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Amnesty for Apartheid Crimes?
The South African Truth and Reconciliation Commission and International Law

by

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„Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced“[1]

I. Introduction

In July 1998 South Africa signed and endorsed the Rome Statute on an International Criminal Court (ICC). At the conference of signatories, Dullah Omar declared in his capacity as South African Minister of Justice and spokesperson for the Southern African Development Community, that „the establishment of [an international criminal] court would not only strengthen the arsenal of measures to combat gross human rights violations, but would also ultimately contribute to the attainment of international peace.“ Referring to the experience of the region under apartheid he said that „such a court would send out a clear and unequivocal message [...] that the perpetrators of such heinous crimes will not get away with impunity.“[2] The Statute has not yet entered into force[3], but was adopted by 120 states. On the 7th of October 1998 already 53 States had signed the ICC-Statute, including South Africa.[4] These developments confirm an international consensus that such horrendous human rights violations like genocide, war crimes and crimes against humanity most be prosecuted and punished.

South Africa has been exposed to the difficult problem of dealing with the gross human rights violations of the apartheid past. In 1995, parliament passed a law establishing one of the most important institutions of post-apartheid South Africa. The *Promotion of National Unity and Reconciliation Act*[5] provides the legal framework of the Truth and Reconciliation Commission (TRC).[6] The South African TRC started operating in December 1995 and published its report in October 1998.[7] It has received 21.296 statements from victims of human

[1] Judgement of the International Military Tribunal at Nuremberg from 1 October 1946, reprinted in 41 *American Journal of International Law* (1947) Suppl., 172-333 at 221.
[2] Speech by Minister of Justice, Dullah Omar, at the Rome Conference in July 1998.
[3] Art. 126 of the Statute requires that 60 states have signed and ratified the Statute, before it enters into force.
[4] For current developments related to the International Criminal Court (ICC) see the official webpage of the Rome Conference at *http://www.un.org/icc* and the webpage of the NGO-Coalition on the ICC at *http://www.igc.org/icc.*
[5] Act. No. 34 of 1995. Government Gazette No. 16579, 26 July 1995 [hereafter referred to as TRC-Act].
[6] On the TRC see Medard R. Rewelamira & Gerhard Werle (1996): *Confronting Past Injustices. Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany*. Durban: Butterworth; Peter Parker (1996): The Politics of Indemnities, Truth Telling and Reconciliation in South Africa. Ending Apartheid without Forgetting. 17 *Human Rights Law Journal*, No. 1/2, 1-13. Antje Krog (1998): *Country of my Skull.* Johannesburg: Random House, gives a passionate account of the work of the Truth Commission.
[7] Truth and Reconciliation Commission of South Africa (1998): *Report of the Truth and Reconciliation Commission of South Africa*, Vol. I-V, Cape Town: Juta [TRC-Report I-V]. Vol. I of the *TRC-Report* gives a detailed overview over the mandate and work of the TRC.

rights violations from all the sectors of South African society.[8] For most of the victims it was the first time to tell their personal stories of suffering to the South African public. Not only victims of past abuses were asked to give evidence before the Human Rights Violation Committee of the Truth Commission. The Truth Commission also called on political parties, liberation movements, security forces, business, media, religious bodies, the legal and medical profession to give evidence about their past involvement in human rights violations.[9] All this happened in public, only in exceptional circumstances hearings were held *in camera*. The public character of the TRC and the extensive media coverage[10] are distinctive features of the South African Truth Commission.

However, there is another distinctive feature, in contrast to Latin American truth commissions,[11] the South African truth finding is directly linked with an amnesty process. The Amnesty Committee of the TRC has the difficult task to decide upon individual amnesty applications for past politically motivated human rights violations. These amnesty provisions are the topic of this thesis.

In June 1996 the Constitutional Court of South Africa declared the amnesty provisions of the TRC-Act constitutional.[12] The compatibility of the amnesty provisions with international law was, however, only superficially dealt with.[13] This happened in contrast to earlier decisions of the Court.

The apartheid regime did not accede to most international human rights conventions. It only became a member of the four Geneva Conventions[14] in 1952, but refused to sign the two

[8] TRC Report III, 3, para. 12.
[9] Vol. 4 of the TRC-Report contains an analysis of these statements and hearings.
[10] See for example the Average Rating (AR)-figures of the weekly Special Report on the TRC of the South African Broadcasting Corporation. Johannesburg: Research Department of the SABC. An analysis of the media coverage on the TRC is a current field of research of the author.
[11] See generally Neil Kritz ed. (1995): *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*. Vol. I-III. Washington, DC: United States Institute for Peace, and the overview over several Truth Commissions by Pricilla B. Hayner (1994): 15 Truth Commissions - 1974 to 1994. A Comparative Study. 16 *Human Rights Quarterly*, 597-655.
[12] *Azapo v President of the Republic of South Africa*, Constitutional Court of South Africa, CCT 17/96 *reprinted in* 1996 (4) SA 562 (CC).
[13] See Chapter II B.
[14] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [I. Geneva Convention], 12 Aug. 1949, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [II. Geneva Convention], 12 Aug. 1949, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War [III. Geneva Convention], 12 Aug. 1949, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War [IV. Geneva Convention], 12 Aug. 1949, 75 UNTS 287.

Additional Protocols of 1977.[15] The view prevails that international law is as *treaty law* rather inapplicable to the amnesty question in South Africa.[16] The Geneva Conventions have, however, some relevance, especially in relation to war crimes committed outside the country. Furthermore, international human rights treaties, not ratified by South Africa, question the international validity of South African amnesty. International humanitarian and human rights law and the overwhelming adoption of the Rome Statute of the International Criminal Court, furthermore give substance to an emerging customary duty to investigate and punish severe crimes committed during internal and international conflict.[17]

The question of amnesty is not a question of the past. Neither in South Africa, nor abroad. The South African amnesty process is widely regarded as a model for other societies in transition that have to deal with past gross human rights violations. Also, inside South Africa amnesty remains an important issue. Soon after the publication of the TRC-Report, renewed calls for a general amnesty were made.[18] A time limit on the prosecution of apartheid atrocities is being considered.[19] Thus, an enquiry into the compatibility of the South African amnesty process with international law is still very appropriate.

The amnesty provisions of the TRC-Act and the amnesty decision of the Constitutional Court are reviewed in Chapter II. Chapter III stresses the nature and role of conventional and customary law as sources of international law. Chapter IV to VI deal with the duty to prosecute and punish gross human rights violations under international law. The compatibility of the amnesty process with the Geneva Conventions, Additional Protocol I and II, and customary humanitarian law is raised first. The following chapter examines the duty to prosecute and punish gross human rights violations in international human rights law. Reference is made to conventional human right treaties, the jurisdiction of the Inter-American Court on Human Rights and the soft law of the United Nations. Chapter VI reviews the

[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 Dec. 1977, 1125 UNTS 3, reprinted in 16 ILM 1391 [hereafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 Dec. 1977, 1125 UNTS 609, reprinted in 16 ILM 1442 [hereafter Protocol II].

[16] John Dugard (1997): Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question. 13 *South African Journal on Human Rights,* 258 at 262.

[17] See Chapter IV,C below.

[18] Such calls were inter alia made by the leaders of the United Democratic Movement, Mr. Bantu Holomisa, and of the National Party, Mr. Marthinius van Schalkwyk. See *Cape Argus* (6 Nov. 1998) and *Sowetan* (9 Nov. 1998).

[19] See TRC-Report V, 309, para. 14. The National Director of Prosecutions, Bulelani Ngcuka remarked in th*e Sowetan* (2 Nov. 1998) that criminal charges against some perpetrators identified by the commission could be dropped "in the name of reconciliation".

compatibility with international criminal law. Especially the obligations of states towards crimes against humanity are discussed. The last chapter summarises the compatibility of the TRC-Act and the decision practice of the Amnesty Committee with international law. Special attention is given to the question of state responsibility and the granting of amnesty in a state of necessity. The thesis concludes with suggestions for future truth commissions in other societies in transition.

Granting amnesty for politically motivated crimes is not *per se* incompatible with international law. The amnesty provisions of the TRC-Act comply in many respects with international law, and the Act provides scope for international law considerations. By establishing individual responsibility the South African amnesty process complies with the duty to investigate gross human rights violations. This is a major positive development compared to general amnesties granted in Latin America. The TRC however ignores the duty to investigate and punish criminal conduct that was legalised under the apartheid order. Amnesty decisions resulting in a *de facto* impunity for gross human rights violations are also incompatible with international law. Unfortunately the Constitutional Court judgement and the current decision *practice* of the Truth Commission's Amnesty Committee give rise to the apprehension that international law requirements have rather been ignored.

II. The Amnesty Provisions of the TRC-Act and its Constitutionality

This chapter examines the amnesty provisions of the TRC-Act and its legal effects. Thereafter it discusses the Constitutional Court's approach to international law in its amnesty decision.

A. Amnesty Provisions of the TRC-Act

The amnesty provisions of the TRC-Act reflect the historical compromise of the South African negotiated settlement between the African National Congress (ANC) and the former apartheid regime. The negotiation partners agreed in a last minute deal to include a „postamble" into the Interim Constitution of 1993 to give way for the first democratic elections of 1994. Its most relevant part reads:

> „In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date [...] and providing for the mechanism, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed."[20]

The former National Party government and its security forces were not willing to hand over the power to a future black majority government without such a constitutional amnesty provision. The ANC acceded to this provision in light of the ongoing and escalating violence triggered by clandestine operations of the South African Security forces.[21]

1. The Definition of a Political Crime in the TRC-Act

After a long drafting process the *National Unity and Reconciliation Act* was passed by the South African parliament in 1995 to accomplish the postamble of the Interim Constitution. The act gives the Amnesty Committee of the South African Truth and Reconciliation Commission (TRC) the power to grant amnesty to persons who have committed an „act associated with a political objective" in or outside the Republic between March 1st, 1960, the month of the Sharpeville massacre, and May 10th, 1995, the inauguration of Nelson Mandela

[20] Postamble of the Interim Constitution, Act 200 of 1993.

[21] On human rights violations during the negotiated transition to democracy see Amnesty International (1992): *South Africa - State of fear. Security Force Complicity in Torture and Political Killings 1990-1992*. London: Amnesty International; Africa Watch (1994): *Impunity for Human Rights. Abuses in Two Homelands. Reports on KwaZulu and Bophuthatswana*. New York: Africa Watch; Africa Watch (1993): *Half-hearted Reform. The Official Response to the Rising Tide of Violence*. New York: Africa Watch; Anthony Minnaar, Ian Liebenberg & Charl Schutte eds. (1994): *The Hidden Hand: Covert Operations in South Africa*. Cape Town: IDASA.

as the president of the first democratic government of South Africa.[22] A politically motivated crime is defined in the Act as a crime committed on behalf of, or in support of the state, a liberation movement, or any other political organisation.[23] Such crimes can be any acts or omissions which constitute an offence under South African law. Amnesty may be granted for crimes that are regarded as gross violations of human rights, like the killing, abduction, torture or severe ill-treatment of a person[24] and also for comparable minor crimes like the illegal possession of firearms or damage to property.

2. Political Criminality Outside the Scope of the TRC-Act

It must be emphasised that the TRC-Act covers only crimes that were illegal under South African law. The TRC cannot grant amnesty for legalised criminal activity which was a distinctive feature of the apartheid legal order.[25] People who were responsible for 'legally' detaining persons for lengthy periods without trial[26], ordering forced removals[27] or applying the law by punishing human beings for committing crimes such as interracial sexual encounters[28], are neither prosecuted in the new South Africa, nor have they applied for amnesty under the TRC-Act. It must be noted that the enactment and execution of certain „legal" apartheid measures might however accomplish the factual finding of crimes under

[22] S 20 (2) TRC-Act. The TRC-Act refers only to a cut-off date, the original date of the proclamation of the South African Interim Constitution, Act 200 of 1993 on the 9th of December 1993. The period for which amnesty applications can be filed with the TRC was later extended to the 10th of May 1994, the day of the inauguration Nelson Mandela as the new President of the Republic of South Africa. This was mainly a concession to the right wing to cover their bomb blasts as well in the run up to the first democratic election in South Africa on the 27th of April 1994.

[23] S 20 (2) a-g, TRC-Act gives an extensive definition. The definition is problematic as it may exclude amnesty for persons who acted only on their own political convictions without being a supporter or member of the state or an other publicly known political organisation.

[24] see S 1(1)ix for a definition of what constitutes a gross violation of human rights according to the TRC-Act and TRC-Report I, 70-85 for the TRC's own interpretation of its mandate.

[25] The apartheid legal order clearly violated international law see e.g. John Dugard (1978): *Human Rights and the South African Legal Order*. Princeton: Univ. Press. Certain aspects of apartheid must be regarded as crimes against humanity and are punishable under international law. See Chapter VI, C.

[26] The TRC interpreted its legal mandate broadly. It came to the conclusion that detention without charge or trial, my in certain circumstances amount to severe ill-treatment and may therefore constitute a gross human rights violation according to the TRC-Act, see TRC-Report I, 81, para. 119. On the use of detention without trial see Max Coleman ed. (1998): *A Crime Against Humanity. Analysing the Repression of the Apartheid State*. Cape Town: David Philip, 43-53.

[27] About 3,5 million people were forcefully removed during the apartheid regime. See Laurine Platzky & Cherryl Walker eds. (1985): *The surplus people. Forced Removals in South Africa*. Johannesburg: Ravan Press; Christina Murray & Catherine O'Regan (1990): *No Place to Rest. Forced Removals and the Law in South Africa*. Cape Town: Oxford Univ. Press.

[28] The Immorality Act, Act 23 of 1957 criminalized sexual encounters of such a nature. See as well Dugard (1978), Fn. 25, 68-71 and the reports on the Immorality Act in the annual *South African Survey of Race Relations* (1960-1988) published by the South African Institute for Race Relations in Johannesburg.

international law.[29] While there were good reasons to exclude these criminal activities from the ambit of the Truth Commission - it was already very ambitious to investigate the many cases of torture, killings and disappearances between 1960 and 1994 - the current South African approach is unsatisfactory, as it deals only with the unlawful excesses under the unjust regime, but does not touch the inherent criminality of the apartheid legal order. It is my contention that the worst legalised criminality should and must be prosecuted.[30] Section 32 of the 1996 Constitution protects only against any conviction „for an act or omission that was not an offence under either national or international law at the time it was committed or omitted." It does not rule out the possibility to hold people accountable for offences which might have been legal under national law but are severe breaches of international law.

3. The Amnesty Process

Amnesty may only be granted to individuals who made an application before the 10th of May 1997.[31] The perpetrator must give a detailed account of the crime for which he or she wants to be granted amnesty.[32] Applicants who committed gross human rights violations have always to be heard at a public hearing before the Amnesty Committee of the TRC. Only in exceptional cases may such amnesty hearings be held *in camera*.[33] Alleged perpetrators have the right to legal representation[34] and victims and their relatives the right to attend an amnesty hearing relating to them.[35]

The Amnesty Committee may only grant amnesty if it is convinced that the applicant has made a full disclosure of all relevant facts related to the crime.[36] In order to ascertain whether the crime was associated with a political motive the Amnesty Committee of the TRC must be guided by the following criteria:

- the motive of the person who committed the act,
- the context of the act,
- the legal and factual nature of the act, including its gravity,

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[29] Article 2 (d) of the International Convention on the Suppression of the Crime of Apartheid [Apartheid Convention], A/RES/3068 (XXVIII), 30. Nov. 1973, 1015 UNTS 243, reprinted in: ILM 13 (1974) 50, for example criminalizes explicitly „any measures, including legislative measures, designed to divide the population along racial lines", including the expropriation of landed property and the prohibition of mixed marriages.

