Accepting state responsibility by means of an 'apology': the Australian and South African experience

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Abstract

The International Law Commission's 2001 Draft Articles on State Responsibility declares that, besides restitution and compensation as a means of accountability for an international wrong, satisfaction may also be offered. Article 37 states that satisfaction may take the form of an expression of regret or a formal apology. This is a movement away from the *Chorzow Factory Case* PC1J Series A no 17 4 (1928) where it was held that a breach of an international obligation demands full reparation for the injury caused. Article 37 is more in line with the *Genocide Convention Case* 2007 ICJ Rep 43 where it was held that state responsibility could arise at a political level. In the *Rainbow Warrior Affair* 20 RIAA 217 (1990) the tribunal considered that a French declaration of responsibility was, *inter alia,* an appropriate form of redress for using force against the territorial integrity of New Zealand. It is submitted that Australian Prime Minister Rudd's 2008 formal apology for the removal of aboriginal children from their parents (the 'Stolen Generation') and South Africa's 1998 Truth and Reconciliation Commission are examples of an expression of regret or formal apology as set out in article 37 of the ILC's Draft Articles on State Responsibility. It is submitted that in so doing Australia and South Africa have accepted accountability for breaches of *ius cogens* norms and *erga omnes* obligations.

INTRODUCTION

In its study of state responsibility, the International Law Commission (ILC) initially assumed the approach that an internationally wrongful act which results from a breach by a state of an international obligation so essential for the protection of fundamental interests of the international community, that

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when its breach is recognised as a crime by that community as a whole, gives rise to state responsibility.[1] The ILC gave as examples of such crimes: aggression, colonial domination, slavery, genocide, apartheid, and the massive pollution of the atmosphere or the seas.[2] Objections were raised against the notion of criminal responsibility taking into account the absence of the appropriate machinery within the then international institutional structures.[3] As a result, the ILC dropped the notion of state criminal responsibility from its final Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) and instead adopted a special regime for the violation of peremptory norms not involving criminal responsibility in articles 40 and 41 of its final Draft Articles.[4] Articles 40 and 41 provide that states are obliged to cooperate in bringing to an end, through lawful means, serious breaches by a state of an obligation arising under a peremptory norm of general international law. States are also obliged to refrain from recognising as lawful, a situation created by a serious breach of a peremptory norm. Article 48 states that a non-injured state may invoke the responsibility of another state if the other state violates an obligation owed to the international community as a whole.

The move away from criminal responsibility as part of state responsibility is illustrated by the decision of the International Court of Justice (ICJ) in the *Genocide Convention Case*,[5] where the court stressed that the obligations for states under the Genocide Convention were not of a criminal nature. Serbia was held responsible for breaching articles 4 and 5 of the Genocide Convention, but was not held to be criminally accountable. The ICJ highlighted that the state responsibility doctrine may leave a gap when it comes to the answerability of states. It held that other sources of international protection were contemplated within the Genocide Convention, and recognised that such forms of protection could arise at a political level

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1 Report of the International Law Commission (1996) GAOR 51st Session, Suppl No 10 (A/51/10); (1998) 37 *ILM* 440; Bowett 'Crimes of states and the 1996 Report of the ILC on State Responsibility' (1998) 9 *European Journal of International Law* 163.

2 Dugard *International law: a South African perspective* (4ed 2011) 270.

3 Crawford *The International Law Commission's articles on state responsibility* (2002) 16; Gilbert 'The criminal responsibility of states' (1990) 39 *ICLQ* 345.

4 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/117 12 Dec 2001, reprinted in Crawford n 3 above.

5 *Application of the Convention on the Protection and Punishment of the Crime of Genocide: Bosnia and Herzogovina v Yugoslavia (Serbia and Montenegro)* 2007 ICJ Rep 43, 115 par 170. This judgment was heavily criticised for failing to identify the gravity of Serbia's actions. It must be pointed out however that the court's role was only to resolve Serbia's responsibility for genocide as set out in the 1948 Genocide Convention.

rather than as a matter of legal responsibility.[6] This view of the ICJ illustrates that responses to breaches of international law may be broader than the traditional view of state responsibility as set out in the *Chorzow Factory Case*[7] where the Permanent Court of International Arbitration stated that it is a principle of international law that any breach involves an obligation to make full reparation for the injury caused by the wrongful act.[8] It held that the reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if the act had not been committed.[9]

IUS COGENS, NORMS AND *ERGA OMNES* OBLIGATIONS

The ILC's final Draft Articles recognise that, besides international delictual responsibility, there are also consequences attached to breaches of peremptory norms of international law from which no derogation is permitted (*ius cogens*), and obligations to the international community as a whole in the enforcement of which all states have an interest (*erga omnes*). Although the final Draft Articles do not identify the peremptory norms, the ILC Commentary on article 40 gives examples of such norms. These include the prohibition of aggression, slavery, genocide, racial discrimination, apartheid, torture and the respect for the obligation of self-determination.[10] The identification of such norms were initially very controversial but have been increasingly accepted in international law.[11]

What is the status of the ILC's Draft Articles? These draft articles to a large extent represent a codification of international law. They include some innovative features, especially as regards the violation by states of peremptory norms. Because of the innovations, the draft articles have not yet been translated into a multilateral treaty. Rather it has been considered better to leave the draft articles as a restatement of the law until such time as it is clear that there is sufficient support to adopt them in treaty form. In practice the Draft Articles have been referred to with approval by international

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6 *Id* at par 159.

7 *Chorzow Factory (Merits)* PCIJ Series A No 17 4 (1928).

8 *Id* at 29.

9 *Id* at 47.

10 Crawford n 3 above at 246. See Weill 'Towards relative normativity in international law' (1983) 77 *AJIL*; Dugard n 2 above at 278.

11 Orakhelashvili *Peremptory norms in international law* (2006); Tams *Enforcing obligations erga omnes in international law* (2005); Yarwood *State accountability under international law: holding states accountable for a breach of ius cogens norms* (2011).

tribunals, and are generally accepted by practitioners of international law as being a restatement of the law on state responsibility.

