violations, as the following statement of the Committee shows: “Much more severe sanctions are needed to effectively discourage torture and other abuses by prison and law enforcement officials.”¹⁰² In case of large-scale violations severer sanctions are necessary in order to effectively discourage future violations. At the same time the punishment should be commensurate with the gravity of the crime commit-

terior to domestic legislation and to ensure its conformity with the Constitution. However, there is no corresponding individual right to claim a specific status of the Covenant. For a detailed account of the obligations under article 2 para. 2, see Seibert-Fohr, see note 21.

¹⁰¹ Orentlicher, see note 18, 2573, 2576; Scharf, see note 24, 27.

¹⁰² Comments on the Dominican Republic, Doc. CCPR/C/79/Add.18, para. 10 (1993).

ted.¹⁰³ The overall goal is the effective protection of human rights. In finding the right punishment the State party, as already pointed out, needs to take into account the human rights of the offenders. For example, the prohibition of retroactive criminal laws pursuant to article 15 needs to be observed. However, if an act or omission was criminal according to the general principles of law recognized by the community of nations at the time it was committed, it may nevertheless be punished pursuant to article 15 para. 2.

These are only guidelines. The concrete measures to be taken, to a certain extent, depend on the specific circumstances. The finding of a violation may signify a sufficient punishment in one case while not in others. Since article 2 provides for some leeway in the implementation of the Covenant States parties should be granted a certain margin of discretion in finding the right sanction.¹⁰⁴ However, in cases of serious human rights violations, such as summary executions, disappearances, torture, ill-treatment and arbitrary detention, criminal prosecution is mandatory according to the Human Rights Committee. As the Committee held in *Bautista de Arellana v. Colombia*, "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, para. 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."¹⁰⁵ The Committee held that the State party was under a duty to prosecute criminally, try and punish those held responsible for such violations as forced disappearances and violations of the right to life.¹⁰⁶ Similarly in cases of police abuse criminal rather than merely administrative sanctions were recommended in the Comments on Romania.¹⁰⁷

Apart from criminally prosecuting, offenders convicted of serious offences should be permanently removed from office.¹⁰⁸ In its Com-

¹⁰³ In its Comments on Romania the Committee criticized "that penalties prescribed by law are not commensurate with the gravity of the crimes committed." Comments on Romania, Doc. CCPR/C/79/Add.30, para. 10 (1993).

¹⁰⁴ Seibert-Fohr, see note 21, 462.

¹⁰⁵ Doc. CCPR/C/55/D/563/1993, para. 8.2 (1995). See also Tomuschat, see note 23, with further references in note 30 there.

¹⁰⁶ Doc. CCPR/C/55/D/563/1993, para. 8.6 (1995).

¹⁰⁷ Comments on Romania, Doc. CCPR/C/79/Add.30, para. 15 (1993).

¹⁰⁸ Comments on Brazil, Doc. DDPR/C/79/Add.66, para. 20 (1996); Comments on Guatemala, Doc. CCPR/C/79/Add.63, para. 26 (1996); Con-

ments on Argentina of 2000 the Committee recommended that persons involved in past gross human rights violations be removed from military or public service.¹⁰⁹ This step, apart from other sanctions, should be done “in order to guard against a culture of impunity” as Mr. Lallah, a member of the Committee, put it.¹¹⁰ To leave such perpetrators in office would run the risk of new violations by state authorities. Other feasible sanctions are the cancellation of government pension, the requirement to pay damages through administrative fines or civil proceedings.¹¹¹ Also, the names of the offenders should be made public.¹¹²

5. Who Needs to Be Punished: State Officials and Private Individuals?

It goes without saying that a State party needs to punish its own officials who violate human rights acting under state authority. Whether the duty to punish also concerns acts of private individuals shall be dealt with in the following. Not every abuse of a human right by a private person is a human rights violation under the Covenant, resulting in state responsibilities, such as for example, the duty to prosecute. States parties are primarily under an obligation not to violate human rights through their authorities.¹¹³ However, certain rights do also have horizontal effects. In other words, they create a duty of the State party to protect against interference by private individuals. For example, article 20 explicitly proscribes the prohibition of war propaganda by law, and article 8 the prohibition of slavery. The right to life shall be protected by law pursuant to article 6 para. 1.

The Commission on Human Rights in drafting this provision intended to protect the individual against public and private interfer-

cluding Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 32 (1997).

¹⁰⁹ Concluding Observations on Argentina, Doc. CCPR/CO/70/ARG, para. 9 (2000).

¹¹⁰ Summary record of the 1397th Mtg., Haiti, Doc. CCPR/C/SR.1397/Add.1 (1995).

¹¹¹ Scharf, see note 24, 27.

¹¹² Comments on Morocco, Doc. CCPR/C/79/Add.44, D. (1994).