[30] See Chapter VI, C below.

[31] S 18(1), the law gave originally applicant only 12 month to decide to apply (S 18(1)). The period for application was later extended.

[32] See the amnesty application form in *Government Gazette*, Vol. 368, No. 5640, 9 February 1996.

[33] S 33.

[34] S 34.

[35] S 30(2)

[36] S 20(1c).

- the target of the act - especially whether it was directed against public institutions, political opponents or not,
- the ordering or approval of the act by the state or a political organisation,
- the proportionality between the act and its goal.[37]

These guidelines follow similar criteria that Carl Norgaard drew up in analogy to principles of extradition for the release of political prisoners during the transition to democracy in Namibia.[38] The amnesty provisions of the TRC-Act are not precise and open to interpretation as the Amnesty Committee may take into account the amnesty provisions of the *Indemnity Act* of 1990 and the *Further Indemnity Act* of 1992 which do not contain the above mentioned criteria.[39] Persons who fail to apply for amnesty or who are refused amnesty may be prosecuted in an ordinary court.

4. Legal Effects of Amnesty

What are the legal effects of amnesty? Section 20 (7a) of the Act excludes the successful applicant from criminal *and* civil liability. The applicant must be a) either released from prison, b) his pending court case stopped, or c) indemnity is granted for applicants who were not tried.[40] Furthermore, no civil claims can be made by the victims against the applicant, his political organisation, or the state.[41] By virtue of the application of Section 20 (7a) perpetrators of human rights violations receive impunity for their crimes, whereas their victims are not able to lay any civil charges for their suffering caused by the perpetrator or his employer.

It is most likely that perpetrators who are granted amnesty by the Amnesty Committee of the TRC will not only evade any criminal and civil liability for their deeds, but will also be protected against non-criminal sanctions, like disciplinary measures, removal from public office or the seizure of their firearm licence. The TRC-Act provides in Section 20 (10) that „any entry or record of the conviction [for which amnesty was granted] shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place“. The Amnesty Committee has only the power to recommend measures „as it may

[37] S 20(3).
[38] See Gerhard Werle (1996): The South African Rechtsstaat and the Apartheid Past. 29 *Verfassung und Recht in Übersee*, 58 at 69.
[39] S 20(4), S(48).
[40] S 20(8).
[41] S 20(7).

be necessary for the protection of the safety of the public."[42] At the time of writing (November 1998) the Amnesty Committee has not yet issued any such recommendation. Furthermore, the Truth and Reconciliation Commission stated in its Report that it „decided not to recommend lustration [= removal form public office] because it felt that it would be inappropriate in the South African context."[43] The Commission did not give any reasons why it came to this conclusion.

5. Legal Effects of Amnesty on Victims' Rights

The granting of amnesties to the perpetrators of human rights violations does not leave the victims in any improved situation. Once amnesty is granted, victims loose their right to bring a civil claim against the perpetrator or the state. Furthermore, the TRC-Act does not provide for any reparation or compensation to victims. The Reparation and Rehabilitation Committee of the TRC only has the power to recommend a reparation policy to Parliament.[44] It remains to be seen whether or not Parliament will enact legislation, including individual reparation for victims, as suggested in the TRC-Report.[45] The TRC-Act and the recommendations of the Truth Commission indicate that only victims of gross human rights violations will be eligible for reparation.[46] This means that people who were not victims of murder, torture, abduction, or severe ill-treatment may not qualify for any reparation in the future while their perpetrators could be granted amnesty under the TRC-Act. According to the TRC-Report victims will only be eligible for reparation if they

a) made a statement to the TRC before December 1997;

b) were mentioned in a statement made on behalf of them or

c) were identified as victims of a gross human rights violations during an amnesty process.[47]

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[42] S 20 (10).
[43] *TRC-Report* V, 311, para. 19.
[44] S 25(1b), see generally Lovell Fernandez (1996): Possibilities and Limitations of Reparations for the Victims of Human Rights Violations in South Africa. In: Medard R. Rwelamira & Gerhard Werle eds.: *Confronting Past Injustices.* 65-79.
[45] The Truth and Reconciliation Commission suggests, that victims of gross human rights violations or their next of kin relatives will receive an annual reparation of R 17.029 to R 23.023 for a period of six years, see *TRC-Report* V, 187. The TRC has only very lately used its power to grant interim reparation to victims of gross human rights violations. This interim reparation is, however, a very limited once-off payment of R2 000 to R 5705. The first payments for such interim relief were only made in July 1998, two and a half years after the TRC started operating.
[46] S 26(1), see as well TRC-Report I, 86, para 133-36.
[47] TRC-Report I, 86, para. 136.

The effect of these criteria is that many victims of gross human rights violations will be excluded from the benefit of compensation because they did not apply for reparation in time or were not mentioned in any TRC document as a victim.

B. The Amnesty Decision of the Constitutional Court

The amnesty provisions were challenged by the widow of Steve Biko and other prominent relatives of former Black Consciousness activists. The applicants, represented by the Azanian Peoples Organisation (AZAPO), argued that the amnesty provisions violate Section 22 of the 1996 Constitution which provides that „every person shall have the right to have justiciable disputes settled by a court of law." Furthermore, they argued that international law would oblige the state to prosecute those responsible for gross human rights violations.[48] However, the Constitutional Court of South Africa ruled in the *AZAPO-Case*, contrary to the argument presented by the applicants, and upheld the constitutionality of the TRC-Act.[49] In its judgement the Court only marginally touched the question whether or not the contested amnesty provisions are compatible with international law requirements. It only noted that „it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which the country found itself during the years of conflict"[50].

1. The Courts Limited Regard to International Law

I will discuss the substance of the courts' argument later. At this stage it should be noted that Section 35(1) of the 1993 Interim Constitution compels any Court to „have regard to international law".[51] In its own ground-breaking judgement on the constitutionality of the death penalty the Constitutional Court interpreted section 35(1) to include binding *and* non-binding international law. At that time it ruled:

> In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a

[48] *AZAPO Case*, Fn. 12, para 25.
[49] For a critical commentary of the decision see John Dugard (1997): Is the Truth and Reconciliation Process Compatible with International Law? 13 *South African Journal on Human Rights*, 260 and Ziyad Motala (1996): The Constitutional Court's approach to international law and its method of interpretation in the 'Amnesty decision': Intellectual honesty or political expediency? 21 *South African Yearbook of International Law*, 29-59.
[50] *AZAPO Case*, Fn. 12, para 29.
[51] It must be noted that the 1996 Constitution emphasises international law even stronger. Its Section 39(1) states that the courts „must consider international law" in interpreting the Bill of Rights. Furthermore its section 233 requires a court when interpreting legislation to „prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation that is inconsistent with international law", see John Dugard (1997): International Law and the South African Constitution. 8 *European Journal on International Law*, 77-92, at 84-5.

> framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[52]

In its amnesty-decision the Constitutional Court referred only sparsely to the above-mentioned human rights law. It ignored important human rights conventions and their interpretation by the United Nations Committee on Human Rights, rulings on Latin American amnesty laws by the Inter-American Court on Human Rights and the precedents of international criminal tribunals.[53] Neither did the Court attempt to interpret the amnesty provisions of the TRC-Act in a way that would make them more consistent with international law. Such an obligation is now expressively provided in Section 233 of the 1996 Constitution.[54] By ignoring customary and non-binding international law the Constitutional Court suspended its own human rights orientated approach towards constitutional interpretation.[55]

2. The Continuing Legacy of Parliamentary Supremacy

Instead, the Constitutional Court relied heavily on Section 231 of the Interim Constitution which provides that an Act of Parliament can override any contradictory rights or obligations under international agreements entered into force before the commencement of the 1993 Constitution.[56] This provision infringes on basic principles of international law. A state cannot override treaty law by introducing constitutional provisions or national law contradictory to its obligations under international law.[57] *Pacta sunt servanda*. The binding force of the Geneva Conventions, for example, can only be terminated by a written denunciation to the Swiss Federal Council.[58] Such a denunciation was never made by South

[52] *S v. Makwanyane* 1995 (3) SA 391 (CC) at 413-14.
[53] See Chapters V and VI below.
[54] See Fn. 51 above.
[55] See Ziad Motala (1996) Fn 50, for a similar critique.
[56] *Azapo-Case*, para. 27.
[57] See Article 27 of the Vienna Convention on the Law of Treaties, 1155 UNTS: „A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
[58] Art. 63 I. Geneva Convention, Art. 62 II. Geneva Convention, Art. 142 III. Geneva Convention, Art. 158 IV. Geneva Convention.

Africa. Furthermore, states cannot derogate at all from norms that have become peremptory norms of general international law like the essential content of the Geneva Conventions.[59]

3. Amnesty for Civil Liability and International Law

Before turning to the main topic - the duty to punish and prosecute gross human rights violations under international law - some few remarks need to be made on the question of amnesty for civil liability and its compatibility with international law. The Constitutional Court held that amnesty was not only constitutional in respect of criminal and civil liability. It argued that amnesty for civil liability was necessary to ensure that the truth is heard. Perpetrators will not come forward if they would later face civil lawsuits.[60] In the light of systematic destruction of state documents and other evidence linked to gross human rights violations[61], this argument has its merits. The state may be unable to investigate thousands of human rights violation cases without granting some benefits to perpetrators for their co-operation with the courts or the Truth Commission. Without incentives to disclose the truth, the investigation of many human rights abuses could fail. The state would be able to fulfil its duty to investigate these violations only selectively and most victims might never know what happened to their loved ones.

While individuals might be discouraged from disclosing the truth if they are personally held liable for their deeds, this argument is not valid for the state. Perpetrators will not be discouraged to make a full disclosure if their co-operation with the Truth Commission will only lead to liability for compensation by the state. If the state grants amnesty to individuals in respect of civil liability, and thereby substantially invades the fundamental right of victims to have their matter settled in an ordinary court, the state has to be responsible for such liability.[62] The need to reconstruct the society and to give relief to all South Africans who suffered from the injustice of apartheid cannot be used as an argument for denying victims of torture and other gross human rights violations their right to be compensated.

According to the Draft Articles on State Responsibility of the International Law Commission, states incur responsibility for all acts committed by any organ or person acting on behalf of the state, even if their conduct exceeds their competence according to internal law or

[59] See Art. 53 and Art. 60 (5) of the Vienna Convention on the Law of Treaties. See as well Chapter II below.
[60] *Azapo-Case*, para. 36.
[61] See TRC-Report I, 201-243.
[62] The Inter-American Court on Human Rights held in *Velazquez Rondriquez* that Honduras has to pay compensation to the relatives of disappeared persons, irrespective of the fact whether those responsible were state officials or not. See Chapter V, C.

contravenes instructions.[63] This not only applies to the acts of the former apartheid government. According to Article 15(1) of the Draft Articles, any act „of an insurrectional movement which becomes the new government of a State" shall also be considered as an act of state.

International law leaves the discretion to a state to regulate the compensation of victims of gross human rights violations out of court through specific compensation laws.[64] It does, however, not exempt the state from its duty to provide effective remedy to victims of gross human rights violations.[65] This entails that a fair and adequate compensation must be provided and that such compensation must reach the victim within reasonable time.[66] Victims cannot lawfully be left uncompensated for years. This would not be an *effective* remedy. One may argue that the Convention against Torture and the Convention on Political and Civil Rights which entail the right to compensation and effective remedy were not binding on South Africa at the time of the amnesty decision. But this should not have prevented the Constitutional Court from applying this conventional law already signed by South Africa. The interim reparations of the TRC - a once-off payment of a maximum of R 5705 - was implemented very late and is insufficient to comply fully with the duty to provide adequate compensation under international law.[67] Furthermore, it is most likely that victims will only benefit from a comprehensive compensation and rehabilitation scheme after 1999, more than four years after the TRC-Act came into force. Such delays do not fully comply with the victim's rights to effective remedy in international law.

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[63] See Articles 5 to 10, International Law Commission: Draft Articles on State Responsibility, 37 ILM (1998) 440.

[64] See for example Principle 7, of the *Revised Set of the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, Annex, E/CN.4/Sub.2/1996/17, 24 May 1996: „In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations."

[65] See the right to „effective remedy" in Article 2(3) of the *International Convenant on Civil and Political Rights* [CCPR], 16 Dec. 1966, 999 UNTS 171, and Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Convention against Torture], 10 Dec. 1984, 23 ILM (1984) 1027, which entitles victims of torture to obtain redress, fair and adequate compensation, including the means for as full rehabilitation as possible. The duty to compensation is as well contained in the humanitarian law. Common Article 51/52/131/148 of the Geneva Conventions states that no party 'shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [Article 147 grave] breaches..."

[66] See as well the Principle 5 of the *Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, Fn. 64: „The legal system of every State shall provide for prompt and effective disciplinary, administrative, civil and criminal procedures so as to ensure readily accessible and adequate redress, and protection from intimidation and retaliation."

[67] Reparation should according to Principle 7 of the UN Guidelines (Fn. 64) be „proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."

III. Conventional and Customary Law and the Duty to Punish

According to Article 38 (1) of the Statute of the International Court of Justice (ICJ) the duty to prosecute gross violations of human rights may arise either out of conventional or customary law. Conventional law is only binding on state parties. Norms contained in conventional international law may, however, also impose obligations on third parties if these norms reflect customary law.

The scope of custom in international law is less precise. It has for example been argued that there is a lack of state practice supporting the duty to prosecute and punish human rights violations. These assumptions are usually based on a misunderstanding of the concept of state practice in international human rights and humanitarian law. I will therefore clarify the meaning of state practice as a central element in the formation of legal custom, before I will turn to the substantial law in the next Chapter.

A. Conventional Law as Source of International Law

Conventional law achieves its binding effects through bilateral or multilateral treaties between states. It usually has only binding effect on state parties to a treaty. But there are important exceptions to this rule.

1. The Relationship between Conventional and Customary Law

The first exception is that conventional law may be a mere expression of an already existing norm of international customary law. Norms of conventional law reflecting customary law impose obligations on member states *and* non-member states alike.

Secondly, international conventional law may in itself generate custom. A norm of conventional law that becomes widely accepted among states may generate a new rule of international customary law, and thereby impose obligations on states who never have signed the treaty that contains the norm.

Conventional law may in fact, generate peremptory norms of international law, or *ius cogens*. Such a peremptory norm is a rule „accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which

can be modified only by a subsequent norm of general international law having the same character."[68]

2. The Binding Force of Conventional Law

South Africa has signed the Geneva Conventions in 1952. The non-incorporation of the Geneva Conventions into municipal law of South Africa is irrelevant from an international law perspective. According to Article 12 and 14 of the Vienna Convention, a state is bound to a treaty after signing or ratifying it. The principle of *pacta sunt servanda* applies.[69] South Africa must therefore meet all obligations imposed by the Geneva Conventions.