What precisely are peremptory norms of international law (*ius cogens*) and obligations to the international community as a whole (obligations *erga omnes*)? In practice there is a substantial overlap between *ius cogens* norms and *erga omnes* obligations, and as Cassese states, they inextricably coincide.[12] The examples of *erga omnes* obligations given by the ICJ in the *Barcelona Traction Case,*[13] involve *ius cogens* norms, and the examples of *ius cogens* norms given by the ILC,[14] involve *erga omnes* obligations.[15] Both sets of norms are designed to protect the common interests of states and basic universal moral values. The two concepts are clearly inextricably linked.[16] It can thus be submitted that both *ius cogens* norms and *erga omnes* obligations will entail the international responsibility of states. In 2006 the ILC's Study Group on the Fragmentation of International Law concluded that some rules of international law are more important than others and enjoy a superior status in the international legal system.[17] Included in this hierarchical structure are *ius cogens* norms, followed by article 103 of the United Nations Charter, the United Nations Charter itself, and obligations *erga omnes*. Specific attention is given to the link between *ius cogens* norms and *erga omnes* obligations.[18] The higher status accorded to *ius cogens* norms and *erga omnes* obligations, is based on their moral and humanitarian

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12 Cassese 'The character of the violated obligation' in Crawford *The law of international responsibility* (2010) 415 417; Roux *A comparative analysis of the causes for breaching the erga omnes obligation to prevent and prosecute gross human rights violations* (2012) (unpublished doctoral thesis University of Johannesburg) 15.

13 *Barcelona Traction Light and Power Company Limited (Belgium v Spain)* 1970 ICJ 3.

14 'Commentary to article 50 par 3, 248 of the ILC's Commentary to the Draft Articles on the Law of Treaties' 1966 *Yearbook of the International Law Commission Volume II, Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly* (A/CN 4/Ser A/1966/Add I).

15 Commentary on Chapter III par 7, 281 *ILC's Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC, Official Records of the General Assembly, 53 Session* 10 August 2001, Supplement 10 (A/56/10).

16 Jorgenson *The Responsibility of States for International Crimes* (2003) 4; Roux n 11 above at 15.

17 *Conclusions of the work of the ILC Study Group on the Fragmentation of International Law: difficulties arising from the diversification and expansion of international law,* 58th session (A6/61/10 par 251) 2006.

18 *Id* at par 37–38.

nature.[19] As stated by Dugard,[20] the notions of *ius cogens* norms and obligations *erga omnes* have had a profound effect on international law, and have transformed international law from a system where all rules carried equal weight, to a system of graduated normativity in which certain norms enjoy a higher status than others.[21]

The notion of peremptory norms has been accepted by the ICJ in the *Barcelona Traction Light and Power Company Limited* case.[22] The court held that obligations of a state towards the international community as a whole, are obligations *erga omnes* and all states can be held to have a legal interest in their protection:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[23]

In the *Democratic Republic of the Congo* v R*wanda*,[24] Dugard, sitting as an *ad hoc* judge stated:

> Norms of *ius cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognise the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination, while on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierachical superiority to other norms in the international legal order.[25]

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19 For criticism of *ius cogens* norms and *erga omnes* obligations see Schwartzenberger 'International ius cogens' (1964–1965) 43 *Texas Law Review* 455; Weil 'Towards relative normativity in international law' 1983 *AJIL* 413.

20 Dugard n 2 above at 14.

21 Ferreira-Snyman 'Sovereignty and the changing nature of international law: towards a world law?' (2007) 40 *CILSA* 395.

22 Note 13 above. Here the ICJ repudiated its finding in the South West Africa Cases 1996 ICJ Reports 6 where it denied Ethiopia and Liberia legal standing to enforce an obligation owed to the international community.

23 *Id* at 32.

24 2006 ICJ Reports 379.

25 *Id* at 611 par 10.

Similarly, in *East Timor (Portugal v Australia),*[26] the ICJ accepted that the right to self-determination has an *erga omnes* character. In the ICJ advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,*[27] the court held that by constructing a wall within Palestinian territory, Israel had violated certain *erga omnes* obligations pertaining to Palestinian self-determination and international humanitarian law.

SATISFACTION AS REPARATION

The ILC's Draft Articles[28] recognise three forms of reparation: restitution, compensation, and satisfaction.[29] Satisfaction,[30] in contrast to restitution and compensation, consists of an acknowledgement of the breach of international law, an expression of regret, or a formal apology. This article concentrates on satisfaction as a means of being held accountable for breaching peremptory norms of international law (*ius cogens*), and obligations to the international community as a whole (obligations *erga omnes*). As seen above, in article 40 the Draft Articles[31] set out examples of peremptory norms: prohibitions on aggression, slavery, genocide, racial discrimination, apartheid, and torture – examples which have gradually come to be accepted by national and international courts.[32]

Satisfaction, according to Brownlie,[33] could be described as any measure which the author of a breach of a duty takes under customary law, or under an agreement between the parties to a dispute, which is not either restitution or compensation. If the intention is predominantly that of seeking a token of regret and acknowledgement of wrongdoing, then satisfaction is achieved.

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26 1995 ICJ Reports 90, 102.

27 2004 ICJ Reports 136 par 155. See further *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, 123 ILR 24 and *Furundzija* International Criminal Tribunal for the Former Yugoslavia (ICTY) IT–95–17/1–A; 131 ILR 213, 260. In *Furundzija* the Trial Chamber of the ICTY emphasised the character of the prohibition of torture and the consequent obligations of states as obligations *erga omnes*, and also having the status of *ius cogens* (260–2). The notion of peremptory norms has also been accepted by national courts such as *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97 (HL) and *Ferrini v Federal Republic of Germany* Italian Court of Cassation 11 March 2004 reported in (2005) 99 *AJIL* 242.

28 Note 4 above.

29 Articles 34, 35, 36 and 37.

30 Article 37.

31 Note 4 above.

32 Such as in *DRC v Rwanda* n 24 above, the *East Timor Case* n 26 above, the *Wall Case* and the *Pinochet Case* n 27 above.

33 Brownlie *Principles of public international law* (7ed 2008) 461.

The objects of satisfaction can take the form of an apology,[34] an acknowledgement of wrongdoing, or the adoption of measures to prevent a recurrence of the harm. They could include the payment of an indemnity, and the punishment of the individuals concerned. One of the earliest reported cases where an apology was ordered is the *I'm Alone* case[35] where the United States was ordered to apologise to the Canadian government for the sinking on the high seas, of a Canada-registered vessel smuggling liquor.