¹¹³ A State party is also responsible for acts committed by private parties if its failure to prevent a violation is systematic and therefore amounts to complicity or condonation.

ence.¹¹⁴ An indication of horizontal effects of the Covenant rights may also be taken from article 2 para. 3 Subpara. (a), which provides for an effective remedy “notwithstanding that the violation has been committed by persons acting in an official capacity.”¹¹⁵ Article 2 para. 1 clarifies that the States parties are not only under an obligation “to respect”, that is to refrain from violations, but also under an obligation “to ensure” the Covenant rights. If there were no criminal prosecution of murder in general, regardless of the status of the offender, the right to life would not be sufficiently protected and ensured.¹¹⁶

Whether private individuals need to be punished depends on the scope of horizontal effects created by the respective Covenant right. Only if there is a duty to protect individuals against interference from individual parties can a duty to punish private offenders be assumed. This depends on the gravity and scale of the violation. The more people are affected and the graver the violation is, the more the State party is required to intervene in order to fight an atmosphere of impunity and prevent future violations. Accordingly, the Human Rights Committee has asked States parties to punish offenders in specific cases, whether they are state officials or private individuals.¹¹⁷ In its General Comment on article 7 of 1992, for example, the Committee asked States parties to indicate in their reports “provisions of their criminal law which penalize torture ... specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons.”¹¹⁸ To include private individual offenders may also be due to a reflection of equal treatment, which is mandated by article 26 of the Covenant.

¹¹⁴ Doc. E/CN.4/SR.90, 8-10, 12. Other examples for the requirement to take positive measures to protect against private interference are arts.17, para. 2; 23, 24, 26 and 27. See Nowak, see note 31, 38.

¹¹⁵ Nowak, see above.

¹¹⁶ This is why the Human Rights Committee asks for the punishment of deprivation of life by criminal act regardless whether committed by public officials or private individuals. See General Comment 6 on article 6 (1982), HRI/GEN/1/Rev.1, 6, para. 3.

¹¹⁷ In the case of Yemen the Committee criticized equally the amnesty granted to civilian and military personnel for human rights violations, Comments on Yemen, Doc. CCPR/C/79/Add.51, para. 11 (1995).

¹¹⁸ General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para. 13.

6. Related Duties

In order to deal with human rights violations adequately it is not enough to seek the offenders and to punish them. Though an individual right of the victims to see their perpetrators prosecuted has been denied there are still rights of the victims to be observed, like the right to an effective remedy pursuant to article 2 para. 3.

a. Duty to Investigate

As already mentioned above the duty to investigate thoroughly allegations of human rights violations has repeatedly been emphasized by the Human Rights Committee.¹¹⁹ The inquiry cannot be burdened on the victims but needs to be conducted officially. For example, in *Blanco v. Nicaragua* the Committee did not consider it to be sufficient that the individual may institute actions before the courts: “Notwithstanding the possible viability of this avenue of redress, the Committee finds that the responsibility for investigations falls under the State party’s obligation to grant an effective remedy.”¹²⁰ The reason was given in *Rodríguez v. Uruguay* where the Committee stressed that the absence of an investigation and of a final report constituted “a considerable impediment to the pursuit of civil remedies, e.g. for compensation.”¹²¹ This duty though overlapping with the duty to prosecute is independent of the duty to fight impunity. Thus, even if there were no duty to criminally prosecute and punish a violation¹²² there is still the duty to investigate allegations of human rights violations.

¹¹⁹ See *Bleier v. Uruguay*, Communication No. R. 7/30 (1978), HRC Report, GAOR Suppl. No. 40 (Doc. A/37/40), 130, para. 15 (1982); *Barbato v. Uruguay*, Communication No. 84/1981, HRC Report, GAOR Suppl. No. 40 (Doc. A/38/40), 124 et seq., (124, para. 11) (1983); *Quinteros v. Uruguay*, Communication No. 107/1981, Selected Decisions under the Optional Protocol, Vol. 2, CCPR/C/OP/2, 138 et seq., (143, para. 15) (1983); *Laureano Atachahua v. Peru*, Communication No. 540/1993, Doc. CCPR/C/56/D/540/1993, para. 10 (1996).

¹²⁰ Communication No. 328/1988, Doc. CCPR/C/51/D/328/1988, para. 10.6 (1994). See also *Rodríguez v. Uruguay*, Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, paras 12.3, 12.4 (1994).

¹²¹ Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 6.3 (1994).

¹²² For example, if other sanctions are more adequate, see Chapter III. 4.

As to the legal basis for the duty to investigate the Committee elaborated in its General Comment on article 7 of 1992 that his article should be read in conjunction with article 2 para. 3, of the Covenant and that “[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”¹²³ In *Joaquín Herrera Rubio et al. v. Colombia* the Committee held that the State party had violated article 6, among others, because it had failed to investigate effectively the responsibility for the victim’s murder and concluded that the State party was under an obligation, in accordance with article 2, to take effective measures to investigate the violations of arts 7 and 10 para. 1.¹²⁴ Hence, the obligation to conduct an official investigation derives from the substantive rights — such as the ones in arts 6 and 7 — read together with article 2 para. 3.¹²⁵ While there is no individual right of the victims to claim prosecution of offenders there is, indeed, an individual right of the victim to seek an investigation into human rights abuses.

Turning to the specific requirements of the duty to investigate, the investigation should be conducted by an independent institution examining allegations of human right violations *sua sponte*.¹²⁶ In its Concluding Observations on Cambodia, for example, the Committee recommended an independent human rights monitoring body to receive and investigate allegations of torture or other abuses of power by public officials.¹²⁷ An effective remedy can be provided through recourse to a

¹²³ General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para. 14.

¹²⁴ HRC Report, GAOR Suppl. No. 40 (Doc. A/43/40), 190, paras 11-12 (1988).