South Africa's obligations arising out of the International Convention on Civil and Political Rights and the Convention against Torture are of a different nature. Although both treaties have been signed by South Africa before the TRC-Act was published, they have not been ratified to date. They are therefore *as treaty law* non-binding on South Africa. Its signature places South Africa however under an obligation „to refrain from acts which would defeat the object and purpose of such a treaty..."[70]

3. Problems of Applicability *ratione temporis*

Like domestic law, international conventional law cannot be applied retroactively.[71] In respect to human rights violations the prohibition of non-retroactive punishment is usually not a problem. Gross human rights violations are in most cases either criminal under national law or under international customary law.[72] The question is not whether states are *entitled* to punish gross human rights violations, it is rather, whether they are *obliged* to punish, especially then, when the violations were committed before a specific treaty entered into force. Latin American countries have for example claimed that the Convention against Torture does not oblige them to prosecute and punish acts of torture that have been committed before they became party to the Convention.

Interpreting the obligations of the Convention against Torture, two separate acts should be distinguished. The act of torture and the state's omission to investigate and punish such an act, may constitute two separate breaches of international law.[73] The failure of the state to

[68] See Article 53 of the Vienna Convention of the Law of Treaties.
[69] Article 26 of the Vienna Convention of the Law of Treaties.
[70] Article 18 of the Vienna Convention of the Law of Treaties.
[71] Article 28 of the Vienna Convention of the Law of Treaties.
[72] See Chapter VI, below.
[73] Such a distinction was as well made in the case of *Laura M.B. Janes et al. (USA) vs. United Mexican States*, 16.11.1925, Reports of International Arbitral Awards, Vol. 4, 82 in which the relatives of the murdered Janes

investigate a past human rights violation is a omission in its own right, that must be separated from the original deed. Not the time of the original act, but the time of the omission to investigate and punish is relevant.[74] This view is supported by Article 25(1) of the Draft Articles on State Responsibility of the International Law Commission: Article 25(1) specifies that „the breach of an international obligation by an act of the State having a continuing character occurs at the moment when the act begins." This means as soon as it is evident that the state actively refuses to investigate a human rights case. Article 25(1) clarifies that „the time of commission of the breach extends over the period during which the act continues and remains not in conformity with the international obligation."[75] If the Convention against Torture is interpreted in the light of this provision, one has to come to the following conclusion: When a state continues to refuse the investigation of cases of torture after it has acceded to the Convention, the state breaches its international obligation to investigate them, even then when the act of torture took place before the state's accession to the treaty.

In fact, I do maintain nothing else than that it is a breach of international law to continue a practice incompatible with a treaty after it has been signed and ratified. The decision made by the UN Committee against Torture, not to compel Argentina to punish previous acts of torture after it became a member to the Convention, must therefore be criticised.[76] More convincing is the contrary decision of the Inter-American Commission on Human Rights.[77] I should add, that a predecessor regime's failure to prosecute gross human rights violations can also not be used as an excuse for failing to investigate and punish those acts under a new government. The principle of state continuity entails that international obligations of a former government continue to apply.

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sued Mexico for compensation because it failed to prosecute. The arbitration court distinguished between the „killing itself" and „non-punishment" as „two delinquencies being different in their origin, character, and effect [...]"(at 88-9). See as well Kai Ambos (1997b) *Straflosigkeit von Menschenrechtsverletzungen. Zur „impunidad" in südamerikanischen Ländern aus Sicht des Völkerrechts*, Freiburg (i. Breisg.): Edition Iuscrim, at 221-22.

[74] similar Florian Jessberger (1996): Von der Pflicht des Staates, Menschenrechtsverletzungen zu untersuchen. *Kritische Justiz*, 290 at 299

[75] International Law Commission. Draft Articles on State Responsibility. UN GA Res. 51/160, 16 Dec. 1996, 37 ILM (1998) 440.

[76] The Committee against Torture held that the Convention did not apply to acts, including amnesty laws, that occurred before the Convention entered into force (26 June 1987), *see* Decisions of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN Doc. CAT/C/3/D/1,2 and 3/1988.

[77] The Inter-American Commission on Human Rights found in relation to similar complains that „[t]he violation at issue [...]is the denial of the right to judicial protection and of the right to a fair trail [...]" and that „the disputed measures were adopted at the time when *the* [Inter-American] *Convention* [on Human Rights] *was already in force* for the Argentine State. [...] Therefore the petitions are admissible *ratione temporis*." (Italics in original) Report No. 28/92 in: Annual Report of the Inter-American Commission on Human Rights 1992-1993, para. 16 and 19.

B. Customary Law as Source of International Law

As South Africa was not party to the Additional Protocols to the Geneva Conventions and to most international human rights instruments. The question whether the TRC's amnesty process complies with international law is therefore largely a question of comp ability with international customary law.

1. The Definition of Customary Law

According to Article 38 1b) of the Statute of the International Court of Justice, international custom is defined as „evidence of a general practice accepted as law". Customary law consists of two elements a) general practice of states and b) a sense of legal obligation to follow a certain practice (*opinio iuris*). Like conventional law, customary law may not be applied retroactively.

The scope of international custom depends largely on what is considered as evidence of state practice. Critics have doubted whether there is at all a state practice to punish gross human rights violations. Indeed impunity seems to be rather the rule than the exception. In Biafra, Bangladesh, Uganda or Cambodia hardly anybody was held accountable. Many Latin American countries like Argentina, Chile or El Salvador passed amnesty laws preventing prosecutions.[78] There are however substantial exceptions to this superficial belief. War criminals were not only tried in Germany and Japan, but in most European countries after Word War II.[79] Greek and Portuguese juntas were brought to trial after a wave of political change in Southern Europe.[80] Argentina tried and punished its military rulers after a return to democracy, only thereafter they were granted amnesty.[81] Trials were held after the collapse of communism in Eastern Europe.[82] The former ruler of South Korea was tried and sentenced,

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[78] See Kai Ambos (1997a): Impunity and International Criminal Law. A Case Study on Columbia, Peru, Bolivia, Chile and Argentina. 18 *Human Rights Law Journal*, No. 1-4, 1-15.

[79] See Kritz (1995), Fn. 11; Peter Novick (1968): *The Resistance versus Vichy: The Purge of Collaborators in Liberated France*. New York: Columbia Univ Pr.; Paul Sérant (1966): *Die politischen Säuberungen in Westeuropa am Ende des Zweiten Weltkrieges*. Oldenburg*:* Stalling; Christiaan F. Rüter (1968): *Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen*, 22 Vol., Amsterdam: Univ. Pr.; Adalbert Rückerl (1984): *NS-Verbrechen vor Gericht. Versuch einer Vergangenheitsbewältigung.* Heidelberg: Müller; Gerhard Werle & Thomas Wandres (1995): *Auschwitz vor Gericht: Völkermord und bundesdeutsche Strafjustiz.* München: Beck. For a bibliographic listing: Norman E. Tutorow ed. (1986) *War Crimes, War Criminals and War Crimes Trials.* New York: Greenwood; Inge S. Neumann (1978)*: European War Crimes Trials.* Westport, Conn.: Greenwood.

[80] See Guillermo O'Donell et al. eds. (1986) *Transitions from Authoritarian Rule. Southern Europe.* Baltimore: Hopkins Univ. Pr, 109-37; Amnesty International (1977): *Torture in Greece: The First Tortures Trial 1975*. London: Amnesty International.

[81] See Amnesty International (1987): *Argentina. Report of the Trail of the Former Junta Members 1985*. London: Amnesty International.

[82] See Georg Brunner ed. (1995): *Juristische Bewältigung des kommunistischen Unrechts in Osteuropa und Deutschland*. Berlin: Spitz; Klaus Marxen & Gerhard Werle (1997): *Erfolge, Defizite und Möglichkeiten der*

and national prosecutions are under way in Ethiopia and Uganda.[83] Last but not least, two International Criminal Tribunals have been set up under the auspices of the United Nations.[84] As shown above, there is actually some evidence of a state practice to prosecute and punish gross human rights violations.

2. The Concept of State Practice

The infringement of a rule of law does not prove its non-existence. There is hardly any support for the claim that impunity for gross human rights violations is regarded by states as an acceptable legal norm. The basic evidence is contrary. All states criminalize gross human rights violations under their ordinary national criminal law. Extra-legal executions and torture are usually crimes under national law. This elementary evidence of state practice, confirmed by national criminal law and its daily application by national courts is often disregarded. *Opinio iuris* and state practice correspond: People who murder and assault others are usually exposed to judicial inquiries and punishment. Even if states may fail to prosecute perpetrators, state reports and communications to the UN human rights bodies confirm regularly, that they accept the obligation to bring suspected perpetrators to trial.[85]

Obstacles in the prosecution of human rights violations, like, fear of victims to report such violations to the police, lack of resources in the judicial system, or insufficient access to state information, cannot be used as evidence of a state practice that favours impunity. Moreover, impunity is often a direct result of unlawful or criminal activity. Unfortunately interference with the judicial system by way of murder of witnesses or perversion of justice, are common phenomena.[86] To infer state practice from governments which systematically support, plan, or commit gross human rights violations is a contradiction in itself. Criminal behaviour can never be the foundation of legal custom.

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strafrechtlichen Aufarbeitung des SED-Unrechts in vorwiegend empirischer Sicht. Gutachten für die Enquete-Kommission „Überwindung der Folgen der SED-Diktatur im Prozeß der Deutschen Einheit“ Manuscript. Berlin: Juristische Fakultät, Humboldt Universität zu Berlin.

[83] See Kritz (1995), Fn. 11.

[84] See Virginia Morris & Michael P. Scharf (1995) *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*: Irvington-on-Hudson, N.Y: Transnational Publ.; M. Cherif Bassiouni (1996): *The Law of the International Criminal Tribunal for the Former Yugoslavia*. Irvington-on-Hudson, N.Y: Transnational Publ.; Virginia Morris & Michel P. Scharf (1997): *The International Criminal Tribunal for Rwanda.* Irvington-on-Hudson, N.Y: Transnational Publ.

[85] See Kai Ambos (1997b): *Straflosigkeit von Menschenrechtsverletzungen. Zur „impunidad“ in südamerikanischen Ländern aus Sicht des Völkerrechts*, Freiburg (i. Breisg.): Edition Iuscrim, at 204. Ambos provides there plenty references to state reports of Latin American Countries.

[86] See *Special Report on Extrajudicial, Summary or Arbitrary Executions.* Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye. UN Commission on Human Rights, UN Doc. E/CN.4/1995/61, 14 Dec 1994.

When a government passes an amnesty law after transition to democracy and justifies these laws with the imminent threat of a military coup, such practice is rather evidence of an *opinio iuris* that is contradictory to the actual behaviour of the state. The ruling of the International Court of Justice in the *Nicaragua* Case confirms this view:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of States conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of the attitude is to confirm rather than to weaken the rule.[87]

3. Opinio Iuris as Evidence of State Practice

Finally, it must be emphasised that the *opinio iuris* may in itself be evidence of state practice. Principles repeatedly reaffirmed by states in international organisations are not only expressions of *opinio iuris*. As an eminent authority has explained, „Through acceptance of norms stated in human rights instruments by states, especially non-parties, human rights treaties have generated new customary rules [...] New human rights instruments have been adopted that already embody certain customary rules. The repetition of certain norms in many human rights instruments is *in itself an important articulation of state practice* and may serve as evidence of customary international law."[88] In *Prosecutor vs. Tadic* the International Tribunal for the Former Yugoslavia followed this position:

> When attempting to ascertain state practice with a view of establishing the existence of a customary rule or a general principle, it is insufficient and inappropriate to rely only on the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour. [...] In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions."[89]

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[87] Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U:S.) 1986 ICJ Rep. at 98, para. 186, *reprinted in* 25 ILM (1986) 1023. I owe this point Theodor Meron (1989): *Human Rights and Humanitarian Law as Customary Law.* Oxford: Clarendon. See especially pp. 59-62.

[88] Theodor Meron (1989): *Human Rights and Humanitarian Law as Customary Law.* Oxford: Clarendon, at 92 (emphasis by author).

[89] see *Prosecutor v. Tadic* (Appeals Chamber) International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72, 2 October 1995, at para. 99, *reprinted in* 105 ILR 419.

Evidence for of a state practice should therefore primarily be found in national and international conventional law, national and international judicial decisions, proclamations of state official, and resolutions of the United Nations and its human rights bodies.

Having clarified this, I will turn to the substantive law. Chapter IV reviews the international humanitarian law applicable to the amnesty question in South Africa, namely, the Geneva Conventions of 1949, their 1977 Additional Protocols and the current development of customary law in the field of humanitarian law. Chapter V deals with the conventional and customary human rights law. The compatibility of the South African amnesty process with the duty to investigate and punish the crime of apartheid and other crimes against humanity is discussed in Chapter VI.

IV. The Duty to Punish in International Humanitarian Law

The Truth Commission has the power to grant amnesty for acts which may constitute war crimes.[90] While domestic laws and international human rights conventions apply during peace- and war-time alike, the protection offered by humanitarian law is confined to situations of armed conflict. Murder or torture, for example, amount to war crimes, if they are committed against civilians and non-combatants during or in connection with armed conflict. The system of humanitarian law differentiates between international and non-international armed conflicts, for which different norms are applicable.

The characterisation of the conflict inside and outside of South Africa is very relevant to the question of amnesty. While the obligation to punish perpetrators of grave breaches of humanitarian law is generally accepted for crimes committed in international armed conflict, such a duty has often been contested for crimes committed during internal armed conflicts. I will therefore examine closely the relevant provisions of the Geneva Conventions for international and internal armed conflict.

The classification of the armed conflicts in Southern Africa is very complicated. Most armed conflicts in Southern Africa, were in fact of a mixed character.[91] They had domestic roots but were often fought across international borders. The conflict in Angola, Namibia and cross-border raids by South African security forces in the neighbouring frontline states are such examples. The different types of armed conflicts outlined in the Geneva Conventions may furthermore coexist on the same territory, or follow each other.[92] This means that different law may be applicable for acts committed during the same time or in subsequent time periods. The legal nature of the past conflicts is further complicated by Article 1(4) of Protocol I to the Geneva Conventions. It states that armed conflicts of national liberation are international conflicts.

This chapter examines the law applicable to international and internal armed conflict. The review starts with the treaty law contained in the Geneva Conventions and its Additional

[90] War crimes are here understood as breaches of humanitarian law as defined in Article 85(5) of Protocol 1 to the Geneva Conventions.

[91] The *ICRC Annual Report* for 1988 treats for example the armed conflict in Angola as an international armed conflict in so far as it involved South Africa, but as an internal conflict in other respects, at 16-17. On the applicability of humanitarian law in mixed armed conflicts see generally Martin Hess (1985): *Die Anwendbarkeit des humanitären Völkerrechts, insbesondere in gemischten Konflikten*. Zürich: Schulthess.

[92] Veuthey, Michel (1986): Non-international Armed Conflict and Guerrilla Warfare. In: Bassiouni, M. Cherif ed.: *International Criminal Law. Vol.1 Crimes.* New York: Transnational Publishers, 243 at 250.