It is submitted that modern examples of satisfaction (as opposed to restitution and compensation) as a means of acknowledging breaches of *ius cogens* and *erga omnes* obligations, and thereby accepting accountability for such state actions, can be found in the recent histories of South Africa and Australia. The two states may appear to be strange bedfellows, yet factually contemporaneous with the discriminatory policies of the Australian government from 1945 onwards, were the apartheid policies of the South African government. The reasons why South Africa came under sharp international scrutiny while Australia did not – despite the fact that both states adopted and implemented racially discriminatory policies, is a separate debate. As will be seen, Australia ultimately did not avoid accountability in that the state itself (and not the international community) was instrumental in the accountability process. In South Africa various reactions by members of the international community and international organisations led to the end of apartheid.

AUSTRALIA

In the case of Australia, its racial policies clearly violated a *ius cogens* norm. It arguably also violated a second norm, namely, genocide. Since the 1970s various voices have suggested that the term 'genocide' might be properly considered when looking at the history of Australia. The debates have focussed on two specific issues: first, the killings accompanying settlement during the process of land seizure and dispossession, and, secondly the twentieth-century policies of institutionalisation following upon removal[36]

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[34] According to Brownlie n 33 above at 462 meassures demanded by way of apology should not take forms which are humiliating and excessive. Article 47(3) of the ILC Draft Articles on State Responsibility n 4 above states that satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible state.

[35] RIAA 1609 (1935) 29 *AJIL* 296. See also the *Borchgrave case (Preliminary Objections)* 1937 PCIJ Ser A/B No 72, No 73, 5 and the *Panay* case RIAA (1937) 757.

[36] Curthoys, Genovese & Reilly *Rights and redemption: history, law and indigenous people* (2008) 108. In *In the matter of an application for a writ of mandamus directed to Phillip R Thompson, Ex parte Nulyarimma and Others* (1998) ACTSC 136, 178 it was held by Crispin J that: 'There is ample evidence to satisfy me that acts of genocide were

of aboriginal and Torres Strait Islander children from their families – a group of children who would come to be known as the 'Stolen Generation'.[37] This article will briefly concentrate on the latter issue as part of the bigger picture of Australia's breach of the *ius cogens* norms outlawing racial discrimination, and possibly genocide.

It is ironic that Australia, which always saw itself in the forefront of international human rights protection, by its policy of child removal breached a number of human rights norms. It specifically breached human rights recognised as *ius cogens,* which led to the government's formal apology in 2008. This apology was followed by apologies from the federal states, and acts of public commemoration which illustrated a desire by the state as a whole to make amends. This formal apology, as will be seen, was mainly the result of domestic, and to a minor extent, international pressure.[38]

It would be inopportune to go into great detail on the issue of child removal in Australia. The 1997 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families'[39] (BTH Report) was extensive and the relevant findings therein will be referred to briefly. Before discussing these findings, I will look briefly at the history of child removal legislation. Before federation in 1901, the various territories that would later comprise the Commonwealth of Australia, adopted certain pieces of legislation giving local government's wide powers in relation to the aboriginal communities.[40] Similar legislation was adopted after the federation was formed, legalising forcible removal of aboriginal children from their parents, and exercising the rights of

committed during the colonisation of Australia'. See *Coe v Commonwealth of Australia* (1979) 53 ALJR 403; Reynolds *An indelible stain? The question of genocide in Australia's history* (2001); Kuper *Genocide* (1981) 31; Dirk Moses (ed) *Genocide and settler society: frontier violence and stolen indigenous children in Australian history* (2004); Watson *Caledonia Australia* (1984) 169.

37 The term 'Stolen generation' was coined by Read, a historian. See Read *The stolen generation: the removal of Aboriginal children in New South Wales 1883 to 1969* (Department of Aboriginal Affairs (1981), reprinted in 2006).

38 Yarwood n 11 above at 149.

39 Human Rights and Equal Opportunity Commission, Commonwealth of Australia 1977. In response to increasing domestic criticism and in pursuance of the 1986 Human Rights and Equal Opportunity Commission Act the Attorney General requested the Human Rights and Equal Opportunity Commission to inquire into and report on the allegations of forcible transfer and racial discrimination of aboriginal and Torres Strait Islander communities.

40 *Eg* the 1869 Aboriginal Protection Act of Victoria and the 1897 Aboriginal Protection and Restriction of the Sale of Opium Act of Queensland.

guardianship over them.[41] Prime Minister Rudd, in his 2008 formal apology, specifically referred to this legislation. He saw it as forming part of the historical record of the deliberate and calculated policies of various federal states consequent to the powers given to them under statute by the Commonwealth parliament.[42]

What precisely did this removal of children entail? To whom precisely does the term 'Stolen Generation' refer? The BTH Report[43] was comprehensive and condemned federal state and local authorities for their roles in implementing and legalising the policy of forced child removal. The report found that the practice of indigenous child removal involved systematic racial discrimination, and controversially held that the government's policy amounted to genocide as defined by international law. The report found that the predominant aim of indigenous child removals was the absorption or assimilation of the children into a wider, non-indigenous, community, so that their unique cultural values and ethnic identities would disappear by giving way to models of Western culture. The report found that the objective was the disintegration of the political and social institutions of indigenous culture, language, national feelings, religion, and economical existence. The report concluded that the children were removed from their families by compulsion, force, coercion, duress, and undue pressure – including the use of church and community officials who exercised their influence to persuade aboriginal parents to relinquish their children to the guardianship of the state.[44] The commission responsible for the BTH Report was mandated to look for past laws and practices which resulted in the separation of aboriginal and Torres Strait Islander children from their families by compulsion, duress, or undue influence; the effects of the relevant laws,

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41 *Eg* the 1905 Aborigines Act and the 1936 Native Administration Act of Western Australia; the 1915 Aborigines Protection Amendment Act of New South Wales; the 1918 Aborigines Ordinance of the Northern Territories.