¹²⁵ The duty to investigate cases of human rights violations is sometimes derived from the substantive rights of the Covenant. In its Comments on Senegal the Committee criticized that “[t]he passiveness of the Government in conducting timely investigations of reported cases of ill-treatment of detainees, of torture and of extra-judicial executions is not consistent with the provisions of articles 7 and 9 of the Covenant.” Comments on Senegal, Doc. CCPR/C/79/Add.10, para. 5 (1992). In its General Comment No. 6 (16) concerning article 6 the Committee held it to be mandatory to establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons.

¹²⁶ Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 10 (1999).

¹²⁷ Concluding Observations on Cambodia, Doc. CCPR/C/79/Add.108, paras 6, 10 (1999).

competent judicial, administrative, legislative or other authority.¹²⁸ Any investigating reports of human rights abuses should be transparent and the results should be made public.¹²⁹

b. Compensation for Victims

Following the investigation procedure, the victim's and his or her family's right to appropriate compensation for injuries suffered may not be denied.¹³⁰ The right to appropriate compensation is an element of the right to an effective remedy under article 2 para. 3 Subpara. (a).¹³¹ Article 9 para. 5 explicitly guarantees an enforceable right to compensation in case of unlawful arrest or detention, and article 14 para. 6 requires compensation for those punished as a result of a miscarriage of justice. However, as the Committee pointed out during the consideration of Morocco's third periodic report, "[c]ompensation, however admirable in itself, would not be sufficient Only identification and punishment of those responsible would do so, since it would make plain that there was no impunity for such action and prevent any repetition."¹³²

7. Conclusions

While an individual right to demand prosecution of perpetrators of human rights violations has been repeatedly denied, the Human Rights Committee has derived from the Covenant a duty of States parties to *bring to justice* perpetrators of human rights violations. Especially in

¹²⁸ Comments on Uruguay, Doc. CCPR/C/79/Add.19, para. 7 (1993).

¹²⁹ Comments on Tunisia, Doc. CCPR/C/79/Add.43, para. 14 (1994).

¹³⁰ See *Bleier v. Uruguay*, Communication No. R. 7/30 (1978), HRC Report GAOR Suppl. No. 40 (Doc. A/37/40), 130, para. 15 (1982); *Barbato v. Uruguay*, Communication No. 84/1981, HRC Report, GAOR Suppl. No. 40 (A/38/40), 124, para. 11 (1983); *Quinteros v. Uruguay*, Communication No. 107/1981, Selected Decisions under the Optional Protocol, Vol. 2, CCPR/C/OP/2, 138, 143, para. 15 (1983); *Laureano Atachahua v. Peru*, Communication No. 540/1993, Doc. CCPR/C/56/D/540/1993, para. 10 (1996).

¹³¹ *Thomas v. Uruguay*, Communication No. 321/1988, Doc. CCPR/C/49/D/321/1988, para. 11 (1993). See also Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 15 (1995).

¹³² Summary records of the 1365th Mtg. Morocco, Doc. CCPR/C/SR.1365, para. 54 (1994).

cases of extra-judicial executions, disappearance, torture, ill-treatment and arbitrary arrest the Committee has called upon States parties to punish the offenders. This duty has been extended to all human rights violations. However, this does not mean that criminal prosecution is required for every such violation. Perpetrators of serious violations of human rights should be criminally prosecuted and removed from office. Apart from that, the sanction required depends on the particular violation and on the effectiveness of the sanction, that is, its deterrent effect. Not only state officials committing human rights violations need to be punished. Depending on the human right affected and the scope of its horizontal effects, a State party may need to punish also private individuals in order to effectively protect human rights.

It is interesting to note that for the Committee, punishment is not only an option of effective human rights protection but it is essential and mandatory in order “to respect and to ensure” the Covenant rights pursuant to article 2 para. 1. Otherwise a duty to punish could not be assumed. While the Committee usually gives some latitude for the choice of implementation measures it is much stricter if it comes to the question of how perpetrators of human rights abuses need to be dealt with. In assuming a *duty* to prosecute the Committee rules out any other option. Punishment becomes the only effective means of protection. Apart from that the State party is required to conduct an official investigation *sua sponte* pursuant to article 2 para. 3 read together with the substantive right violated in order to provide the victims with an effective remedy. While there is no individual right to see one’s abusers punished, there is indeed a right of the victim to demand an investigation and a right to compensation.

The duty to prosecute is derived from article 2 paras 1 and 2. This has implications not only for its international enforcement but also for its content, its dispensability and for how exactly the duty to prosecute needs to be implemented: since there is no corresponding individual right it cannot be claimed in the individual communications procedure. Therefore, the international enforcement is left to the reporting procedure and to the optional inter-state communications procedure pursuant to article 41.¹³³ Additionally, the fact that the duty to prosecute is derived from article 2 paras 1 and 2 as opposed to para. 3 has implications for its particular content. The content of an obligation is informed by its purpose. According to the Human Rights Committee, impunity is an obstacle to the respect of human rights. Punishment, therefore, is

¹³³ Unfortunately this systems has not been used so far.

regarded as a general means of protection against future human rights violations. The emphasis is on the punishment's deterrent effect rather than on its remedial implications. The particular punishment required by this provision has to take into account how much punishment is needed in order to effectively deter future violations. The focus on countrywide deterrence and on prevention of future violations instead of providing a specific remedy for the victims is also important for its dispensability: if the question arises whether an exception can be made to the duty to prosecute, it needs to be determined whether the overall protection of human rights, which is the ultimate measure to evaluate the obligation undertaken under article 2 paras 1 and 2, is better served by the renunciation of punishment combined with supplementing measures or by the enforcement of the punishment.¹³⁴ A renunciation of punishment would be more difficult to find if there was an individual right of the victims to see their abusers prosecuted.