Protocols. The applicability of humanitarian law to the different conflicts in Southern Africa will be discussed separately. I will distinguish South African cross-border raids, the conflict of Namibia, and armed conflict inside South Africa. Finally, the question whether there is a customary duty to prosecute and punish war crimes in internal armed conflicts is discussed.

A. The Grave Breaches System of the Geneva Conventions

South Africa acceded to the four Geneva Conventions in 1952. They are conventional law binding on South Africa. The Geneva Conventions apply to „all cases of declared war or any other armed conflict, which may arise between two or more High Contracting parties, even if the state of war is not recognised by one of them."[93] They also cover all cases of occupation and of armed conflict between a state party and another Power, if the latter accepts and applies the provisions of the Conventions.[94] They regulate occupation and all forms of international armed conflict. The only exception to this is Article 3 common to the Geneva Conventions, which is applicable to all non-international armed conflicts.

1. The Duty to Investigate and Punish

The Geneva Conventions oblige states in Common Article 49/50/129/130 either to prosecute and punish or to extradite persons, that have committed grave breaches of the law of war.

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Grave breaches are defined in the following Article 50/51/130/147 as follows:

> „Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the

[93] Common Article 2, para. 1 of the Geneva Conventions
[94] Common Article 2, para. 2 and 3 of the Geneva Conventions.

> present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The Geneva Conventions protect non-combatants. These are civilians[95] and people who are not any more actively participating in combat, like, prisoners of war[96], the shipwrecked[97], and the wounded and sick[98]. Persons who kill or torture a protected person must therefore be punished. As far as international armed conflicts are concerned, this is an uncontested position of international law.

2. Applicability to Internal Armed Conflicts

It is often denied that the Geneva Conventions entail a duty to prosecute and punish war crimes in internal armed conflicts. Neither the common article 3 of the Geneva Conventions, which outlaws gross human rights violations in non-international armed conflicts, nor the Protocol II of 1977 contain an explicit provision requiring states or other parties to a non-international armed conflict to punish these serious violations.[99] The predominant view is that the grave breaches provisions of the four conventions only apply to international armed conflicts. This argument is mainly based on Article 4 of the IV. Geneva Convention, which defines a protected person as somebody who finds himself in the hand of a party to the conflict or occupying power of which he is *not a national*. The traditional view is that own nationals are not protected persons according to the Geneva Conventions, and that therefore States are not compelled to punish war crimes in internal armed conflicts.[100]

Such an opinion must however be contested. The Geneva Conventions offer a minimal protection to persons who find themselves trapped in internal conflicts. Common Article 3, applicable to all forms of non-international armed conflict, explicitly protects *any* person

[95] Article 4, IV. Geneva Convention.
[96] Article 4, III. Geneva Convention.
[97] Article 12, II. Geneva Convention.
[98] Article 12, I. Geneva Convention.
[99] The lack of such explicit enforcement provisions in regard to non-international armed conflicts is a relict of the concept of state sovereignty and non-interference into internal matters which has been the principle of international law up to recently. Since 1945 this principle has subsequently been eroded by international human rights law.
[100] See Michael Bothe (1996): War crimes in non-international armed conflicts. In: Dinstein, Yoram & Tabory, Mala eds.: *War crimes in international Law*. The Hague: Martinus Nijhoff, 293 at 294; Theodor Meron (1995): The International Criminalisation of Internal Atrocities. 89 *American Yournal of International Law*, 554-577. Similar as well the Tadic-Decision of the International Criminal Tribunal for the Former Yugoslavia, IT-94-1-AR72, at para 71 and 79, although noting that the „language of the Conventions might appear to be ambiguous and the question [of applicability of the grave breaches provisions to internal conflicts] is open to some debate".

irrespective of „birth, race, colour, religion or faith, sex, birth or wealth, or any other similar criteria“ (like nationality) from inhuman acts such as murder, torture and hostage taking.[101]

The International Court of Justice has referred to Common Article 3 in its *Nicaragua*-Judgement as ‘elementary considerations of humanity’ to be upheld in every armed conflict, regardless whether of internal or international character.[102] The provision containing the duty to prosecute and punish, Article 147 of the IV. Geneva Convention, does not explicitly refer to the definition of a protected person in article 4. It speaks more generally about acts committed against „persons or property protected by the *present Convention*“[103]. It is obvious that Article 3, protecting persons in non-international armed conflicts, is part of the convention. The killing or torturing of a civilian during internal armed conflict must therefore be regarded as a grave breach of the Geneva law.[104]

Such an interpretation of the grave breaches provisions may not be supported by the *travaux préparatoires* of the conventions, but is confirmed by a teleological interpretation of the conventions and the development of international human rights law since 1945. Object and purpose are central to the interpretation of international law. Article 31(1) of the Vienna Convention of the Law of International Treaties states that conventional law shall be interpreted „in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.“

The main object and purpose of the Geneva Conventions is to protect non-combatants in armed conflicts against the most severe infringements of their rights. This is achieved by

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[101] The text of Common Article 3 to the Geneva Conventions reads:
„In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. [...]“

[102] 1986 ICJ Rep. at 114.

[103] Article 147 IV. Geneva convention (emphasis by author).

[104] Similar the separate opinion of Judge Abi-Saab, Prosecutor v. Tadic (Appeals Chamber) 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72; reprinted in 105 ILR 419 at 534-538; Gerhard Werle (1997): Menschenrechtsschutz durch Völkerstrafrecht. 109 *Zeitschrift für die*

outlawing such conduct and by imposing a duty to punish grave breaches. One cannot justify why such a protection should only be limited to international conflicts and not be extended to civil wars. There is no convincing reason why non-derogable human rights, like the right to life, and physical integrity should be less protected in internal than international armed conflicts.

Furthermore, international law is not static and must take developments in humanitarian and human rights law into account. According to Article 31(3) of the Vienna Convention of the Law of International Treaties any interpretation of treaty law should take into account:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

The provisions of the Geneva Conventions must therefore be interpreted in the context of the two Additional Protocols, international human rights law and rules of customary humanitarian law. As I will show below, the criminalisation of internal atrocities is also supported by recent case law and *opinio iuris*.[105]

The grave breaches system compels states to punish war crimes in international *and* internal armed conflicts. This is not missionary writing, it is rather a coherent interpretation of humanitarian law based on international human rights law and international custom that has emerged. The outdated traditional interpretation of the grave breaches regime has to give way for a human rights orientated interpretation of the Geneva law. Severe violations of humanitarian law have to be punished regardless whether they were committed in internal or international armed conflict.

3. The Duty to Suppress other Infringements of the Geneva Law

Even if one sticks to the traditional interpretation of the grave breaches system, member states are obliged to apply some form of sanction against atrocities in internal armed conflict. This is apparent as all four Conventions impose a duty to „take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches ...“[106]. If a state does not apply criminal punishment to that effect, it is at least

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gesamte Strafrechtswissenschaft, 808 at 820 and Rüdiger Wolfrum in: Dieter Fleck ed. (1994): *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*. München: Beck, 413 at 425.

[105] See Chapter IV C below.

[106] Article 146(4) VI Geneva Convention.

bound to apply non-criminal sanctions. War crimes must be suppressed, people who disregard the elementary humanitarian norms of common article 3 may not be awarded blanket amnesty, nullifying all legal consequences of their deeds. Impunity in the form of a complete absence of criminal or non-criminal sanction is in any case a violation of the international humanitarian law of the Geneva Conventions.

B. South Africa's International and Internal Armed Conflict

There is abundant evidence that certain gross human rights violations under review by the South African Truth and Reconciliation Commission took place in the context of an international armed conflict, where a treaty based duty to punish such violations is unanimously accepted.[107] Armed invasions into Angola and other neighbouring states and the South African occupation of Namibia, must be regarded as international armed conflict. There is also substance to the claim that military encounters during the national liberation war should be classified as international armed conflict. Finally, I will enquire if the amnesty provisions contained in Article 5(6) of Additional Protocol II may be regarded as a legal justification for amnesty for gross human rights violations committed in internal armed conflict.

1. The Angolan Conflict and South African Cross-Border Operations

Although South Africa never declared a war against its front-line states, invasions into Angola and military attacks in other neighbouring states obviously reached such a level of conflict that make the provisions for international armed conflicts of the Geneva Conventions applicable.[108] South Africa substantially supported the destabilisation of its neighbouring countries through armed guerrilla forces.[109] In the case of Mozambique such support continued in contravention of a peace accord signed at Nkomati in the year 1984.[110] It has convincingly been argued that the 1975 invasion of Angola, support of RENAMO and UNITA, and cross-

[107] See for example Fania Domb (1996): War crimes in peace settlements. Prosecution or amnesty? In: Yoram Dinstein & Mala Tabory (eds.): *War crimes in international law*. The Hague: Martinus Nijhoff, 305-320.
[108] The declaration of a war is not necessary to invoke the Geneva Conventions. Every conflict between two nations which leads to an invasion of members of the armed forces into another country must be regarded as armed conflict according to the common Article 2 of the Geneva Conventions, see Dieter Fleck (1994), Fm. 91, para. 202.
[109] In the Nicaragua-Case (Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. US.) 1986, ICJ 14, reprinted in 25 ILM (1986) 1023, the International Court of Justice concluded that the support of the Contras by the United States constitutes an act of aggression against Nicaragua.
[110] Accord of Nkomati from 16. March 1984, reprinted in Chan, Stephen (1990): *Exporting apartheid. Foreign policies in Southern Africa, 1978-1988*. London: Macmillan, 364-367.

border raids against alleged ANC-bases in the frontline states, were acts of aggression in violation of the established principles of international law and the UN Charter.[111]

The TRC-Report gives a detailed account of gross human rights violations committed by South African security forces outside the country.[112] War crimes were especially committed during the Angolan conflict from 1975-1988. The most prominent case is the attack on the SWAPO-refugee camp at Kassinga in Southern Angola in 1978. Although it appears that the camp was guarded by a 200 men-strong group of armed SWAPO members, it was predominately a civilian refugee camp.[113] The attack on the camp was approved at Cabinet level.[114] The operational orders of the South African Defence Force included the following instruction: „Maximum losses were to be inflicted on the enemy but, where possible, leaders must be captured and brought out."[115] Military documentation contained a detailed plan for a systematic disinformation campaign. One document suggested that weapons should be placed alongside the dead to „counter probable hostile counter-claims of SADF operations *and mass killings of civilians, especially women and children*."[116] The SADF obviously knew that there were civilians present in the Camp. Otherwise it would not have given the instruction that „women and children must, where possible, not be shot".[117] The Camp was however attacked with fragmentation bombs, which killed and maimed indiscriminately. Afterwards parachutes invaded the camp and more than 600 people were killed, including many women and children.[118] There are also allegations by South African soldiers that injured people were shot in cold blood[119] and no prisoners-of-war were taken from the camp.

Guerrilla fighters were often tortured and killed after they had surrendered. Former death-squad commander Eugene de Kock described, for example, how a captured SWAPO

[111] see Michael F. Higginbotham (1987): International Law, the Use of Force in Self-Defence, and the Southern African Conflict. 25 *Columbia Journal of Transnational Law*, 529, similar Edward Kwakwa (1987): South Africa's May 1986 Military Incursions into Neighbouring African States. 12 *Yale Journal of International Law*, 421. As Namibia was an illegally occupied territory by South Africa, the military raids against SWAPO bases in neighbouring countries can, in principle, not be regarded as acts of self-defence, as SWAPO never threatened the integrity of the Republic of South Africa. See the next paragraph below.
[112] TRC-Report II, 42-164.
[113] Probably the most accurate account on the event to date are given by Annemarie Heywood (1994): *The Cassinga event. An investigation of the records*. Windhoek: National Archives of Namibia. New evidence is documented in Further South African documents included and the TRC-Report II, 46-55.
[114] TRC-Report II, 49, para. 29
[115] TRC-Report II, 48, para. 26
[116] Document reprinted in TRC-Report II, 49, para 27 (emphasis of author).
[117] TRC-Report II, 53, para. 45.
[118] TRC-Report II, 52, para. 39.
[119] TRC-report II, 54, para 46.

freedom fighter was let off from a helicopter at a height of 10 000 feet.[120] It must be stressed, that the killing or torturing of captured combatants is a war crime irrespective of whether such a person may qualify as prisoners of war or not.[121]

Since 1974 many people were killed by bombs and in cross-border raids by South African security forces.[122] These raids may amount to grave breaches of the Geneva Conventions, especially in instances, where non-combatants like, civilians, women and children were targeted indiscriminately. The TRC found that these operations „involved gross human rights violations of all those killed and injured in the attacks, irrespective of their status as trained combatants if such combatants were attacked in a non-combatant situation."[123] South African commandos killed several ANC representatives.[124] Some of the atrocities, involved car and parcel bombs, which murdered SACP member and academic Ruth First, the ANC representative Petros Nzima and his wife Jabu, and severely maimed human rights lawyer Albie Sachs and Michael Lapsley, a priest working with exiled South Africans. It is difficult to argue that a priest or an academic may be regarded as a combatant. All these crimes took place outside the territory of the Republic of South Africa, and were supported and covered up by the apartheid government. These bombings and cross-border raids were not isolated incidents, they followed „a systematic pattern of abuse which entailed deliberate planning on the part of the former cabinet, the State Security Council and the Leadership of the SADF [South African Defence Force] and the SAP [South African Police]."[125] Although members of the police and military were more reluctant to apply for amnesty for crimes committed outside South Africa, the TRC-Report shows that several individuals have nevertheless applied for these crimes. The above mentioned operations of the South African security forces must be regarded as war

[120] Eugene de Kock (1998) *A Long night's damage. Working for the Apartheid State.* Saxonwold [Johannesburg]: Contra Press, 72-74.

[121] see Article 4 and 5 of the III. Geneva Convention. Even if a member of a guerrilla force does not fulfil the conditions of Article 4 A(2) to be granted the official status of a prisoner of war, he remains protected by the full regulations of the III. Geneva Convention through Article 5. It states that „such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

[122] These raids were part of the destabilisation policy of the apartheid government. 13 ANC members and a Portuguese citizen were killed in a raid by the South African Defence Force on the suburb of Matola of Maputo on 30 January 1981. On 9 December 1982 a dozen flats and houses were attacked in Maseru, killing 42 people. Amongst the victims were 12 Basotho and the Lesotho ANC representative Zola Nguni. Similar attacks occurred in Botswana, Swaziland, Zambia and Zimbabwe. Often nationals of these countries were killed. See TRC-Report II, 97-123, 144-154. Joseph Hanlon (1986): *Beggar your neighbours. Apartheid Power in Southern Africa*. London: James Currey; Phyllis Johnson & David Martin eds. (1989): *Apartheid Terrorism. The Destabilisation Report*. London: James Currey.

[123] TRC-Report II, 154, para. 463.

[124] ANC representative Dulcie September, for example was assassinated in Paris on 28 March 1988, Joe Qgapi shot in front of his Harare house in Harare on 31 July 1981.

crimes committed in the context of an international armed conflict. They are grave breaches of the Geneva Conventions and South Africa is obliged to punish these perpetrators. It is incompatible with international law to leave these atrocities unpunished.