42 For a full text of Rudd's speech see the *Herald Sun* 8 July 2008.

43 Note 39 above.

44 *Id* at chapters on 'Scope of inquiry' and 'Reparation'. For more detail on what transpired during the removal of indigenous children see Bennet 'The *Cabillo* and *Gunner* cases' Nov 2000 *Quadrant* 35; Brunton 'Genocide, the ''stolen generations'' and the unconceived generations' (1998) 42 *Quadrant* 19; 'Justice O'Loughlin and bringing them home: a challenge to the faith' Dec 2000 *Quadrant* 37; Flynn & Stanton 'Trial by ordeal: the stolen generation in court' (2000) 25 *Alternative Law Journal* 15; Van Krieken 'The barbarism of civilisation: cultural genocide and the stolen generations' (1999) 50 *British Journal of Sociology* 297; Read *A rape of the soul so profound: the return of the stolen generations* (1999); Reed 'The stolen generations, the historian and the courtroom' (2002) 26 *Aboriginal History* 51; McRae *Indigenous legal issues* (3ed 2003) 492 580 603.

practices, and policies which led thereto; whether such policies and practices of forcible transfer were directed towards a particular cultural group; the adequacy and need to change current laws, practices, and policies; possible assistance in locating and re-unifying families; possible compensation and possible policies to ensure self-determination of aboriginal and Torres Strait Islander peoples; and possible breaches of public international law.

Regarding violations of public international law, the BTH Report found that because the relevant legislation had established a legal regime for indigenous children and their families which was inferior to the regime which applied to non-indigenous children and their families, Australia's obligations under the Universal Declaration of Human Rights (UDHR)[45] had been breached. In particular, the BTH Report found that article 3 (right to liberty and security of the person); article 7 (equal protection under the law); article 10 (right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations); article 12 (freedom from arbitrary interference with privacy and the family home); and article 26 (right to a free elementary education and the right of parents to choose the kind of education to be given to their children), had been breached. The BTH Report concluded that Australia was legally obliged to provide an effective remedy and reparation to the victims by referring to the principles of customary international law; article 2(3) of the International Covenant on Civil and Political Rights (ICCPR);[46] article 39 of the Convention on the Rights of the Child (CRC);[47] article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);[48] and the United Nations' Sub-Commission on Prevention of Discrimination and Protection of Minorities' 'Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law'.[49] The BTH Report recommended that Australia acknowledge its liability in the form of an *apology* and other acts of commemoration, including introducing the history of the 'Stolen Generation' into state school curricula. The BTH Report also sought redress by way of compensation[50] and appropriate assistance to facilitate land, culture and

45 GA Res 217 A (III) of 10 Dec 1948.

46 999 UNTS 171; (1967) 6 *ILM* 368.

47 GA Res 25/44 1989; (1989) 28 *ILM* 1448.

48 60 UNTS 195; (1966) 5 *ILM* 352.

49 Yarwood n 11 above at 48.

50 There has been no major national implementation of reparations or compensation. See McRae n 44 above at 609. *Trevorrow v State of South Australia* (No 5) (2007) SASC 285 was the first case to award compensation. This case lasted thirteen years and is not seen to be a strong precedent for future compensation claims.

language restitution in the form of financial aid and legislative recognition of the right of the aboriginal community to exercise self-determination.

The 1997 Liberal government refused to apologise on the basis that the current generations should not be held accountable for the acts of past governments, and that the removal of the children was factually not illegal under Australian law. Various federal states[51] have, however, since 1997 apologised and made profound expressions of moral accountability. Since 1998, thousands of Australians have commemorated a national Sorry Day. In 2000, 250 000 people embarked on a solidarity walk across Sydney as a public act of apology. It was only in 2008, however, that the Labour government under Kevin Rudd, apologised on behalf of the nation.[52]

This apology was a clear statement that Australia, in all its manifestations, accepted liability for instituting a policy of forced child removal of indigenous children. Further, that by implication the state had breached, and sought to make amends for, violating *ius cogens* norms and *erga omnes* obligations as understood in public international law.[53] State accountability had been achieved in practice. Yarwood[54] suggests that the international community accepted Australia's apology as sufficient as it had a good record of compliance with its international law obligations; initiated a credible inquiry into the *erga omnes* and *ius cogens* breaches; and used the opportunity to address its accountability internally.

GENOCIDE

The BTH Report's most controversial finding was that the Australian practice of indigenous child removal amounted to genocide as defined by international law. It found that removing children with the aim of dismantling the political and social institutions of culture, language, national feeling, religion, and economical existence of indigenous peoples, was genocidal because it aimed to destroy the cultural unit which the Genocide

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51 Tasmania (1997), Western Australia (1997) and Queensland (1999).

52 Note 42 above.

53 After the apology by Prime Minister Kevin Rudd in 2008 the United Nations Human Rights Council in Resolution 7/33 called on global action against racism, racial discrimination, xenophobia and related intolerance and welcomed the landmark and historical formal apology by the government of Australia. The 2008 apology was preceded by an increased global awareness of the plight of the 'Stolen generation' due to the BTH report, the film *Rabbit Proof Fence* and the exposure given to the issue at the 2000 Sydney Olympic Games.

54 Yarwood n 11 above at 273.

Convention[55] aimed to preserve. Article II of the Genocide Convention defines genocide as any act committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, by (a) killing members of a group, (b) causing serious bodily or mental harm to members of a group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, and (e) forcibly transferring children of the group to another group.[56]

The issue of genocide has been widely debated among Australian legal academics and historians, and there is considerable disagreement about the applicability of genocide to the facts.[57] This is not the place for a rigorous analysis of the topic, and for purposes of this article it is sufficient briefly to set out how genocide has been examined by Australian courts in a variety of contexts. In *Kruger and Ors v Commonwealth of Australia*[58] plaintiffs argued that the Aboriginal Ordinance 1918 (NT) was invalid because it violated an implied constitutional right of freedom from genocide. The High Court rejected this claim holding that there was no such implied constitutional right, the Genocide Convention post-dated the Ordinance, and there was no intention to destroy a racial group. The court made no finding as to whether acts actually carried out in the purported exercise of the Ordinance, amounted to genocide as the question before the court was specifically whether the Ordinance authorised genocide. The court thus limited itself to that specific inquiry and did not interpret the Ordinance in

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55 United Nations Convention for the Prevention and Punishment of the Crime of Genocide GA Res 260 (III), 78 UNTS 277. The BTH report cited an earlier judgement of the High Court of Australia in *Polyukovich v Commonwealth* (1991) HCA 32 and in particular a dissenting judgment of Brennan J where he held that, at a minimum, the policy of forcible removal of indigenous children for the purpose of raising them separately from their culture could be labelled as genocide in the legal sense – at least as the term was initially understood.