IV. Amnesties under the Covenant

There has been considerable discussion as to whether there may be an exception from the duty to prosecute human rights violations.¹³⁵ It has been contended that in the aftermath of civil war and dictatorship an amnesty may be granted in order to restore peace and respect for human rights. Accordingly, the State party in *Rodríguez v. Uruguay* argued "that notions of democracy and reconciliation ought to be taken into account when considering laws on amnesty and on the lapsing of prosecutions."¹³⁶ It elaborated that "to investigate past events ... is tantamount to reviving the confrontation between persons and groups.

¹³⁴ The answer to the question whether an amnesty is permissible under the Covenant ultimately depends on whether one thinks that respect for human rights can be re-established by means of and despite the impunity for human rights violations. See Chapter IV. 1. b.aa.

¹³⁵ See e.g. Orentlicher, see note 18, 2599; Roht-Arriaza, see note 18, 57; Am-bos, see note 18, 209; Tomuschat, see note 23, 343 et seq. Article 6 para. 4 provides that amnesty may be granted in case of the death penalty. However this does not require or permit a general amnesty for all serious human rights violations.

¹³⁶ Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 8.3 (1994).

This certainly will not contribute to reconciliation, pacification and the strengthening of democratic institutions.”¹³⁷

Virtually none of the obligations created by the Covenant is absolute. Duties may compete and therefore need to be balanced against each other. The main scope is the effective protection of human rights. If the prosecution of offenders would lead to an atmosphere adverse to peace and the enjoyment of human rights, an exception may need to be made. However, it is questionable whether an amnesty has the potential of restoring peace in society. This certainly depends on the individual case, the scope of the amnesty, the particularities of the state concerned, its culture, the alternative remedies etc.

1. Covenant Rights and Duties Affected by Amnesties

As elaborated in the first part of this article, there are two sets of obligations for dealing with human rights abuses. One concerns the obligation derived from the individual rights of the victims, namely the duty to investigate and to compensate in accordance with the victim’s right to an effective remedy. The other one is the duty to prosecute in order to regain respect and in order to protect the Covenant rights. The fact that both sets of obligations are usually interfered with by the proclamation of an amnesty led the Human Rights Committee to prefer a general prohibition of amnesties for human rights violations. In the case of Ecuador, for example, it generally welcomed constitutional provisions prohibiting the enacting of future amnesty legislation for human rights violations.¹³⁸

It seems advisable to deal with the particular State party obligations affected by an amnesty separately in order to determine whether and under which circumstances an exception to the respective obligation can be made. The Committee in several pronouncements elaborated why and in which way State party obligations under the Covenant are affected.

¹³⁷ *Ibid.*, para. 8.5.

¹³⁸ In its observations on the fourth periodic report of Ecuador the Committee “welcomes the information that article 23 of the Constitution prohibits the enacting of amnesty legislation or granting pardons for human rights violations; that torture, enforced disappearances and extrajudicial executions have no statute of limitations,” HRC Report, GAOR Suppl. No. 40 (Doc. A/53/40), Vol. I, para. 280 (1998).

a. The Right to an Effective Remedy Including Compensation

In *Rodríguez v. Uruguay* the Committee examined the Uruguayan Law No. 15,848 of 22 December 1986, the Limitations Act or Law of Expiry (*Ley de Caducidad de la Pretensión Punitiva del Estado*), which provided for the immediate end of judicial investigation into allegations of human rights violations and made impossible the pursuit of these crimes committed during the years of military rule.¹³⁹ It held:

“that amnesties for gross violations of human rights and legislation such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses.”¹⁴⁰

Similarly, the Committee expressed its concern over Argentina’s former Act 23.521 (Law of Due Obedience) and Act 23.492 (Law of Punto Final) for denying an effective remedy to victims of human rights violations during the period of authoritarian rule in violation of article 2 paras 2 and 3 and of article 9 para. 5 of the Covenant.¹⁴¹ Its main concern was that “amnesties and pardons have impeded investigations into allegations of crimes.”¹⁴² In regard of the Chilean Amnesty Decree Law it held that it “prevents the State party from complying with its obligation under article 2, para. 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated.”¹⁴³ Accordingly, in the case of El Salvador the Committee recommended

¹³⁹ Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 2.2 (1994).

¹⁴⁰ *Ibid.*, para. 12.4. In order to ensure that victims of past human rights violations have an effective remedy the Committee recommended adopting legislation to correct the effects of Uruguay’s Expiry Law in its Comments on Uruguay’s third periodic report, See Comments on Uruguay, Doc. CCPR/C/79/Add.19, para. 11 (1993).

¹⁴¹ Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995). The cited laws were repealed in 1998.

¹⁴² Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995).