2. The Namibian Conflict

The situation in Namibia is a special case, because of the legal status of the territory.[126] The TRC-Report gives evidence that extralegal executions, killings, torture and sexual assault were part of the South African occupation of former South West Africa. Especially the work of the paramilitary *Koevoet*- (crowbar) unit of the South African security police left a drain of blood. *Koevoet's* operational mode involved rewards for killings, captures and the discovery of arms on a graduated scale, which rated and rewarded killings most highly.[127] A document supplied to the Truth Commission by a one-time *Koevoet* member gives details of 1754 „contacts" of fourteen officers in which 3.323 individuals were killed and only 104 prisoners were taken.[128]

The question is, whether these violations of humanitarian law were committed during an international armed conflict or not. The existence of armed resistance is not necessary to make the grave breaches provisions of the Geneva Conventions applicable. The rules of the Geneva Conventions relating to international armed conflicts apply as well to „all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[129] Therefore the question is, whether the South African administration of the territory of Namibia must be regarded as a partial or total occupation of a High Contracting Party to the Geneva Conventions.

In 1966 the United Nations General Assembly terminated South Africa's mandate to administer the territory of Namibia.[130] Subsequent resolutions allude several times to South Africa's occupation of the territory.[131] This view was expressly reaffirmed by the 1971 ruling of the International Court of Justice[132] that declared South Africa's continuous occupation of Namibia illegal. While urging states not to sign any treaties with the South African occupants

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[125] TRC-Report II, 133, para. 376 and 154, para. 463.
[126] See Edward Kwakwa (1988): The Namibian Conflict: A discussion of the ius ad bellum and the ius in bello. 9 *New York Law School Journal of International and Comparative Law*, 195-236.
[127] TRC-Report II, 75, para. 121.
[128] TRC-Report II, 77, para 124-125.
[129] Art. 2 (2) of the Geneva Conventions.
[130] UN GA Res. 2145 (XXI), 27 Oct. 1966.
[131] UN GA Res. 2372 (XXII), 12 June 1968 and UN SC Res. 284, 29 July 1970.
[132] 1971 ICJ rep. 16 at 58.

on behalf of Namibia, the Court explicitly expressed its view that multilateral conventions „such as those of humanitarian character" are binding on the relations of states towards Namibia.[133] In the same year the UN General Assembly urged South Africa to comply with the third and fourth Geneva Convention in the territory Namibia.[134] Although South Africa's occupation of Namibia is marked by some exceptional features, it is evident that the Geneva Conventions fully apply to the territory of Namibia.[135]

This view is confirmed by the reactions of the liberation movement SWAPO and the UN Council for Namibia. During the 1970's and 1980's the international community consistently held the view that sovereignty in Namibia resided in the Namibian People, which were officially represented through the UN Council for Namibia and the liberation movement SWAPO.[136] In October 1983, the UN Council for Namibia deposited instruments of accession to all four Geneva Conventions and its two Protocols. SWAPO had already officially declared to comply with the Geneva Conventions at an international conference in 1976 and repeated such a declaration in 1981.[137] Until 1989, South African security forces nevertheless continued to occupy the territory of Namibia, whose legitimate representatives had become a High Contracting Party.[138] The application of the provisions for international armed conflict of the Geneva Conventions is further supported by article 2(3) of the Conventions, which states that parties shall be bound to them, even if the opposing power is not a member of the Conventions, but accepts and applies its provisions. The Geneva Conventions speak only about an 'opposing power', which must not necessarily be a state.

Finally the international character of the Namibian conflict is reaffirmed by the mere fact that SWAPO fighters operated from neighbouring countries, while the South African defence force often operated against Angolan, Cuban and SWAPO military forces outside the territory of South Africa.

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[133] id., at 55.
[134] see, e.g. UN GA Res. 2687 (XXVI), 20 Dec. 1971.
[135] See Adam Roberts (1984): What is military occupation? 55 *British Yearbook of International Law*, 249-305 at 291-92.
[136] See Edward Kwakwa (1992): *The International Law of Armed Conflict. Personal and Material Fields of Application. Dordrecht*: Kluwer, 70.
[137] See John Dugard (1976): 'SWAPO: The Jus ad Bellum and the Jus In Bello'. 93 *South African Law Journal*, 144 at 152 and Heather A. Wilson (1988): *International Law and the Use of Force by National Liberation Movements*. Oxford, Clarendon Press, 171 (Fn 83).
[138] See Kwakwa (1992), Fn. 136, 70, for a dissenting opinion. He argues that the language of Article 2(2) of the Geneva Conventions suggests that the provision must be prospectively interpreted and would only be applicable to occupations which took place after 1949. This argumentation is not convincing as South Africa only became an occupying force after its trusteeship over Namibia had lapsed in 1966. My interpretation of Article 2(2) is furthermore confirmed through Article 1(4) of Protocol I to the Geneva Conventions (see below).

The protection of the civilian population by the Geneva Conventions applies to the whole occupied territory of Namibia.[139] Gross human rights violations committed by South Africans against the 'foreign' civilian population of Namibia are grave breaches of the Geneva Conventions. The South African government is therefore obliged to punish these crimes or to extradite alleged perpetrators to be tried.

3. The Struggle in South Africa as an Armed Conflict of National Liberation

The situation in South Africa is slightly different. The apartheid regime was not an 'alien' occupation of its own country. Therefore common article 2(2) of the Geneva Conventions cannot apply to South Africa. With exception of cross-border operations, most human rights violations happened inside the country. This suggests that the conflict in South Africa may, if at all, only be classified as an internal armed conflict.

The internal predominance of the South African conflict may nevertheless not preclude to treat military operations in the struggle against apartheid as an international armed conflict. It is true, that under traditional international law, wars of national liberation against colonial and racist domination were regarded as civil wars, and not as international armed conflicts. However, developments after 1945 have led to radical changes in theories relating to wars of liberation.[140] Through article 1(4) of Protocol I to the Geneva Conventions[141], armed conflicts of national liberation were defined as international armed conflicts:

> The situation referred to [i.e. international armed conflicts] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

This rule confirmed an earlier resolution of the General Assembly to apply the 1949 Geneva Conventions to armed conflicts involving liberation movements.[142] The implication of this provision is that the parties to such conflict are offered the full protection of the Geneva

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[139] see Common Article 2 of the Geneva Conventions.

[140] See Heather A. Wilson: (1988): *International Law and the Use of Force by National Liberation Movements*. Oxford, Clarendon Press.

[141] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on 8 June 1977, entered into force 7 Dec. 1979.

[142] UN GA Res. 3103 (XXVII), 12 Dec. 1973 states that „The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes".

Conventions. The protection of Protocol I applies as well to national liberation struggles taking place within the territory of a single state between the government and insurgents of the same nationality.[143] According to Article 85 of Protocol I grave breaches of the Geneva Conventions and the additional breaches mentioned in Articles 11 and 85 of Protocol I must be prosecuted and punished.[144]

There is no doubt that the armed struggle of the ANC represented an armed conflict as described under Protocol 1(4). The ANC was internationally recognised as a national liberation movement and the terms „colonial" and „racist regimes" directly referred to situations as in South Africa.

It should be noted that Protocol I does not cover armed conflicts between different liberation movements. Bloody clashes between supporters of the Inkatha Freedom Party and the African National Congress are, for example, not directed against colonial domination, alien occupation or a racist regime.[145] Furthermore Article 43 (1) of Protocol I requires that the armed forces of a party to a conflict consist of groups and units „which are under a command responsible to that Party for the conduct of its subordinates [...]. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."[146] Such a degree of organisation is evident in the armed military wing of the ANC. There is no doubt, that there was an armed conflict between the liberation movement and the apartheid state. The military activity of Umkontho we Sizwe (MK) clearly surpassed incidents of sporadic violence after 1977.[147] Its cadres received military training and arms from East European countries, which enabled to launch sustained attacks on strategic targets inside the Republic of South Africa. Protocol I

[143] See e.g. Theodor Meron (1987): *Human Rights in Internal Strife. Their International Protection.* Cambridge: Grotius, at 31 and Theodor Meron (1983): On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument, 77 *American Journal of International Law*, 589 at 596-70.

[144] Articles 85-86 of Protocol I includes the obligation to provide effective penal sanctions for grave breaches and to prosecute or extradite persons responsible for such war crimes.

[145] See Wilson (1988), Fn. 140, 168. Such conflicts are often only regulated by the minimum standards of common Article 3 to the Geneva Conventions. Additional Protocol II may apply to conflicts between different liberation movements as well, but it was never signed by South Africa on which territory these conflicts took place nor did the parties to the conflict claim to be bound by its provisions.

[146] In order to be granted status as prisoner of war, combatants, must further comply with the requirements of Article 44 (3). Combatants not qualifying for prisoner of war must, however, according to Article 44 (4) and Article 45 (1) and (2), presumed to be a prisoners of war, and therefore shall be protected by the III. Geneva Convention. Such people shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

[147] Similar Christian Koenig (1988): *Der nationale Befreiungskrieg im modernen humanitären Völkerrecht. Ein Beitrag zum Geltungsumfang des Artikels 1 Absatz 4 des I. Zusatzprotokolles von 1977 zu den Genfer Konventionen von 1949*. Frankfurt/M.: Lang, at 150-54. The TRC-Report II, 326-347 gives an account of ANC activities inside South Africa.

does not specify that a party to the conflict must have effective control over a territory. Such a criteria was intentionally not included in Protocol I, although the topic was intensively debated at the 1977 Diplomatic Conference.[148]

The degree of military organisation was however less amongst militant youth operating under the banner of the United Democratic Front, ANC-aligned Self-Defence-Units or Inkatha aligned Self-Protection Units. Although they might have become victims of grave breaches of humanitarian law, they cannot be regarded as combatants. The Truth Commission therefore decided correctly to classify members of these less organised groupings, who were killed during the political violence as victims of human rights violations.[149] MK-soldiers, freedom fighters of the Azanian People's Liberation Army (APLA), SADF-soldiers and members of the Police force who acted in paramilitary operations, were however correctly classified as combatants.[150] The TRC followed the distinction between combatants and non-combatants in international humanitarian law, when it wrote:

> Those combatants who were killed or seriously injured while they were unarmed or out of combat, executed after they had been captured, or wounded when they clearly could have been arrested were held to be victims of gross human rights violations, and those responsible were held accountable.[151]

The other consequence of such a classification of militant youth, self-defence units and self-protection units is, that their deeds cannot be regarded as grave breaches of the Geneva Conventions, although they are in most cases human rights violations.

I conclude, while it is obvious that not all forms of armed conflict inside South Africa are covered by Protocol I, it would be applicable to the armed conflict between armed formations of the liberation movement (MK and APLA) and the security forces of the state. As the apartheid regime never signed Protocol I, the most critical question however remains. Can South Africa, which acceded to Protocol I only in 1995, be obliged to prosecute and punish grave breaches of humanitarian law?

Article 96(3) of Protocol I enables national liberation movements, who are engaged in armed conflict against a High Contracting Party, to apply the Protocol by a unilateral declaration addressed to the Swiss Federal Council. On October 20th, 1980, ANC President

[148] See Christian Koenig (1988): Fn. 147, 155.
[149] TRC-Report I, 77, para. 105.
[150] TRC-Report I, 76, para. 102.
[151] TRC-Report I, 76, para 102 b)

Oliver Tambo signed and handed to the President of the International Committee of the Red Cross the following declaration:

> The African National Congress of South Africa hereby declares that it intends to respect and be guided by the general principles of international humanitarian law applicable to armed conflicts. Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 Additional Protocol I relating to the protection of victims of international armed conflicts.[152]

The vague language of the ANC declaration raises the question whether or not the ANC had in fact committed itself to the Geneva Conventions and Protocol I. The ANC however considered itself as a signatory to the Geneva Conventions and incorporated as well some very rudimentary humanitarian norms in the Military Code of its armed wing Umkhonto we Sizwe.[153] The Swiss Federal Council refused to accept the ANC's deposit of the declaration only because, they believed that the ANC was not engaged in armed conflict against another High Contracting Party. Indeed, South Africa was never a signatory of Protocol I during the apartheid era. South Africa courts refused therefore to treat captured freedom fighters as prisoners of war[154], despite being urged so by the United Nations in several resolutions. It has been argued, that a declaration under Article 96(3) by a liberation movement involved in a conflict with a non-party to the Protocol will create a situation analogous to that envisaged in Article 96(2) for a war between two states.[155] This argument has been challenged on the grounds that Article 96(2) was aimed at states and not at non-state entities and that Protocol I was therefore not binding on part of the South African state.[156]

Although South Africa was not bound by treaty to apply Additional Protocol I during the apartheid time, South Africa is nevertheless obliged without reservations to adhere to its provisions after it became a member in 1995. The state shall not continue practices which are incompatible with treaty law, to which it is a signatory. As I have argued earlier in Chapter III,

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[152] As quoted in Kwakwa (1992), Fn. 136, 79.

[153] The ANC claimed, probably wrongly, to have already become „a signatory to the Geneva Convention on the conduct of war in 1977 [sic!]", see African National Congress (1996): *Statement to the Truth and Reconciliation Commission.* Johannesburg: ANC Department of Information, p. 65. The Umkontho we Sizwe Military Code, reprinted in *supra* on pp. 86-89, made inter alia the following acts and omissions an offence: „3d) Cruelty inflicted on a member of the army or public. 3e) Assaults, rape, [...] whether against a comrade or against a member of the public. [...] 3g) Unjustifiable homicide. 3h) Ill-treatment of prisoners of war or persons in custody."

[154] see *S v. Sagarius and others* 1983 (1) SA 833 (SWA), *S v. Petane* 1988 (3) SA 51 (C); John Dugard (1988) Soldiers or terrorist? The ANC and the SADF compared. 3 *South African Journal on Human Rights*, 221-224; Christina Murray (1984): The status of the ANC and SWAPO and international humanitarian law. *South African Law Journal*, 402-410.

[155] Andrew Borrowdale (1982): The Law of War in Southern Africa: The Growing Debate. 15 *Comparative and International Law Journal on Southern Africa,* 41 at 43.

[156] Kwakwa (1992), Fn. 136, at 78.

the failure to prosecute and punish severe breaches of humanitarian law committed during the liberation war, is an omission of continuing character. The current South African Government must therefore respect the provisions of Protocol I. This position is also supported by the fact that the ANC declared in 1980 that it would adhere to the Additional Protocols and always insisted that captured freedom fighters should be treated as prisoners of war. The Draft Articles on State Responsibility provide in Article 15(1) that any act „of an insurrectional movement which becomes the new government of a State" shall also be considered as an act of that state, for which the state incurs responsibility. It follows, that at least the most severe breaches of humanitarian law directly linked to the armed conflict of national liberation inside the country should not be indemnified without punishment, irrespective if committed by cadres of a liberation movement or by members of the security forces.

This position is supported by current trends in customary law. With the exception of South Africa and Israel, state practice, to grant national liberation movements the protection offered by Protocol I, has increased.[157] Resolutions of the United Nations and of the Organisation of African Unity confirm this trend.[158] Although some major world powers have not yet become members of Protocol I, it enjoys the support of 143 nations. A more detailed analysis on the development of customary law regarding armed conflicts of national liberation has increasingly become futile, as the evolution of customary law has led to criminalisation of severe breaches of humanitarian law in all forms of armed conflict.[159] With these development in customary law, the question whether wars of national liberation most be regarded as international or not, has largely become obsolete.