56 Genocide as a discursive concept was created in 1944 by Raphael Lemkin when his famous book *Axis rule in occupied Europe* was published. For Lemkin genocide is composite and manifold. It signifies a coordinated plan of different actions aimed at the destruction of the essential foundations of the life of a group. Such actions can but do not necessarily involve mass killing. It can also involve cultural, political, social, moral, spiritual, religious and physiological considerations. See Curthoys n 36 above at 111.

57 Evans & Thorpe *Indigenocide and the massacre of aboriginal history* (2001) 163; Lofgren & Kilduff 'Genocide and Australian law' (1994) 70 *Aboriginal Law Bulletin* 6; Manne *The way we live now* (1998); Tatz *Genocide in Australia research discussion no 8* (1999); Wooten *Report of the inquiry into the death of William Charles Smith* Royal Commission into Aboriginal Deaths in Custody (1989).

58 (1997) 2 AILR 371; (1997) 146 ALR 126.

its ideological, social, and historical contexts. In *Nulyarimma v Thompson,*[59] the Federal Court dealt with two separate situations. The first situation arose from a decision of the Australian Capital Territory (ACT) Supreme Court in *Re Thompson, Ex parte Nulyarimma,*[60] where plaintiffs appealed a decision by an ACT magistrate to disallow a charge of genocide against prime minister John Howard, the deputy prime minister, and two senators, for supporting 1998 amendments to native (aboriginal) title legislation. These amendments made it possible to extinguish native title to land. The plaintiffs submitted that extinguishing[61] of native title amounted to genocide in that it led to the physical destruction of the group, and inflicted mental harm in contravention of the Genocide Convention. The second situation arose from *Buzzacot v Hill*[62] where the applicants argued that the Australian Commonwealth and the Ministers for the Environment and Foreign Affairs, committed genocide by failing to proceed with a World Heritage Listing of the lands of the Arabunna people. The first question was whether customary international law making genocide a crime was recognised in Australian domestic law. The majority found that there was no automatic incorporation of customary international law into Australian domestic law. The majority also found that the plaintiffs had not proved the *dolus specialis* – special intent – required for genocide.[63] The majority was also not receptive to the arguments relating to cultural genocide.[64] In *Sumner v United Kingdom of Great Britain and Others,*[65] the plaintiffs claimed that the defendants (the United Kingdom, South Australia, and certain developers) had committed genocide against the Ngarrindjeri people by their role in the construction of the Hindmarsh Island bridge. The Supreme Court of South Australia dismissed the claim on the basis that genocide was not an offence under

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59 (1999) 165 ALR 621.

60 (1998) 136 ACTR 9.

61 See *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 66 ALJR 408; *Western Australia v Commonwealth* (1995) 183 CLR 373; McRae n 44 above at 987 236 265 299 302 329 358.

62 (Unreported) FCA 10 May 1999 No 523 639. The applicants in *Nulyarimma* and *Buzzacot* were an alliance of aboriginal elders who called themselves the 'Aboriginal Genocide Prosecutors'. The way in which their applications were framed suggest that they viewed their cases as an opportunity to determine the unresolved question of whether genocide had been perpetrated.

63 The special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical or religious group, as such. See *Prosecutor v Akayesu* (1998) 37 *ILM* 1401.

64 Mitchell 'Genocide, human rights implementation and the relationship between international and domestic law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 26.

65 (2000) SASC 91.

Australian law, and further that the plaintiffs had not proved the necessary special intention required for genocide.[66]

The above cursory view of relevant precedents would suggest that members of the 'Stolen Generation' would have major difficulties in establishing the commission of genocide. It must be noted that when the court decisions discussed above were decided, genocide did not constitute a crime under Australian domestic law. This situation has been remedied by Australia's becoming a member of the Rome Statute (ICC Statute),[67] and accepting the jurisdiction of the International Criminal Court (ICC) by adopting the International Criminal Court (Consequential Amendments) Act 2002, and the International Criminal Court Act 2002. The Australian government has denied the charges that the removal of aboriginal children constituted attempted genocide in its 12th Report to the UN Committee on the Elimination of Racial Discrimination.[68] This was in reaction to a statement by Dodson, the Social Justice Commissioner, in 1997 following on the BTH Report, that the removal of the children from a specific cultural group amounted to 'attempted genocide'.[69] Article 6 of the Rome Statute, following on article IVC of the Genocide Convention, defines various classes of action that constitute the crime of genocide. Four kinds of group are protected, namely national, ethnic, racial, or religious. Political or social groups are not included. The submission arguing for the inclusion of the concept 'cultural group' in the ICC Statute's definition of genocide, was rejected by the drafters of the ICC Statute.[70]

APARTHEID

As set out above, articles 40 and 41 of the Draft Articles provide that states shall cooperate to bring to an end, through lawful means, to any serious

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66 See *Thorpe v Kennet* (1999) VSC 442 (unreported, Supreme Court of Victoria, 15 November 1999). It is a moot point whether submissions related to the 'breeding out' of the aboriginal race in Australia, or the policy of 'absorption' and later of 'assimilation' would not have led to greater success in proving the special intent necessary for genocide. See Clarke 'Cubillo v Commonwealth' (2001) 25 *Melbourne University Law Review* 218.

67 (1998) 37 *ILM* 999; Bassiouni *The Statute of the International Criminal Court: a documentary history* (1998); Cassese 'The Statute of the International Criminal Court' 1999 *European Journal of International Law* 144; Rakate 'An international court for a new millennium – the Rome Conference' 1998 *SAYIL* 217.

68 UN Doc CERD/C/SR 1395 paras 115–118.

69 Aboriginal and Torres Strait Islander Social Justice Commissioner (1996–7) *Native Tittle Report 1997* (July 1996–June 1997) (Human Rights and Equal Opportunity Commission).