¹⁴³ Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 7 (1999).

amending or repealing the Amnesty Law in order to ensure that victims of past human rights violations have an effective remedy and that they may be compensated.¹⁴⁴

To sum it up, amnesties often have as a consequence that — due to the end of prosecution and the lack of alternative routes of investigations — the right to seek an official investigation into human rights abuses pursuant to article 2 para. 3 is effectively denied. At the same time, the payment of compensation, also guaranteed by this provision, is hampered. The absence of an official investigation constitutes at least a considerable impediment to the pursuit of civil remedies (e.g. compensation). At the same time, amnesties frequently interfere with article 14 by excluding the possibility of the victims to claim compensation through civil litigation. Article 14 of the Covenant provides that the individual right to have ones rights determined in a suit at law (i.e. compensation) may not be denied. To be clear, this does not mean that a duty to prosecute can be derived from article 14. But the State party needs to make sure that the victims are able to enforce their right to compensation through a suit at law. In addition, if an amnesty results in the denial of compensation for unlawful detention article 9 para. 5 is violated. In disappearance cases the failure to investigate as a consequence of an amnesty may amount to a violation of the right to recognition as a person before the law pursuant to article 16.¹⁴⁵

Arguably, it is conceivable that amnesty legislation makes provision for an official investigation without the result of criminal prosecution. Whether a national fact-finding procedure will suffice the Committee's standards under article 2 para. 3 remains to be seen. The first reporting session on South Africa, which will probably deal with South Africa's Truth and Reconciliation Commission and its conditional amnesty and will hopefully give some insight into this question, is scheduled for July 2002. However, even if there is an official investigation and provision is made for the compensation of the victims, there is still the question whether a State party to the Covenant may not punish the offenders in order to re-establish peace.

¹⁴⁴ Comments on El Salvador, Doc. CCPR/C/79/Add.34, paras 12 et seq. (1994).

¹⁴⁵ Mr. Hipólito Solari Yrigoyen in his Dissent, Communication No. 717/1996, Doc. CCPR/C/66/D/717/1996 Appendix (1999). See also Christine Chanet, *ibid.*

b. The Duty to Prosecute

The Human Rights Committee, apart from pointing to the right to an effective remedy has frequently criticized amnesties because of the failure to prosecute perpetrators of human rights violations. For example, in its Comments on Argentina the Committee recommended “that appropriate care be taken in the use of pardons and general amnesties so as not to foster an atmosphere of impunity.”¹⁴⁶ In its Comments on Peru of 1996 the Committee expressed its concern that the Peruvian amnesty granted by Decree Law 26,479 on June 1995 absolves from criminal responsibility and prevents punishment of perpetrators of past human rights violations.¹⁴⁷ Therefore, in *Lauteano Atachahua v. Peru* the Committee once again urged the State party “to bring to justice those responsible for her [the victim’s] disappearance, notwithstanding any domestic amnesty legislation to the contrary.”¹⁴⁸ Accordingly, in its Concluding Observations on Colombia the Committee recommended that “in order to combat impunity, stringent measures be adopted to ensure that all allegations of human rights violations be promptly and impartially investigated, that the perpetrators be prosecuted, that appropriate punishment be imposed on those convicted.”¹⁴⁹

aa. Prosecution versus Reconciliation?

The Human Rights Committee has not accepted the argument that an amnesty is necessary to restore respect for human rights. In its Concluding Observations on Chile of 1999, while appreciating the political background of the Chilean amnesty facilitating the transition from military dictatorship to democracy, it criticized the constitutional arrangements made as part of the political agreement.¹⁵⁰ It stressed “that internal political constraints cannot serve as a justification for non-

¹⁴⁶ Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 15 (1995).

¹⁴⁷ Comments on Peru, Doc. CCPR/C/79/Add.67, para. 9 (1996).

¹⁴⁸ Communication No. 540/1993, Doc. CCPR/C/56/D/540/1993, para. 10 (1996).

¹⁴⁹ Concluding Observations on Colombia, Doc. CCPR/C/79/Add.76, para. 32 (1997).

¹⁵⁰ Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 6 (1999).

compliance by the State party with its international obligations under the Covenant.”¹⁵¹

The reasons for holding on to the duty to prosecute even in the aftermath of armed conflicts and dictatorship was given when dealing with the Peruvian single sided amnesty. The Committee stated that the prevention of the perpetrator’s punishment for past human rights violations “undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity ... and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant.”¹⁵² That a State party by adopting an amnesty contributes “to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.” This was also emphasized in *Rodríguez v. Uruguay*.¹⁵³

During the consideration of Haiti’s report in 1995 Judge Higgins, then member of the Committee, “[n]oting that in many newly democratized countries, amnesty had been viewed as the negotiating price for the restoration of democracy” stressed that “unless past crimes were addressed, the future would remain uncertain.”¹⁵⁴ The effect of reconciliation has been repeatedly questioned by other members.¹⁵⁵ Mrs. Chanet explained during the deliberations on Guatemala’s second periodic report that “[i]f national reconciliation was to be made possible, the people of Guatemala needed to come to terms with the past.”¹⁵⁶ A general amnesty, which prevents the examination of past crimes, cannot serve the process of reconciliation. Therefore, the Committee while

¹⁵¹ Ibid.

¹⁵² Comments on Peru, Doc. CCPR/C/79/Add.67, para. 9 (1996). See also Comments on Yemen, Doc. CCPR/C/79/Add.51, para. 11 (1995); Comments on Paraguay, Doc. CCPR/C/79/Add.48, para. 9 (1995).