4. The Conflict in South Africa as an Internal Armed Conflict

The question remains, whether certain gross human rights violations inside South Africa were committed in the context of internal armed conflict, covered by Common Article 3 of the Geneva Conventions and Additional Protocol II. And if so, whether this would support the South African approach to grant amnesty to the perpetrators of war crimes committed in internal conflict.

One may argue that humanitarian law is completely irrelevant for most gross human rights violations inside the country, because the conflict in South Africa failed to reach a sufficient level to make the protection of Common Article 3 applicable.. Additional Protocol II

[157] See Wilson (1988) Fn. 140, 151-162.
[158] Id.

to the Geneva Convention excludes for example „internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature“ from its application and requires that armed groups exercise control over a part of the territory to enable them to „carry out sustained and concerted military operations“[160]. There are no similar provisions entailed in Common Article 3 of the Geneva Conventions. Article 3 prohibits severe infringements of basic humanitarian norms in armed conflict not of an international character „at any time and in any place“. The threshold of application of common article 3 is therefore significantly lower than Additional Protocol II,[161] article 3 does for example not necessarily require the control over part of the territory by the insurgents.

Different criteria have been proposed, to define the threshold of application of common article 3.[162] It has been argued, that the armed resistance must have reached such a level that ordinary measures to maintain law and order are insufficient, for example, military is deployed to suppress a revolt. There is also agreement, that the conflict must have collective character. Activities of small terrorist groups or criminal gangs are not covered by Article 3.[163] As further criteria were suggested, the length of the conflict, the number of members involved, and the degree of control exercised by the leadership of the opposing armed force over its combatants.[164]

The declaration of a national state of emergency in 1985 led to the deployment of military and paramilitary police forces and increasing guerrilla attacks. Obviously the South African conflict contained features of an internal armed conflict during the state of emergency. Certain townships were in fact ungovernable and the South African Police and military effectively had lost control. The conflict was also regarded by the South African government as a war situation. The official military doctrine was that the country was subject to a „total onslaught“[165], which had to be countered by anti-revolutionary warfare. Former members of the State Security Council and high ranking members of the security forces repeatedly claimed before the TRC, that the human rights violations must be seen in the context of an ongoing

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[159] See Chapter IV, C.
[160] Article 1 of Additional Protocol II.
[161] Theodor Meron (1983): On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for an International Instrument. 77 *American International Law Journal* 589 at 600.
[162] Dietrich Schindler (1979): The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols, 163 II, *Recueil des Cours*, 117 at 146-47; Martin Hess (1985): *Die Anwendbarkeit des humanitären Völkerrechts, insbesondere bei gemischten Konflikten*. Zürich: Schulthess, 97-8.
[163] G.I.A.D. Draper (1965): The Geneva Conventions of 1949, 114 *Recueil des Cours*, 59 at 89.
[164] See Hess (1985) Fn. 162, 98 with further references.
[165] The ideology claimed that South Africa was facing a total war, on an military, political, social and psychological level.

war.[166] These justifications do not assist the applicants in their course. Their insistence rather confirms that their deeds must not only be treated as criminal offences under South African law, but as well as contraventions of international humanitarian law.

The Constitutional Court has however argued that the provisions of Additional Protocol II, applicable to internal armed conflicts, would support the compatibility of amnesty with international law.[167] Article 6(5) of Additional Protocol II to the Geneva Conventions provides:

> 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.

It is therefore often argued that the term „broadest possible amnesty" would also cover amnesty for gross human rights violations in internal armed conflict. Fania Domb, for example, writes: „In contrast to the situation in regard to international armed conflicts, where the States' obligation of prosecution and punishment is imperative, the establishment of amnesty is expressly permitted - and even recommended - in respect to non-international armed conflicts."[168]

Such a literal interpretation of article 6(5) could easily lead to wrong conclusions. However, article 6(5) never envisaged to grant amnesty for severe violations of humanitarian law.[169] Additional Protocol II does not replace the four Geneva Conventions, it only develops and supplements them.[170] If article 6(5) of Protocol II would oblige states to grant amnesty to their own representatives for war crimes, a fundamental contradiction arises between Article

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[166] See e.g. Statement of the former police chef, General van der Merwe, Transcript of the Armed Forces Hearing, 9 Oct 1997, p.26. The conflict inside South Africa was described as a 'war', 'total war', or 'protracted revolutionary war' by former foreign minister 'Pik' Botha, the former minister for law and order Adriaan Vlok, and other State Security Council members like Dr. Neil Barnard and General Magnus Malan. Transcripts of State Security Council Hearing, 18 Oct 1997, pp. 92, 99, 111-12, 115; 19 Oct 1997, pp. 122, 124; 4 & 5 Dec 1997, p. 271. Similar statements were made by the former army general Constand Viljoen and the head of the special forces Major-General Joubert, Transcript of Armed Forces Hearing, 8 Oct 1997, pp. 16, 28-29, 75, 107 (quoted below):
„MR GOOSEN [Leader of Evidence]: [...] You described the situation in 1986, in the mid 1980's, 1986 and through the period in which you were the Officer Commanding Special Forces as a period in which we were involved in full scale war, is that correct?
MAJ GEN JOUBERT: That is correct, yes."

[167] Constitutional Court of South Africa, CCT 17/96, 25 July 1996, at para 30.

[168] Fania Domb (1996): Treatment of War Crimes in Peace Settlements. Prosecution or Amnesty. In: Dinstein, Yoram & Tabory, Mala eds.: *War Crimes in International Law*. The Hague: Martinus Nijhoff, 305 at 319.

[169] On Article 6(5) of Protocol II and its limitations by international law, see Frank Achim Hammel (1993): *Innerstaatliche Amnestien. Grundlagen und Grenzen aufgrund des internationalen Rechts*. Frankfurt/M.: Lang.

[170] Article 1(1) of Additional Protocol II.

6(5) of the Protocol and the general intent of the Geneva Conventions and Protocol II.[171] It is impossible to protect effectively non-combatants by article 4(2) Protocol II if the same Protocol would guarantee automatically potential perpetrators a blanket amnesty for severe infringements of humanitarian law after the end of hostilities. The Geneva Conventions explicitly aim to prevent war crimes by making them punishable. States are obliged to impose criminal sanctions for grave breaches and effective measures against all other breaches of the Conventions.[172] Therefore Article 6(5) was not included into Protocol II to justify amnesty for severe breaches of humanitarian law.[173] The amnesty provision of Article 6(5) must clearly find its limitation in international human rights law and the very international humanitarian law, of which it is part of.

Article 6(5) was included into the protocol regulating internal conflict, and in comparison is absent from the regulations relating to international armed conflict, the reason being that Protocol II specifically covers crimes committed under domestic law, which can only be committed in a civil-war situation and are absent in international wars. Amnesty shall be granted for crimes which are linked to the mere participation in a civil war, such as the illegal possession of firearms, membership in a guerrilla army or conspiring to overthrow the government.[174] Article 6(5) encourages governments only to grant amnesty to those who have taken up arms against the authorities and who have not committed any atrocities which may qualify as war crimes or crimes against humanity.[175]

In conclusion, the humanitarian law regulating internal armed conflict is applicable to certain categories of gross human rights violations inside South Africa. Members of the South African security forces have committed severe breaches of Common Article 3 of the Geneva Conventions during military and paramilitary operations inside South Africa. Article 6(5) of Additional Protocol II cannot be used to justify amnesty for these severe breaches of humanitarian law. As I have demonstrated earlier, civilians and non-combatants protected by

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[171] Hernán Montealegre (1983): The Compatibility of State Party's Derogation under Human Rights Conventions with its Obligations under Protocol II and Common Article 3. 33 *American University Law Review*, 41 at 49-51.

[172] See Article 147 (3) IV. Geneva Convention.

[173] See as well Ambos (1997b), Fn. 85, at 210-11.

[174] Similar J.P. Wolfe (1974): War and Military Operations. In: McDonald, Morris & Johnston eds.: *Candadian Perspectives on International Law and Organisation*. Toronto, 620 at 630.

[175] Similar Rein Müllerson (1997): International Humanitarian Law in Internal Conflicts. 2 *Journal of Armed Conflict Law*, 109 at 121-123. This legal opinion is confirmed by UN Res. 3074 (XXVII), 3 Dec. 1973, calling for international co-operation against persons, who committed war crimes or crimes against humanity, UNGA, Official Records, 28th Session, 78, and by article 4 of the Convention on Non-Applicability of Statutory Limitations to War Crimes, 8 ILM (1969) 68, obliging state parties to „ensure that statutory *and other limitations* shall not apply to the prosecution and punishment" of these crimes (emphasis by author).

Common Article 3 must be regarded as protected persons in the framework of Geneva Conventions. Severe infringements of Common Article 3 are therefore grave breaches of the Geneva Conventions. They must be prosecuted and punished. Blanket amnesty for internal war crimes, granting impunity without any criminal or non-criminal sanctions is beyond doubt contraventions against the treaty law of the Geneva Conventions binding on South Africa since 1952.

C. The Duty to Punish Internal Atrocities in Customary Law

South Africa's duty to prosecute and punish war crimes in internal armed conflict is confirmed by international customary law. Not only the classification of wars of national liberation as international armed conflicts supports this view. Evidence for a duty to punish internal atrocities can be found in the Statute and jurisdiction of the International Criminal Tribunals for Rwanda and Yugoslavia, and the Rome Statute of the International Criminal Court.

1. Article 4 of the Statute of the Rwanda Tribunal

The Statute of the International Criminal Tribunal for Rwanda[176] represents a major development of international humanitarian law.[177] Under its Article 4 the tribunal may prosecute persons who have committed serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Rwanda Statute made atrocities in internal conflicts for the first time subject to international jurisdiction.

2. The Tadic-Judgement of the Yugoslavia Tribunal

A similar provision was not contained in the Statute of the Yugoslavia Tribunal, probably, because of the assumption that the conflict in Yugoslavia would be of international character. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia confirmed however in *Prosecutor vs. Tadic*[178] that gross human rights violations must as well be punished in internal conflicts. The defence challenged in *Prosecutor v. Tadic* the jurisdiction of the tribunal to punish war crimes in internal armed conflicts. Although the

[176] UN SC Res. 955, annex (8 Nov 1994), reprinted in 33 ILM 1602 (1994).
[177] David Turns (1995): War Crimes without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts. 7 *African Journal of International and Comparative Law*, 804.
[178] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995), reprinted in 35 ILM 32 (1996). See as well Christopher Greenwood (1996): International Humanitarian Law and the Tadic Case, 7 *European Journal of International Law*, 265 and Theodor Meron (1996): The Continuing Role of Custom in the formation of International Law, 90 *American Journal of International Law*, 238.

chamber argued that the grave breaches provisions of the Geneva Conventions do only apply to international armed conflicts[179] it held that Article 3 of the Statute gives the tribunal the power to prosecute and sentence persons violating customary humanitarian law in international *and* internal conflicts.[180]

After considering official pronouncements of states, military manuals[181], and unanimously adopted UN General Assembly resolutions[182], the Court ruled that „customary international law imposes criminal liability for serious violations of common Article 3 [of the Geneva Conventions], as supplemented by other general principles and rules on the protection of victims of internal armed conflict [...]"[183] The Trial Chamber of the Tribunal concurred with this view and found Dusko Tadic guilty of crimes against humanity and serious violations of Common Article 3.[184] It follows that, since the adoption of the two Additional Protocols to the Geneva Convention in 1977, a customary rule of international law emerged, that criminalizes internal atrocities.

3. The Akayesu-Judgement of the Rwanda Tribunal

More recently the International Criminal Tribunal for Rwanda held in *Prosecutor v Akayesu:* „The norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."[185] The Rwanda Tribunal also ruled that international customary law establishes not only individual criminal responsibility for fundamental violations against Common Article 3 of the Geneva Conventions but as well for Article 4 of the Additional Protocol II. It made explicit that „authors of such egregious violations must incur individual criminal responsibility for their deeds".[186]

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[179] Tadic-Case, para. 84.
[180] id. at para. 94.
[181] The Court referred inter alia to para 1209 of the Military Manual of Germany, which includes breaches of common Article 3 of the Geneva Conventions as grave breaches. The manual is published together with a commentary in English as Dieter Fleck ed. (1995): *The Handbook of Humanitarian Law in Armed Conflicts*.
[182] UN GA Res. 2444 UN GAOR, 23rd Session, Supp. No. 18, UN Doc. A/7218 (1968) and UN GA Res. 2675, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970) affirm both basic humanitarian principles applying to all forms of armed conflict.
[183] Tadic-Case, para. 134.
[184] *Prosecutor v Tadic, Opinion and Judgement*, 7 May 1997, para. 609-617, Case No. IT-94-1-T. reprinted in 36 ILM 908 (1997).
[185] *Prosecutor v Jean-Paul Akayesu, Judgement*, 2 September 1998, Case No. ICTR-96-4-T, pp. 242-259.
[186] *Ibid.* Akayesu, however, was not sentenced for Common Article 3 crimes, but for the Crime of Genocide, because the tribunal could not proof beyond doubt that his atrocities were part of the war effort against the liberation movement Rwandan Patriotic Front (RPF).

4. The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court[187] recalls in its preamble „that it is the duty of every State to exercise its criminal jurisdiction for international crimes". States pledge further to be „determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes".

Article 5 of the Statute gives the Court jurisdiction over crimes against humanity, genocide and war crimes. According to Article 8 (2c) and (2d) the definition of war crimes includes serious violations of article 3 common to the Geneva Conventions and other serious violations of the laws and customs applicable to internal armed conflict. Only situations of „internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature"[188] are excluded from the jurisdiction of the Court.

The Statute has not yet entered into force, but was adopted by a vote of 120 states in July 1998. As of 8 October 1998, only three months after the state conference in Rome, already 53 states had signed the Statute, including South Africa. This confirms that its jurisdiction over war crimes in internal armed conflict must be regarded as an expression of an international accepted custom.

The Rome Statute, the Statute of the Rwanda Tribunal, and the *Tadic* and *Akayesu* judgements give a firm legal basis for a duty to punish war crimes in internal conflicts. International custom obliges South Africa to prosecute and punish these violations.

D. Conclusion

The Geneva Conventions are not irrelevant for the South African amnesty process, they clearly impose a duty on South Africa to prosecute and punish war crimes committed in Angola, Namibia and during other armed cross-border operations. The traditional view, limiting the duty to punish war crimes to international armed conflicts, is outdated. In the light of the growing human rights law after 1945 and current *opinio iuris* the grave breaches regime of the Geneva Conventions must be interpreted in an inclusive way. Severe breaches of humanitarian law have always to be punished, irrespective whether they were committed in international or internal armed conflict. This view is supported by international customary law. This view is not completely new, already Article 1(4) of the 1977 Additional Protocol I gave

[187] UN Doc. A/CONF. 183/9 [hereafter referred to as ICC-Statute].
[188] Article 8 (2d) of the ICC-Statute.

armed conflicts of national liberation the full protection of the Geneva Conventions, by classifying them as international armed conflicts.