70 Robinson *Crimes against humanity* (2000) 230.

breach of an obligation arising under a peremptory norm of general international law. Such peremptory norms, as set out above, refer to *ius cogens* norms and obligations *erga omnes,* examples of which are aggression, slavery, genocide, race discrimination, apartheid, torture, and denial of the right to self-determination.[71] Article 1 of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid,[72] defines apartheid as a 'crime against humanity', as does the 1996 Draft Code of Crimes against the Peace and Security of Mankind in article 18(f).[73] The Rome Statute of the ICC[74] adopts a similar approach. Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination,[75] states that inhumane acts resulting from the policies and practices of apartheid are crimes.[76] In terms of Additional Protocol I[77] to the Geneva Conventions of 1949, apartheid is a war crime. In *S v Basson,*[78] the South African Constitutional Court saw the practice of apartheid as a crime against humanity. Apartheid can be seen to be part of the *ius cogens* norm prohibiting racial discrimination which can be subsumed into a crime against humanity. The South Africa government pre-1992, can be seen to have been the institutional structure[79] that applied the systematic legalisation of racial discrimination. Much has been written on apartheid, and the policy and its effects have been more than adequately covered.[80] South Africa abstained

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71 Dugard n 2 above at 270.

72 GA Res 3068 (XXVIII) 1974; (1974) 13 *ILM* 50. This Convention has more than one hundred parties to it. This Convention portrays apartheid as a crime against humanity. This view was confirmed by the *Truth and Reconciliation Commission of South Africa Report* (1998) vol 1, 94; vol 5, 222.

73 Report of the International Law Commission on the work of its 48th Session, 1996, GAOR, 51st Session Suppl No 10 (A/5/10). This Draft Code sees apartheid as a species of a crime against humanity.

74 The Rome Statute article 7(2)(h) retains the crime of apartheid to describe inhumane acts committed in the context of systematic oppression and domination by one racial group over any other racial group. The proposed International Convention on the Prevention and Punishment of Crimes Against Humanity article 3(1)(j) sees apartheid as a crime against humanity. See Sadat (ed) *Forging a Convention for Crimes Against Humanity* (2011) 365.

75 660 UNTS 195; (1966) 5 *ILM* 352.

76 The ILC saw apartheid as an international crime that breached a peremptory norm in its Commentary to art 53 of the Vienna Convention on the Law of Treaties. Conference on the Law of Treaties, 1st and 2nd Session, Vienna, 26 March–24 May 1968, UN Doc A/CONF/39/11/Add 2 (1968).

77 Additional Protocol I to Articles 85(4)(c) and 85(5) of the Geneva Conventions of 1949, (1977) 16 *ILM* 1391.

78 2005 (1) SA 171 (CC), 189. But see *In re South African Apartheid Litigation: Ntsebeza et al v Citigroup Inc et al* 346 F Supp 2d 538.

79 The Senate, House of Assembly and arguably the judiciary.

80 Davis & Le Roux *Precedent and possibility: the abuse of law in South Africa* (2009); Dugard 'Apartheid: a case study in the response of the international community to gross

from voting when the Universal Declaration of Human Rights (UDHR)[81] was adopted by the UN General Assembly in 1948. South Africa also did not sign the ICCPR[82] until 1994, or ratify this Covenant until 1998. During the apartheid era, South Africa was regularly judged by the standards of the UDHR and the ICCPR.

For purposes of this article a brief synopsis of the policy of apartheid in practice should suffice. The following statutes are examples of government policy that led to segregation and disenfranchisement: the 1950 Group Areas Act; the 1950 Population Registration Act; the 1951 Bantu Authorities Act; the 1952 Natives (Abolition of Passes and Co-ordination of Documents) Act; the 1953 Reservation of Separate Amenities Act; the 1951 Separate Representation of Voters Act; the 1949 Prohibition of Mixed Marriages Act; the 1950 Suppression of Communism Act;[83] the 1951 Prevention of Illegal Squatting Act; the 1964 Bantu Education Act; and the Black Labour Act. The lives of the vast majority of the South African population were stringently controlled by a complex web of legislation which basically constituted the apartheid structure. This web of legislation governed influx control; the denationalisation of millions of citizens who had Bantustan citizenship[84] imposed on them; and a labyrinth of labour bureaus controlling black labour and job reservation provisions which excluded black labour from being utilised for specified occupations.[85] The battery of laws requiring blacks to carry a pass and regulating influx control, led to 1 774 500 black South Africans being prosecuted between 1916 and 1984.[86] It was accepted policy that the 'Bantu' were only temporarily resident in the 'European' areas of the Republic for as long as they offered their services there. If 'they became no longer fit for work or superfluous in the labour market' they were

violations of human rights' in Cotler & Eliadis (eds) *International human rights laws theory and practice* (1992) 301; Bernstein *The world that was ours: the story of the Rivonia Trial* (1984); Chingman *Bram Fischer: Afrikaner revolutionary* (1998); De Kock & Gordin *A long night's damage: working for the apartheid state* (1998).

81 GA Res 217 (III) of 10 Dec 1948. In 1968 the Final Act of the International Conference on Human Rights stated that the UDHR amounted to an obligation for states – UN Doc E/68/XIV 2 (1968).

82 999 UNTS 171; (1967) 6 *ILM* 368.

83 Which defined communism so broadly that it covered most forms of opposition to the government.

84 Citizenship of the Transkei, Bophuthatswana, Venda and Ciskei which were seen by South Africa to be independent states. Their statehood was never recognised by the international community. See Dugard *Recognition and the United Nations* (1987) 108.

85 Chaskalson 'The right of black persons to seek employment and be employed in the Republic of South Africa' 1984 *Acta Juridica* 33.

86 Savage 'The imposition of pass laws on the African population in South Africa' 1916–1948' 1988 *African Affairs* 181.

expected 'to return to their country of origin or territory of the national unit where they ethnically fitted in if they were not born or bred in the Homeland'.[87] To the above legislation, must be added a myriad of regulations that ordered the lives of South Africans not classified as 'European'. An example of this was the bizarre attempt to remove the right of 'coloured' South Africans to vote alongside "white' South Africans for members of parliament. The government was so determined to circumvent the 1910 South Africa Act's mandate regarding the voting rights of 'coloured voters', that it constituted a special High Court of Parliament. The purpose of the High Court of Parliament (which consisted of all members of the Senate and House of Assembly) was to review any order of the Appeal Court (the highest court of the land) which invalidated a piece of parliamentary legislation. The decisions of this High Court were to be final and binding.[88] This sorry episode led to the so-called 'constitutional crisis of 1952' and illustrated how intolerant the government had become of a judiciary which it saw as subverting the 'will of the people' – the 'people' being white people.