¹⁵³ Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 12.4 (1994). See also Comments on Uruguay, Doc. CCPR/C/79/Add.19, para. 7 (1993); Comments on Haiti, Doc. CCPR/C/79/Add.49, para. 8 (1995).

¹⁵⁴ Summary record of the 1397th Mtg. Haiti, Doc. CCPR/C/SR.1397/Add.1 (1995).

¹⁵⁵ Mr. *El Shafei*, Mr. *Bán* and Mr. *Bruni Celli*, Summary record of the 1520th Mtg. Peru, Doc. CCPR/C/SR.1520, paras 9, 21, 54 (1996). Mr. *Bruni Celli* ascertained that “impunity encouraged the continued commission of human rights abuses.”

¹⁵⁶ Summary record of the 1940th Mtg., Doc. CCPR/C/SR.1940, para. 51 (2001).

urging Governments like Colombia and Guatemala to set up a process of national reconciliation also called upon them to combat impunity.¹⁵⁷ In *Rodríguez v. Uruguay* it rejected the State party's assertion that the Law of Expiry (*Ley de Caducidad de la Pretensión Punitiva del Estado*) which provided for the immediate end of judicial investigation into allegations of human rights violations "consolidate[d] the institution of democracy and ... ensure[d] the social peace necessary for the establishment of a solid foundation of respect of human rights."¹⁵⁸ Contrary to the State party, the Committee did not consider an amnesty as a means to ensure that situations endangering respect for human rights would not occur in the future.¹⁵⁹

Another argument against amnesties was raised by Mr. Klein in consideration of Peru's third periodic report where he pointed out that the Peruvian amnesty laws "did nothing to restore the rule of law but, on the contrary, encouraged the persistence of prehensible practices."¹⁶⁰ Similarly, the climate of impunity in Guatemala was criticized by the Committee as an obstacle to the rule of law.¹⁶¹

To sum it up, while the Human Rights Committee emphasizes that democracy, peace and respect for human rights need to be re-established after a civil war and dictatorship¹⁶², it does not see that this object will be achieved by the proclamation of an amnesty. On the contrary, according to the Committee, impunity may weaken the re-establishment of peace, respect for human rights, democracy and the rule of law.

¹⁵⁷ Concluding Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 30, 32 (1997); Comments on Guatemala, Doc. CCPR/C/79/Add.63, para. 25 (1996).

¹⁵⁸ Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, paras 4.3, 12.4 (1994).

¹⁵⁹ This argument had been made by the State party as a justification, Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 4.3 (1994).

¹⁶⁰ Summary record of the 1519th Mtg. Peru, Doc. CCPR/C/SR.1519, para. 73 (1997).

¹⁶¹ Comments on Guatemala, Doc. CCPR/C/79/Add.63, para. 4 (1996).

¹⁶² Comments on El Salvador, Doc. CCPR/C/79/Add.34, paras 7, 12 (1994).

bb. The Human Rights Violations which Cannot be Amnestied

It has already been explained that the Human Rights Committee requires the punishment of all human rights violations. Whether there may be a limitation as to certain crimes after times of public unrest or dictatorship in order to re-establish peace and democracy shall now be elaborated. *Crimes against humanity* may not be amnestied according to the Committee.¹⁶³ States parties, as for example Burundi, are urged to bring to trial and punish those responsible for *gross violations of human rights*.¹⁶⁴ The term gross violations of human rights was elaborated in the Committee's Comments on Argentina's second periodic report. It criticized the fact that amnesties and pardons had been applied "even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children."¹⁶⁵ Gross violations of civil and political rights should be prosecutable for "as long as necessary" according to the Committee.¹⁶⁶ In the case of Croatia it recommended that *serious human rights violation* should not be amnestied.¹⁶⁷

¹⁶³ In its Concluding Observations on Guatemala of 2001 the Committee recommended that the State party should "[s]trictly apply the National Reconciliation Act, which explicitly excludes crimes against humanity from amnesty." Doc. CCPR/CO/72/GTM, para. 12 (2001). During the consideration of Peru's third periodic report Mr. Pocar, a former member of the Committee held it very disturbing if even those guilty of *crimes against humanity* could be granted amnesty. Summary record of the 1519th Mtg. Peru, Doc. CCPR/C/SR.1519, para. 79 (1997). In its Concluding Observations on Cambodia the Committee recommended to bring the alleged perpetrators of crimes against humanity to trial, Doc. CCPR/C/79/Add.108, para. 6 (1999).

¹⁶⁴ Comments on Burundi, Doc. CCPR/C/79/Add.41, para. 12 (1994).

¹⁶⁵ Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995). Accordingly, in its latest Concluding Observations on Argentina the Committee welcomed that perpetrators of the most serious human rights violations were being brought to trial, Concluding Observations on Argentina, Doc. CCPR/CO/70/ARG, para. 5 (2000).

¹⁶⁶ Concluding Observations on Argentina, Doc. CCPR/CO/70/ARG, para. 9 (2000).

¹⁶⁷ Concluding Observations on Croatia, Doc. CCPR/CO/71/HRV, para. 11 (2001). The Committee criticized that the exception of the Croatian Amnesty Law for "war crimes" was not defined leaving the danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations.