Contrary to the opinion of the South African Constitutional Court, Protocol II to the Geneva Conventions does not authorise to indemnify perpetrators of war crimes and crimes against humanity. Article 6(5) of Protocol II does not intent to impose an obligation on states to grant amnesty for severe breaches of humanitarian law after civil strife. It only suggests to grant amnesty for the mere participation in internal armed conflict.

There is no legal basis for the argument, that the treaty law of the Geneva Convention is not applicable to the South African conflict. Although not all gross human rights violations are covered by humanitarian law, many of them are. The Constitutional Court clearly failed to take this into account, when it made its Amnesty Decision. Conventional and customary humanitarian law has one message: Severe infringements of the laws of war must be prosecuted and punished, regardless whether they were committed in internal or international armed conflict.

V. The Duty to Punish in International Human Rights Law

The apartheid regime never became a member to major international human rights treaties. The International Convenant on Civil and Political Rights[189] (CCPR) and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment[190] were however signed by South Africa before the TRC-Act was promulgated. As the South African parliament has not yet ratified these treaties, they are non-binding. South Africa's signature places the state under an obligation „to refrain from acts which would defeat the object and purpose of such a treaty..."[191]

It is widely accepted that the prohibition of torture, extra-legal killings, and enforced disappearances has *ius cogens* status.[192] The right to life and personal integrity are non-derogable rights that must be upheld in war and peace-time. There is however still some debate whether the duty to punish these acts has already acquired a status of customary law. This chapter will review the duty to prosecute and punish gross violations of human rights in customary human rights law. The review will be based on international human rights conventions, the jurisdiction of the Inter-American human rights system, and the soft law of the United Nations and its human rights bodies.

A. Convention against Torture

The Convention against Torture explicitly imposes a duty to investigate and punish acts of torture. Article 4 of the Convention obliges state parties to ensure that all acts of torture are offences under its criminal law and that these offences shall be made punishable by appropriate penalties which take into account their grave nature. If a state does not extradite a suspect to another country for trial, it is obliged to submit the case to its own judicial system for prosecution.[193]. Article 12 and 13 compel member states to ensure that its competent authorities proceed to a prompt and impartial investigation of acts of torture. Furthermore, Article 13 explicitly states that any individual that has been subjected to torture has a right to have his or her case promptly and impartially examined by its competent authorities.

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190 ILM 23 (1984) 1027, entered into force on 26 June 1987.

191 Article 18 of the Vienna Convention of the Law of Treaties.

192 See *Filartiga vs. Pena-Irlala,* US Second Circuit Court of Appeal, 630 F 2d 876 (1980); Diane F. Orentlicher (1991) Settling accounts: The duty to prosecute human rights violations of a prior regime, 100 *The Yale Law Journal*, 2537 at 2582; Meron (1989), at 31 and 194, Ambos (1997b), Fn. 85 at 177.

Torture is defined in the Convention as an act of severe physical or mental ill-treatment that include an element of official consent or acquiescence.[194] The severe ill-treatment of detainees by members of the apartheid state, for example, included an element of official involvement[195]. These acts are matching the definition of torture in the Convention and the amnesty committee of the TRC has explicit disgression to grant amnesty for „torture and severe ill-treatment of a person"[196]. Acting on official or implied authority is in fact one of the different criteria that may be fulfilled to qualify for amnesty.[197] These amnesty provisions of the TRC-Act are therefore incompatible with the Convention against Torture.

B. Convenant on Civil and Political Rights (CCPR)

The text of the Convenant on Civil and Political Rights (CCPR) contains no explicit obligation for states to punish gross human rights violations. Article 2(3) of the CCPR however obliges states to ensure that any person, whose rights and freedoms recognised in the Convention have been violated, has a right to „effective remedy".[198]

The UN Human Rights Committee, established to monitor the compliance and implementation of the Convenant, has repeatedly asserted that states must investigate gross human rights violations, bring perpetrators to justice, and provide compensation for victims.[199] Interpreting the right to „effective remedy" and the anti-torture provisions of Article 7 CCPR, the Committee held that „[c]omplaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain

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[193] Convention against Torture, Article 7.

[194] Article 1 of the Convention Against Torture defines torture as „any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person fur such purposes as obtaining from him or a third person information or a confession, pushing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

[195] Cases of ill-treatment in the camps of the liberation movement might as well amount to torture as defined in the Convention against Torture, as the ANC was seen as the authoritative representation of the black people of South Africa and was granted quasi-official rights by its respective guest countries. Acts of ill-treatment committed by supporters of the liberation movement inside South Africa may however fall short of the Conventions definition.

[196] see S 1(ix)a read with S 20(1).

[197] see S 20(2)b,c.

[198] Similar provisions are entailed in Article 25 of the American Convention on Human Rights, in Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Art. 1 and 25 of the African Charter on Human and People's Rights.

[199] See Diane F. Orentlicher (1991) Settling accounts: The duty to prosecute human rights violations of a prior regime, 100 *The Yale Law Journal*, 2537 at 2569-76.

compensation."[200] In a subsequent case (*Muteba v. Zaire*) the Committee concluded that the government was under an obligation „to ... conduct an inquiry into the circumstances of [the victim's] torture and *to punish* those found guilty of torture and to take steps to ensure that similar violations do not occur in the future."[201] In other cases the UN Human Rights Committee has urgent member states in similar vein to investigate, bring perpetrators to justice, and to compensate the relatives of victims that were murdered (Article 6(1) CCPR) or disappeared.[202]

C. The Jurisdiction of the Inter-American Human Rights System

The obligation to punish gross human rights violations as a norm in international customary law is also supported by the jurisdiction of the Inter-American Court on Human Rights. In the *Velásquez Rondríguez* case, which involved the forcible abduction and disappearance of Manfredo Velásquez Rondrígez, the Court ruled that Article 1(1) of the Inter-American Human Rights Convention, obliges Honduras to ensure the free and full exercise of those rights recognised by the Convention to every subject to its jurisdiction.[203] It held that as a consequence of this obligation „[s]tates must prevent, investigate and punish any violation of rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[204]

The Court noted further, that an illegal act violating human rights which cannot directly be attributed to the state because it is committed by private or unidentified persons can as well „lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[205] The Court held that this responsibility exists independently of changes of

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[200] General Comment No. 7 (16) article 7, UN Doc. CCPR/C/21/Rev.1 (19.05.1986). General Comment No. 20 (44) article 7, replacing, reflecting and further developing the general comment 7 (16) states in para. 13 that: „Those who violate article 7, whether encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently those who have refused to obey orders must not be punished or subjected to adverse treatment". In para 15 the Committee states: „amnesties are generally incompatible with the duty to investigate [acts of torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future." UN Doc. CCPR/C/Rev.1/Add.3 (07.04.1992).

[201] 39 UN GA Official Records, Suppl. No.40, 182 at 188, UN Doc. A/39/40 (1984), emphasis by Author.

[202] see General Comment Nr.6, Article 6, UN Doc. CCPR/C/21/Rev.1 (19.05.1989) at para 3: „State parties should take measures not only to prevent an punish deprivation of life by criminal acts, but also to prevent arbitrary killings by their own security forces." Orentlicher (1991), supra Fn. 199, 2573-76.

[203] Velásquez Rondríguez Case, Inter American Court of Human Rights, Series C, No 4, 29 July 1988, at para. 166, reprinted in 95 ILR (1994) 259 at 295.

[204] id.

[205] id, at para 172.

government over time.[206] It held that the state has the „legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.“[207]

The court emphasised that the state's obligation entails not only to investigate and compensate gross violations of human rights, but as well to punish these acts: „If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with the duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.“[208]

According to the Inter-American Commission on Human Rights, states also breach international law, if impunity is a consequence of lawfully adopted amnesty laws. This is evident in three reports related to amnesty laws in Argentina, Uruguay and El Salvador.

Uruguay's amnesty law, the *Ley de Caducidad*[209], was approved in 1986 by a national referendum. The Inter-American Commission on Human Rights ruled that the law that grants impunity to officials who violated human rights during the period of military rule, is a breach of articles 1, 8 and 25 of the American Convention on Human Rights.[210] In a separate report the Inter-American Commission found that Argentina's „Due Obedience“ and „Full Stop“ laws[211], as well as Presidential Pardon No. 1002/89, of 7 October 1989, violated the American Convention on Human Rights.[212] The fact that the Argentinean government had investigated disappearances during the so-called „dirty war“ by an official commission (CONADEP), adopted various measures to compensate victims, prosecuted some high-ranking officials of the past government and convicted them of human rights violations, was positively acknowledged by the Inter-American Commission on Human Rights.[213] The Inter-American Commission however stated that the question of compensation must not be confused with the right to a fair trial.[214] It held, that the amnesty laws and the presidential decree „denied the victims their right

[206] id, at para. 184.
[207] id, at para 174.
[208] id, at para 176.
[209] Law No. 15.848, 22 Dec 1986.
[210] Inter-American Commission on Human Rights, Annual Report 1992-1993, Report No. 29/92, 2 Oct 1992, reprinted in 13 *Human Rights Law Journal* 340 (1992).
[211] Law 23.521, 8 June 1986 and Law 23.492, 24 Dec 1986, reprinted in 8 *Human Rights Law Journal* 476 and 477 (1987).
[212] Inter-American Commission on Human Rights, Annual Report 1992-1993, Report No. 28/92, 2 Oct 1992, reprinted in 13 *Human Rights Law Journal* 336 (1992).
[213] Id. para. 42-48.
[214] Id. para. 49 and 52

to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly. Therefore it found that the amnesty laws violate of the right to a fair trial (Article 8) and the right to judicial protection (Article 25) of the American Convention.[215]

D. Soft law of the United Nations

Of particular pertinence to the general principles of law and custom obligating states to combat impunity are resolutions of the United Nations General Assembly and its Human Rights bodies.

The Right to effective remedy is included in Article 8 of the Universal Declaration of Human Rights.[216] The Principles of International Cooperation in Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity[217] and the Declaration on the Protection of All Persons from Enforced Disappearances[218] include the duty to investigate, trial and punish perpetrators of respective crimes. Article 18 of the later declaration interdicts any special amnesty law or similar measures for perpetrators of enforced disappearances, that might have the effect of exempting them from any criminal proceedings or sanction. Principle 7 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment[219] includes the obligation to sanction and investigate acts of unlawful detention. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[220] asked states to enact and enforce legislation proscribing acts that constitute serious abuses. According to the International Law Commissions' Draft Articles on State Responsibility, states shall punish or take disciplinary action against people responsible for internationally wrongful acts arising from criminal conduct of officials or private parties.[221] In similar vein, the Vienna Declaration and Programme of Action called on states to „abrogate

[215] Id. para 50.
[216] UN GA Res. 217 (III), 10 Dec. 1948.
[217] UN GA Res. 3074 (XXVIII), 3 Dec. 1973, principle 1 and 5.
[218] UN GA Res. 47/133, 18 Dec. 1992, Article 4, 5, 14 and 18., GA Official Records, 47th Session, Suppl. No. 49, UN Doc. A/47/49 at 207.
[219] UN GA Res. 43/173, 9 Dec. 1988, GA Official Records, 43rd Session, Suppl. No. 49, UN Doc. A/43/49 at 297.
[220] UN GA Res. 40/34, 29 November 1985, GA Official records, 40th Session, Suppl. No. 53, UN Doc. A/40/53 at 213.
[221] Article 45(2)d Draft Articles on State Responsibility, 37 ILM (1998) 440.

legislation leading to impunity for those responsible for grave violations of human rights ... and prosecute such violations, thereby providing a firm basis for the rule of law."[222]

Similar resolutions have been adopted by the Economic and Social Council[223] and the UN Commission on Human Rights.[224] States should furthermore comply with the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law[225] and the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.[226] Both guidelines were developed during the last years by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The Basic Principles on the Right to Reparation call on states to provide for reparation, rehabilitation, satisfaction and guarantees of non-repetition to victims of gross human rights violations. These include inter alia „the verification of the facts and full and public disclosure of the truth“ and „judicial or administrative sanctions against persons responsible for the violations“.[227]

The Principles against Impunity ask states „to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and

[222] UN Doc. A/CONF.157/24 (Part I), para. 60, adopted by the UN-Word Conference on Human Rights, 25 June 1993.

[223] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN ECOSOC Res. 1989/65, 24 May 1989. Principle 1 requests governments to ensure that any extra-legal, arbitrary and summary executions are recognised as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Governments are obliged to bring persons responsible for such executions to justice (Principle 18) and „[i]n no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.“ (Principle 19). The Principles were officially endorsed by the General Assembly in Res. 44/162, 15 Dec. 1989.

[224] See for example the UN Human Rights Commission Resolution on Rwanda, UN Doc. E/CN.4/S-3/4, 30 May 1994, The Commission affirmed „that all persons who commit or authorize violations of human rights or international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice, while affirming that the primary responsibility for bringing perpetrators to justice rests with national judicial systems.“ (para. 17).

[225] UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law prepared by Mr. Theo van Boven, 48th Session, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996, Annex, [= Basic Principles on the Right to Reparation]. See as well the latest revision before the UN Commission on Human Rights, 53rd Session, UN Doc. E/CN.4/1997/104, 16 Jan 1997.

[226] UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Mr. Joinet, 49th Session, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, Annex II, [= Principles against Impunity].

[227] See Fn. 225, Principle 15.

reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.“[228] Amnesty and other measures of clemency to foster peace or national reconciliation shall, if at all, only be granted to perpetrators of serious crimes under international law, after the state has met these obligations.[229] Principle 30 states:

> „The fact that, once the period of persecution is over, a perpetrator discloses the violations that he or others have committed in order to benefit from the favourable provisions of legislation on repentance cannot exempt him or her from criminal or other responsibility. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth. When disclosures were made during the period of persecution, the reduction of sentence may be extended to absolute discharge on grounds of the risks the person ran at the time.“[230]

E. Conclusion

Conventional human rights law and the soft law of the United Nations leaves no doubt: perpetrators of gross human rights violations must be prosecuted and punished. Support for this principle is overwhelming and has been repeated by nearly all nation states in various UN conventions and resolutions. The jurisdiction of the Inter-American Court on Human Rights supports this view. Amnesty is only compatible with international customary law after the concerned person has been duly punished. This is the essence of international customary law. Only if the disclosure is made before the transition to democracy, perpetrators may be completely indemnified.

[228] See Fn. 226, Principle 18. Duties of States with regard to the administration of justice.
[229] Principle 25, Restriction and other measures relating to amnesty
[230] Principle 30, Restrictions on the effects of legislation on repentance related to the restoration of or transition to democracy and/or peace.

VI. The Duty to Punish in International Criminal Law

The duty to prosecute and punish the most serious human rights violations is also supported by international criminal law. Under long-settled rules of international law any court may exercise universal jurisdiction over acts amounting to crimes against humanity, such as widespread or systematic murder, torture, enforced disappearance, arbitrary detention, forcible transfer of population and persecution on political or racial grounds. Two variants of these crimes, genocide and apartheid, will be discussed separately. Aggression and war crimes are also recognised as international crimes. The duty to prosecute and punish war crimes has already been discussed in Chapter IV. Although there is evidence that state officials were responsible for acts of aggression[231], I confine my discussion to crimes against humanity. The definition of the crime of aggression[232] is still very controversial in international law and is beyond the scope of this work..