THE UNITED NATIONS

South Africa's racial policies featured prominently on the agenda of the United Nations from 1946 to 1994. In 1946 India raised the question of discrimination against the Indian minority in South Africa, in the General Assembly.[89] This was the first time a human rights issue had been placed before the General Assembly. This item was subsequently raised regularly until 1962, when it merged with the question of apartheid.[90] In 1953, the General Assembly under resolution 721, specifically referred to the policies of apartheid as they affected all parties, not only the Indian population. The General Assembly saw this as contrary to the UN Charter and the UDHR. From then on, each year there was a similarly worded resolution in which the General Assembly would invite South Africa to consult on the matter, and express its concern over the ongoing breaches of the UN Charter.[91] The

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87 General Circular of the Secretary of Bantu Administration No 25 (1967) par 1. See Davis and Budlender 'Labour law, influx control and citizenship: The emerging policy conflict' 1984 *Acta Juridica* 141; *Black Affairs Administration Board, Western Cape and Another v Mthiya* 1985 4 SA 754 (A).

88 For a comprehensive exposition of the issues involved and the relevant case law see Barrie *Die soewereiniteit van die parlement* (unpublished LLD thesis University of South Africa, 1970) and Scher *The disenfranchisement of the coloured voters* (unpublished D Litt et Phil thesis, University of South Africa 1983).

89 Resolution 44(1) of 8 December 1946 – Treatment of Indians in South Africa.

90 GA Res 1761 XVII of 6 November 1962.

91 GA Res 820 (1954).

General Assembly also regularly 'regretted' the lack of response by the South African government,[92] and in 1961 called upon South Africa to bring its policies and conduct in line with international law.[93] The shooting of protesters at Sharpeville in 1960 following a peaceful demonstration, elevated the issue to the UN Security Council.[94] General Assembly resolution 1761[95] condemned the policies of the government of South Africa which flouted world opinion, called on member states to break off diplomatic relations with the country, called on member states to take steps to prevent South African ships from using their ports, and called on all states to boycott South African goods. General Assembly resolution 1761 also established a Special Committee with a mandate to keep the apartheid policies of South Africa under review when the General Assembly was not in session. An important feature of General Assembly resolution 1761, was that it called on the Security Council to consider action under article 6 of the UN Charter. Article 6 provides for the expulsion of a member of the UN who has persistently violated the principles of the Charter.

1960 saw the 'Winds of Change'[96] speech by British prime minister, Harold MacMillan, to the South African parliament, in which he stated that a wind of change was blowing in relation to international tolerance of apartheid. MacMillan's sentiments were echoed in the later address by Che Guevara, the Cuban representative to the UN, where he stated that the policy of apartheid was being applied before the eyes of the world.[97] The General Assembly kept South Africa and its racial policies on the agenda.[98] General Assembly resolution 3324E (1974) recommended that 'the South African regime be totally excluded from participation in all international conferences under the auspices of the United Nations so long as it continues to practice apartheid'. By implication, the General Assembly was seeking some sort of sanction against South Africa. By 1977, the Security Council likewise felt that some sort of sanction was appropriate, and with Security Council resolution 418 (1977) instituted a *mandatory* arms embargo against South

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92 GA Res 1248 (1958).

93 GA Res 1598 (1961).

94 Security Council Resolution 134 of 1960 called on South Africa to abandon its policies of apartheid.

95 Note 90 above.

96 Myers 'Harold MacMillan's 'Winds of change' speech: a case study in the rhetoric of policy change' (2000) 3 *Rhetoric and Public Affairs* 555.

97 'Colonialism is doomed' speech to the 19th General Assembly of the UN, 11 December 1964.

98 GA Res 2202 (1966); GA Res 2674 (1971); GA Res 3324E (1974); GA Res 33/23 (1978); GA Res 38/11 (1983).

Africa. Security Council resolution 418 (1977) was adopted in pursuance of chapter VII of the UN Charter which refers to responses to threats to international peace and security. The UN Secretary General stated that the embargo was a response to the threat to international security, and to a massive breach of human rights.[99] Resolution 418 was adopted unanimously.

Continued pressure on South Africa also came from outside of the UN. In 1961 South Africa, after becoming a republic, had to reapply for membership of the British Commonwealth. South Africa decided not to reapply for membership after a number of states had indicated that they would oppose the application due to the apartheid policies.[100] The Lusaka Manifesto,[101] adopted by 13 of 14 states of the Organisation of African Unity (OAU) in 1969, stated that South Africa should be excluded from the UN, and be targeted for trade, diplomatic and political isolation.[102] In 1977, the OAU adopted the Lagos Declaration for Action Against Apartheid. This declaration sought an end to the policies of apartheid and a change of government in South Africa.[103] The United States passed the Comprehensive Anti-Apartheid Act 1986, with the aim of bringing about reforms in South Africa and an end to apartheid. A strong indication of the commitment of the United States Congress to the aims of the legislation, was its overriding of a veto by President Reagan – the first time a presidential veto had been overridden since 1973.[104] Mention must also be made of sporting sanctions imposed by individual states and the International Olympic Committee (IOC). The IOC banned South Africa from the 1964 Tokyo Olympic Games, a ban which continued until South Africa's participation in the 1992 Barcelona Games.[105]

THE TRUTH AND RECONCILIATION COMMISSION

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99 Jorgensen *The responsibility of states for international crimes* (2003) 247; Yarwood n 11 above at 726.

100 See speech by Gaitskell MP in House of Commons 16 March 1961 (House of Commons, Hansard col 1748, 16 March 1961).

101 Hall 'The Lusaka Manifesto' (1970) 69 *African Affairs* 179.

102 Manifesto on South Africa UN Doc A/7754 (1969).

103 Lagos Declaration for Action Against Apartheid (1977); UN Doc E77 XIV 2 (1977).

104 Sethi & Williams *Economic imperatives and ethnical values in global business: the South African experience* (2000); Cortright & Lopez *The sanctions decade: assessing UN strategies in the 1990's* (2000); Butcher 'The unique nature of sanctions against South Africa, and resulting enforcement issues' (1987) 19 *NYUJ Int'l L and Pol* 821.

105 See Yarwood n 11 above at 128; Krotee 'Apartheid and sport: South Africa revisited' 1998 *Sociology of Sport Journal* 125.