The Committee has specified the particular crimes that an amnesty should not be applied to in various pronouncements. The above-cited condemnation of amnesties in its General Comment on article 7 was related to acts of torture.¹⁶⁸ The Committee extended it to extra-judicial executions, which should “in no case enjoy immunity, inter alia, through an amnesty law.”¹⁶⁹ In addition, those responsible for summary executions, disappearances, ill-treatment, and arbitrary arrest and detention should be prosecuted and punished despite the proclamation of an amnesty.¹⁷⁰

While most of the pronouncements focused on impunity for serious crimes the Committee has sometimes extended its criticism to amnesties covering human rights violations in general.¹⁷¹ For example, in its Concluding Observations on Cambodia the Committee recommended that the State party should bring to trial perpetrators of gross human rights violations and crimes against humanity but expanded this obligation to all violations of Covenant rights.¹⁷² In its Comments on Senegal it found that “amnesty should not be used as a means to ensure the impunity of State officials responsible for violations of human rights and that all such violations, especially torture, extra-judicial executions and ill-treatment of detainees should be investigated and those responsible for them tried and punished.”¹⁷³ Amnesties covering any human rights violation were criticized as incompatible with article 2 paras 1 and 3 in the Concluding Observations on Chile.¹⁷⁴ There the Committee declared that “amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its

¹⁶⁸ General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 31, para. 15.

¹⁶⁹ Comments on Nigeria, Doc. CCPR/C/79/Add.17, para. 7 (1993).

¹⁷⁰ Comments on Peru, Doc. CCPR/C/79/Add.67, para. 22 (1996); Comments on Senegal, Doc. CCPR/C/79/Add.10, para. 5 (1992).

¹⁷¹ In its Comments on Haiti the Committee urged the State party to exclude the perpetrators of past human rights violations from the scope of the amnesty, Doc. CCPR/C/79/Add.49, para. 13 (1995).

¹⁷² The Committee urged “to bring those alleged to have violated Covenant rights to trial,” Concluding Observations on Cambodia, Doc. CCPR/C/79/Add.108, paras 6, 11 (1999).

¹⁷³ Comments on Senegal, Doc. CCPR/C/79/Add.10, para. 5 (1992).

¹⁷⁴ Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 7 (1999).

jurisdiction and to ensure that similar violations do not occur in the future.”¹⁷⁵

2. Conclusions and Outlook

The Human Rights Committee leaves virtually no room for amnesties for human rights violations. Its pronouncements show a profound dislike of amnesties and a preference for a general prohibition of amnesties of human rights violations. The argument that an amnesty is necessary for reconciliation and the re-establishment of respect for human rights has been repeatedly rejected. The two main arguments raised against amnesties for human rights violations are based on the right of the victims to an effective remedy (article 2 para. 3) and the duty to respect and ensure the Covenant rights (article 2 para. 1). As the Committee in its General Comment on article 7 pointed out:

“Amnesties are generally incompatible with the duty of States to investigate such acts [acts of torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”¹⁷⁶

According to the Committee, impunity as a result of an amnesty undermines efforts to establish respect for human rights. The answer to the question whether an amnesty is permissible under the Covenant ul-

¹⁷⁵ Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 7 (1999). See also Concluding Observations on Congo, Doc. CCPR/C/79/Add.118, para. 12 (2000). However, under the individual complaint procedure the Committee has been reluctant to expressly condemn the Chilean amnesty law of 1978. It avoided a statement on the compatibility of the amnesty law with the Covenant in the communication regarding the “*Banos de Chihuio*” incident by holding them inadmissible *ratione temporis*. The State party, however, had not explicitly challenged the admissibility of the communication. According to the dissent the Committee should have declared the communication admissible *ratione temporis*. See Communication No. 717/1996 (1999), Doc. CCPR/C/66/D/717/1996, para. 7 and Appendix (1999); see also Communication No. 718/1996 (1999), Doc. CCPR/C/66/D/718/1996/Rev.1, para. 7 (1999); Communication No. 746/1997 (1999), Doc. CCPR/C/66/D/746/1997, para. 7 (1999).

¹⁷⁶ General Comment 20 on article 7 (1992), HRI/GEN/1/Rev.1, 31, para. 15.

timately depends on whether one thinks that peace and respect for human rights can be achieved through an amnesty or not.

So far, no amnesty legislation covering human rights violations has been endorsed by the Human Rights Committee. There are a number of similarities to the pronouncements by the Inter-American organs. The Inter-American Court of Human Rights in *Velásquez Rodríguez* derived a duty to investigate and punish any violation of the rights recognized by the American Convention from its article 1 para. 1.¹⁷⁷ This “ensure and protect” provision is similar to article 2 para. 1 of the Covenant which provides the legal basis for the duty to prosecute proclaimed by the Human Rights Committee. The Inter-American Court, however, explicitly acknowledged that there might be legitimate circumstances not specified by the Court in which states are unable to punish human rights violations.¹⁷⁸ A number of amnesties have been criticized by the Inter-American Commission on Human Rights as a violation of the American Declaration and the American Convention on Human Rights, namely as a violation of the duty to ensure human rights, including the duty to investigate and punish violations of human rights, and as a violation of the victims’ right to a fair trial and their right to judicial protection.¹⁷⁹ In acknowledging an individual right of the victim “to an impartial and exhaustive judicial investigation that ... ascertains those responsible and imposes the corresponding criminal punishment” if the State party’s domestic law provides for a right to participate in or initiate the criminal proceedings,¹⁸⁰ the Commission even went a step further than the Human Rights Committee that so far has not accepted a right of the victims to see their abusers prosecuted.