The active breach of the *ius cogens* norms and *erga omnes* obligations generated by the policies of apartheid of the South African government, came to an end in 1994 with the establishment of the Government of National Unity. There were no tribunals similar to the International Criminal Tribunal for the Former Yugoslavia (ICTY),[106] or the International Criminal Tribunal for Rwanda (ICTR)[107] which were instituted at about the same time.[108] Instead, the international community appeared to accept the institution of the Truth and Reconciliation Commission (TRC) which was brought into being by the Government of National Unity to determine individual accountability, and to answer the question of whether the violations had been the result of deliberate planning on the part of the state. The TRC was mandated to establish a complete picture of gross violations of human rights committed between March 1960[109] and May 1994, by way of investigations and hearings. It also had to prepare a report containing recommendations to prevent future human rights violations.[110] The TRC held 140 hearings, 2 400 witnesses testified, 27 000 victims were recorded, as were 30 384 gross human rights violations. The TRC made more than 15 000 findings. It was for the government to follow up on the recommendations which included redress, retribution, amnesty, prosecution, and further investigations.[111]

The families of anti-apartheid activists who were allegedly murdered by the previous (apartheid) government, together with a political organisation, AZAPO, brought a court application seeking to set aside article 20(7) of the Act that established the TRC.[112] Article 27 precluded prosecution in favour of amnesty. As submitted by the applicants, there was an obligation under customary international law and international treaty law, for the state to prosecute those responsible for grossly breaching human rights. It was alleged that South Africa had breached the Genocide Convention,[113] the

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106 Security Council Resolution 808 of 22 February 1993 and 827 of 25 May 1993; Bassiouni and Manikas *The Law of the International Criminal Tribunal for Yugoslavia* (1996).

107 Security Council Resolution of 8 November 1994. Scheltema and Van der Wolf (eds) *The International Tribunal for Rwanda: facts, cases, documents* (1999).

108 Promotion of National Unity and Reconciliation Act 34 of 1995.

109 The time of the Sharpeville shootings.

110 *Truth and Reconciliation Report* (5 volumes, 1998).

111 For criticism of the TRC see Christodoulis 'Truth and reconciliation as risks' (2000) 9 *Social and Legal Studies* 179.

112 *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa* 1996 8 BCLR 1015 (CC).

113 GA Res 260(III); 78 UNTS 277.

International Convention for the Crime of Apartheid,[114] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[115] The Constitutional Court was confronted with the problem of a political settlement versus justice, and opted for pragmatism.[116] The court accepted that amnesty was a painful and difficult objective, but saw it as a necessary option which took into account the feelings of abused victims and also the feelings of those threatened by a democratic society.[117]

The TRC ultimately found that South Africa had perpetrated, *inter alia*, various types of gross violations of human rights in South and Southern Africa: torture; the manipulation of social divisions in society; judicial killings involving the execution of opponents for political offences; extra-judicial killings in the form of state-planned and executed assassinations; attempted killings; disappearances; abductions; and so-called killings by entrapment.[118] The institution of the TRC brought an end to the international pressure on South Africa. The stated objective of ending apartheid had been achieved. Apartheid had been dismantled and it appears that the international community sought no further redress. The TRC, in effect, was an exercise in political and moral accountability. The pre-1994 South African government was seen to have been held accountable for its breaches of *ius cogens* norms and *erga omnes* obligations. The TRC processes had, for all practical purposes, led to pre-1994 South Africa *apologising.* There was seen to have been political and moral redress.

CONCLUSION

The Draft Articles[119] consider restitution of particular importance as a form of reparation.[120] To the extent that restitution cannot provide redress, draft article 36 states that compensation be granted. However, compensation can only be awarded where the damage can be quantified in financial terms, and is further excluded in the case of an 'affront or injury caused by a violation

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114 (1974) 13 *ILM* 50.
115 (1985) 24 *ILM* 535.
116 Davis n 80 above at 114.
117 Mahommed J n 112 above at 1028. See Asmal & Roberts *Reconciliation through justice* (1996). As seen by Crane 'The bright red thread' in Sadat *Forging a Convention for Crimes Against Humanity* (2011) 59, 63 trials can create difficulties for fragile new democratic regimes attempting to move forward in a spirit of reconciliation and rebuilding.
118 TRC Report n 110 above at par 66.
119 Note 4 above.
120 *Id* at Commentary on article 35 par 6.

of rights not associated with actual damage'.[121] If restitution does not provide redress, and compensation is not appropriate, draft article 37 provides that satisfaction is an appropriate modality to achieve reparation. Draft article 37 is not exhaustive and can include an 'acknowledgement of the breach, an expression of regret (or) a formal apology'. Satisfaction can be tailored to the particular facts and the nature of the breach. Satisfaction appears more likely to ensure redress where there have been breaches of *ius cogens* norms and *erga omnes* obligations. The Arbitration Tribunal in the *Rainbow Warrior Affair*[122] noted that the breach of the treaty settlement between France and New Zealand was grievous because it breached a *ius cogens* prohibition on using force against the territorial integrity of another state. The Tribunal considered that a 'declaration' of French responsibility was an appropriate form of redress. Such a declaration, in effect, was an acknowledgement of the breach, an expression of regret, a formal 'apology' complying with draft article 37's 'satisfaction' as an appropriate modality.

It is submitted that Prime Minister Rudd's apology, and the South African TRC process, are precisely what the drafters of draft article 37 had in mind. The TRC was the instrument which encouraged and enabled South Africa openly to accept that apartheid violated fundamental human rights. Similarly, Australia's formal apology, followed by a series of apologies from the territorial authorities and acts of public commemoration, illustrated the awareness and desire by the state to make amends for racial discrimination.[123] In both instances *ius cogens* norms and *ergo omnes* obligations had been breached.

Rudd's apology and the TRC process were the means used by the respective states ultimately to be held 'accountable'. The pursuit of justice is multifaceted, and the international community clearly accepted the BTH and Rudd's apology on the one hand, and the TRC on the other, as part of this multifaceted approach. Steps were taken to prevent the recurrence of human rights abuses, victims were heard, and reparations considered. Section 37 of the Draft Articles referring to satisfaction, appears to have been complied with.

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[121] *Id* at Commentary on article 36 par 1.
[122] 20 RIAA 217 (1990).
[123] See Yarwood n 11 above at 113.