¹⁷⁷ Inter-American Court H.R. Series C No. 4, para. 166 (1988). This case is not to be confused with the afore mentioned case *Rodríguez v. Uruguay* before the Human Rights Committee.

¹⁷⁸ *Ibid.*, para. 181. The Court, however, did not address the legality of Honduras’ amnesty laws.

¹⁷⁹ See Annual Report of the Inter-American Commission on Human Rights 1992-93, 41 Report No. 28/92 –Argentina– paras 32-37, 40 (1992); Annual Report of the Inter-American Commission on Human Rights 1992-93, 154 Report No. 29/92 –Uruguay– (1992); *Massacre Las Hojas v. El Salvador*, Case 10.287, Report No. 26/92 (1992), Annual Report of the Inter-American Commission on Human Rights 1992-93, 83.

¹⁸⁰ Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 against Uruguay, Annual Report of the Inter-American Commission on Human Rights 1992-93, OEA/Ser.L/V/II.83, Doc.14 Corr. 1 (1993), 154-165, para. 38.

The Inter-American organs, like the Human Rights Committee, so far have stopped short of outlawing all amnesties for perpetrators of human rights abuses.¹⁸¹

By stating that amnesties for acts of torture are “generally incompatible” in its General Comment on article 7 the Human Rights Committee did not entirely rule out the possibility for an amnesty. Whether an amnesty, which is accompanied by stringent alternative measures to deal with the past, could be accepted will be seen in future. It certainly depends on whether the Committee can be persuaded that respect for human rights can be re-established by means of and despite the impunity for human rights violations. This requires an analysis and evaluation of the particular situation combined with a balancing of the prospective positive effects of re-establishing peace through the grant of an amnesty (e.g. if an amnesty is made preconditional for the end of a civil war) against the disadvantages of impunity for the future protection of human rights due to its negative effect on deterrence and the consequences for the victims.

In any case, the essential and indispensable requirements in dealing with past human rights abuses under the Covenant are an official investigation with a final report identifying the perpetrators¹⁸², removal of the perpetrators of serious offenses from office,¹⁸³ compensation and rehabilitation of the victims, the determination of individual responsi-

¹⁸¹ *Ellen Lutz* argues that this may be due to political and institutional considerations of the Inter-American Commission. E. Lutz, “Responses to Amnesties by the Inter-American System for the Protection of Human Rights”, in: D.Harris/ S. Livingston (eds), *The Inter-American System of Human Rights*, 1998, 345 et seq., (361). According to *Juliane Kokott*, who analysed the evaluation of impunity under the Inter-American system, “[t]here may be situations where states have a margin of appreciation as to whether, under exceptional circumstances, the country is better served by granting an amnesty to the supporters of a past dictatorial regime.” J. Kokott, “No Impunity for Human Rights Violations in the Americas,” *HRLJ* 14 (1993), 153 et seq., (156).

¹⁸² In *Rodríguez v. Uruguay* the Committee held an investigation and a final report imperative for the pursuit of civil remedies, Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 6.3 (1994).

¹⁸³ Concluding Observations on Argentina, Doc. CCPR/CO/70/ARG, para. 9 (2000); Comments on Brazil, Doc. DDP/C/79/Add.66, para. 20 (1996); Comments on Guatemala, Doc. CCPR/C/79/Add.63, para. 26 (1996); Concluding Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 32 (1997).

bility¹⁸⁴ as well as efforts to establish respect for human rights, to ensure non-recurrence and to consolidate democracy. Gross violations of human rights, like summary executions, torture and disappearances may in no case be amnestied. One-sided amnesties for State officials, according to the Committee, are entirely unacceptable under the Covenant.¹⁸⁵ The decision to grant amnesty for certain acts should at least be based on a democratic process.¹⁸⁶ In any case, in order not to weaken the transition to security and democracy human rights violators should be excluded from service in the military, the police force and the judiciary.¹⁸⁷ Additional measures should be taken to promote national reconciliation, i.e. institutions and programs to serve as a channel of redress for victims of past abuses, as well as financial and other compensation to the victims.¹⁸⁸

¹⁸⁴ The essential requirements in dealing with past human rights violations were pointed out in the Committee's Comments on Haiti of 1995 where it emphasized "the importance of investigation of human rights violations, determination of individual responsibility and fair compensation for the victims." Comments on Haiti, Doc. CCPR/C/79/Add.49, para. 9 (1995).

¹⁸⁵ According to Professor Buergenthal this constitutes a retroactive ratification of the offences committed, Summary record of the 1519th Mtg. Peru, Doc. CCPR/C/SR.1519, para. 44 (1997).

¹⁸⁶ Mr. *Bán*, Summary record of the 1520th Mtg. Peru, Doc. CCPR/C/SR.1520, para. 21 (1996).

¹⁸⁷ See Comments on Haiti, Doc. CCPR/C/79/Add.49, para. 10 (1995). In its Concluding Observations on Argentina the Committee recommended the removal from office of perpetrators of gross human rights violations, Doc. CCPR/CO/70/ARG, para. 9 (2000).

¹⁸⁸ In its Concluding Observations on Argentina the Committee welcomed the Historical Reparation Programme, the National Commission on the Disappearance of Persons and the National Commission for the Right to an Identity, Doc. CCPR/CO/70/ARG, para. 4 (2000).