South Africa is not party to the Convention on the Prevention and Punishment of the Crime of Genocide[233] and the International Convention on the Suppression and Punishment of the Crime of Apartheid[234], but signed the Rome Statute of the International Criminal Tribunal in July 1998. As the Rome Statute has not yet entered into force, its jurisdiction may only be regarded as an expression of current legal custom. It follows, that South Africa's obligation to prosecute and try crimes against humanity is of customary nature.

The *Pinochet*-Case[235] gives evidence, that suspected perpetrators of crimes against humanity may face prosecution abroad, although they might have the been granted amnesty domestically or claim to possess diplomatic immunity. The principle of universal jurisdiction threatens therefore the international validity of South African amnesty.

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[231] See TRC-Report II, 42-61, 85-164; Michael F. Higginbotham (1987) and Edward Kwakwa (1987).

[232] See Yoram Dinstein (1994): *War, Aggression, and Self-defence*, Cambridge: Grotius; Thomas Ehrlich, Mary Ellen O'Connell (1993): *International Law and the Use of Force*. Boston: Little, Brown; Ian Brownlie (1981): *International Law and the Use of Force by States*. Oxford: Clarendon Press; Thomas Bruha (1980): *Die Definition der Aggression. Faktizitat und Normativitat des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974*. Berlin: Duncker & Humblot.

[233] UN GA Res. 260 A (III), 9 Dec. 1948, 78 UNTS 227 [Genocide Convention].

[234] UN GA Res. 3068 (XXVIII), 30 Nov. 1973, 13 *ILM* (1974) 50. [Apartheid Convention]. The Resolution was adopted by a vote of 91 in favour, 4 against, with 26 abstentions. It entered into force on 18 July 1976 after the Syrian Arabic Republic became the 20th state to ratify the Convention.

[235] Regina v. Bartle and others (ex parte Pinochet) & Regina v. Evans and others (ex parte Pinochet) Jugements of the House of Lords, 25 Nov. 1998. *http://www.parliament.the-stationary-office.co.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm*.

A. Crimes Against Humanity

The definition of crimes against humanity dates back to the Nuremberg trials. The Charter of the Military Tribunal of Nuremberg established in its Article 6 international jurisdiction over crimes against peace, war crimes and crimes against humanity. Similar provisions were entailed in Article 5 of the Tokyo Tribunal.[236]

1. Definition in International Law

In the Nuremberg statute, crimes against humanity were defined as „murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal [...]"[237] While the Tribunal interpreted that its jurisdiction in relationship to crimes against humanity was limited to acts that had a connection to war[238], such a link was not anymore entailed in the definition in the Allied Control Council Law No.10, which gave the legal basis of the trials against war criminals after Nuremberg.[239] In the *Tadic-Case* the Appeals Chamber of the Yugoslavia Tribunal found that „customary international law no longer requires any nexus between crimes against humanity and armed conflict."[240] The Nuremberg Charter established as well the principle of superiority of international criminal law, as crimes against humanity were punishable „whether or not in violation of the domestic law of the country where perpetrated."[241]

On the 11th of December 1946 the UN General Assembly unanimously affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and its judgement.[242] The significance of this resolution has been emphasised by Lord Nicholls in the *Pinochet Case* „From this time on, no head of state could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity."[243] Shortly afterwards the Nuremberg Principles of International Law

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[236] Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946.
[237] Article 6 c), Charter of the International Military Tribunal of Nuremberg, 82 UNTS 280.
[238] International Military Tribunal, Judgement and Sentences, 41 *American Yournal of International Law* (1947) at 249.
[239] Article II 1c), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946.
[240] Tadic -Case, Appeals Chamber, para. 78 see as well *id.*, para. 141.
[241] Article 6c), Charter of the International Military Tribunal.
[242] UN GA Res. 95(I)1946.
[243] Jugements of the House of Lords *Regina v. Bartle and others* (ex parte Pinochet) & *Regina v. Evans and others* (ex parte Pinochet), 25 Nov. 1998.

confirmed the customary nature of crimes against humanity, the principle of individual criminal responsibility and supremacy of international criminal law over national law.[244]

Crimes against humanity were included in Article 3 of the Statute of the Rwanda Tribunal and Article 5 of the Statute of the Yugoslavia Tribunal.[245] In the accompanying report to the Statute of the Yugoslavia Tribunal the Secretary General of the United Nations expressed the view, that the Statute is based on „rules of international humanitarian law which are beyond doubt part of international customary law so that the problem of adherence of some but not all States to specific conventions does not arise.“[246] The Trial Chamber of the Tribunal came to the same conclusion[247] and sentenced Dusko Tadic for crimes against humanity.[248]

The development of international law found its climax in the adoption of the Rome Statute of the International Criminal Court (ICC-Statute) on 17 July 1998.[249]

Article 5 of the Statute gives the International Criminal Court jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The Court may however only exercise jurisdiction over the crime of aggression, after a it is defined by the assembly of state parties to the Statute.[250]

The Rome Statute mentions, murder, extermination, enslavement, persecution, and deportation as crimes against humanity. These acts were already recognised as crimes that may constitute crimes against humanity in the Nuremberg Statute. The list of criminal acts in Article 7 of the ICC Statute, defining crimes against humanity, further includes imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparative gravity, enforced disappearance of persons, the crime of apartheid and other inhumane acts of a similar character as crimes against humanity.[251] The later acts are no newcomers to international criminal law. They were already

[244] Yearbook of the United Nations (1950) at 852. See as well Ian Brownlie (1991): *Principles of Public International Law*. Oxford: Clarendon Press, 562.
[245] UN Doc. S/25704, annex, at 11 (1993), 32 ILM (1993) 1192, adopted by UN SC Res. 827 (25 May 1993); UN SC Res. 955, annex (8 Nov 1994), 33 ILM (1994) 1602.
[246] Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. No. S/25704, para. 34 (1993) 32 ILM (1993) 1192.
[247] id., para. 618-623.
[248] *Prosecutor v Tadic*, Opinion and Judgement, 7 May 1997, para. 609-617, Case No. IT-94-1-T. reprinted in 36 ILM (1997) 908.
[249] UN Doc. A/CONF. 183/9.
[250] Article 5(2).
[251] Article 7(1).

included as crimes against humanity in the Statutes of the Yugoslavia and Rwanda Tribunal,[252] in the Declaration on the Protection of All Persons From Enforced Disappearances[253] and in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[254]

The hallmark of crimes against humanity lies in their widespread or systematic nature. In order to qualify as crimes against humanity these acts must be „committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[255] According to of Article 7(2)a of the ICC-Statute an „'Attack directed against any civilian population' means a course of conduct involving the multiple commission of [...] acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack". One my summarise, as the International Law Commission did in its Commentary to the Draft Statute: „The particular forms of unlawful act [...] are less crucial to the definition than the factors of scale and deliberate policy [...]"[256]

2. The Duty to Punish

The very nature of an international crime entails an obligation on states to prosecute and punish those who have committed them. The famous quote of the Judgement of the Nuremberg Tribunal is an expression of this position. The Tribunal held, „Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[257] International tribunals and the courts of states are to date the only recognised institutions of criminal law enforcement. Thus, it would be absurd to have an international agreement on a crime that does not entail any obligation in respect of its enforcement. There are however further compelling reasons, why crimes against humanity must be prosecuted and punished.

Crimes against humanity and the norms that regulate them are part of *ius cogens*. They are fundamental norms of general international law, that cannot be modified by treaty or

[252] Imprisonment, torture, and rape are as well included in Article 5 of the Statute of the Yugoslavia Tribunal and in Article 3 of the Statute of the Rwanda Tribunal.
[253] The „systematic practice" of enforced disappearances of persons was as well already recognised as a crime against humanity by the UN Declaration on the Protection of All Persons from Enforced Disappearances, UN GA Res. 47/133, 18 Dec. 1992, Preamble, para. 4.
[254] UN GA Res. 3068 (XXVIII), 30 Nov. 1973, 13 *ILM* (1974) 50.
[255] Article 7, chapeau, ICC-Statute.
[256] Report of the International Law Commission on the work of its forty-sixth session, 2.5.-22.7.1994, GA Official Records, 49th Session, Suppl. No.10, UN-Doc. A/49/10, para. 91.
[257] Judgement of the International Military Tribunal at Nuremberg from 1 October 1946, reprinted in 41 *American Journal of International Law* (1947) Suppl., 172-333 at 221.

national law. The legal status and the consequences of such crimes transcend the province of municipal law, they are a threat to the international security and the safety of mankind. It flows from there, that all states are not only entitled but as well obliged to exercise criminal jurisdiction over them.[258] This principle was recognised by the International Court of Justice in the *Barcelona Traction Case*.[259] The Court held that the prohibition in international law of acts of aggression, genocide, and the rules concerning the basic rights of the human person are of such a nature, that they are obligations *erga omnes.* This means, that in the view of the importance of these rights involved, all states have a legal interest in ensuring that they are protected. The Draft Articles of State Responsibility follows this reasoning. Its Article 19(2) states, that „[a]n 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 as a whole constitutes an international crime." According to the Draft Articles on State Responsibility such infringements entitle all other states to reparation, restitution, compensation and satisfaction, including the adoption of countermeasures and the punishment of those responsible.[260] Given that crimes against humanity are *erga omnes*, it follows that all states are under an obligation to try or extradite persons suspected of committing crimes against humanity under the principle of *aut dedere aut judicare.*[261]

In 1973 the UN General Assembly declared, that all states have extensive obligations to co-operate with each other in bringing those responsible for crimes against humanity to justice. According to these UN Principles „Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons."[262] Principle 8 states, that „states shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest extradition and punishment of those guilty of war crimes and crimes against humanity."

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[258] See M. Cherif Bassiouni (1996): International Crimes: Jus Cogens and Obligatio Erga Omnes. 25 *Law & Contemporary Probation*, 63.
[259] *Barcelona Traction, Light and Power Company Ltd*. Judgement, ICJ Rep. 1970, 32.
[260] Article 40(3) in conjunction with Articles 41-53 of the ILC's Draft Articles on State Responsibility; 37 ILM (1998) 440.
[261] M. Cherif Bassiouni (1992): *Crimes against Humanity in International Law*. Dordrecht: Martinus Nijhoff, 499-508; Brownlie (1991): Fn.XX, 315.
[262] UN Principles of International Co-Operation in the Detection, Arrest Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, General Assembly Res. 3074 (XXVIII), 3 Dec. 1973, Principle 5.

Similarly, the ICC-Statute affirmed in its preamble „that the most serious crimes of concern to the international community as a whole must not get unpunished“ and „that it is the duty of every State to exercise its criminal jurisdiction for international crimes“. States pledge further to be „determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes“.[263]

Although as a general rule persons responsible for crimes against humanity should face justice in the courts of the country were they were committed, this rule clearly does not apply when a state has given an amnesty or is unable or unwilling to prosecute genuinely.[264] This is evident in the principle of complementarity contained in Article 17 of the ICC-Statute. According to Article 17(2)a the Court may, in order to determine unwillingness consider, whether „proceedings were or are been undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court“. This provision included into the statute on the insistence of the South African delegation at the Rome conference was obviously a hidden attempt to legitimise the South African amnesty procedures.[265] It is however unclear, how this provision must be interpreted. In general, a national decision to shield a person from criminal responsibility must rather be regarded as evidence for a states' unwillingness to prosecute genuinely. Another interpretation would be contradictory to the preamble of the ICC-Statute and to the following paragraphs of the statute that regard already an „unjustified delay in the proceedings“ or „proceedings [...] conducted in a manner [...] inconsistent with an intent to bring the person concerned to justice“[266] as an indication of unwillingness. It is also difficult to imagine what kind of indemnity for international crimes would be compatible with the „principles of due process recognised by international law“, to which the Court should have explicitly regard.[267] Due process would at least require that the victims are compensated, the alleged crime is proper investigated and perpetrators are convicted and sentenced before they may be pardoned by an amnesty law.[268]

[263] ICC-Statute, Preamble, para. 4,5,6.
[264] Articles 17(1)a, b.
[265] Personal information from the South African delegation member Prof. Medrad Rwelamira, 29. August 1998
[266] Article 17(2)b,c.
[267] Article 17(2) ICC-Statute. Furthermore it must be noted that these provisions, only regulating questions of admissibility to the International Court may according to Article 10 of the ICC Statute „not be interpreted as limiting or prejudicing in any way existing or developing rules of international law.“ The Statute therefore does not limit the ability and duty to prosecute crimes against humanity by any nation state.
[268] See Chapter V above.

Several countries, including Spain, France, Canada and Belgium, have passed "enabling" legislation to facilitate the prosecution of crimes against humanity in their courts. Spanish courts may, according to Article 23 (4) of the Spanish Law of Courts prosecute Genocide, Terrorism and other acts, that are criminal under international law. They have universal jurisdiction over these crimes.[269] On this grounds the highest criminal court in Spain, the *Audiencia Nacional*, rejected a challenge by state prosecutors to the jurisdiction of the Spanish judiciary to try General Pinochet.[270] Similar provisions are included in Section 7 (3.71) of the Canadian Criminal Code. Canadian courts have exercised universal jurisdiction over a non-Canadian accused of crimes against humanity.[271] In the *Barbie Case* the French *Court d'Apel* (Court of Appeal) held that „by reason of their nature crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising there from are completely foreign." [272] Barbie was later sentenced for crimes against humanity by the French *Court de Cassation.* National law and the actual prosecution of suspected perpetrators for crimes against humanity confirm that there is a duty to try and punish crimes against humanity in international customary law.

Persons who commit crimes against humanity incur individual criminal responsibility. According to the General Principles of Criminal Law entailed in Part 3 of the ICC-Statute, an individual is criminally responsible for committing, ordering, soliciting, inducing, aiding, abetting or assisting a crimes against humanity or war crimes.[273] Furthermore, a military commander or a person effectively acting as a military commander shall as well be criminally responsible for war crimes and crimes against humanity committed by forces under his or her effective control, or effective authority and control, as a result of his or her failure to exercise control properly over such forces, where

> a) The military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

[269] Kai Ambos: Der Fall Pinochet. Auslieferung - ein politisches, kein juristisches Problem. *Süddeutsche Zeitung*, 3 Nov. 1998.
[270] See Amnetsy International (1998): *The Case of General Pinochet. Universal Jurisdiction and the absense of immunity for crimes against humanity.* London: Amnesty International, 3 Nov. 1998
[271] *Regina vs. Finta*, 82 ILR (1989) 424.
[272] *Fédération Nationale des Désportés et Internés Résistants et Patriotes and Others v. Barbie* 78 ILR (1985) 128 and 136.
[273] Article 25 ICC-Statute.

b) The military commander or person failed to take all necessary or reasonable measures within his or her power to prevent or to repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[274]

Since Nuremberg, it is also a settled rule of international law, that „[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.“[275] The Nuremberg Tribunal supported this rule in its judgement: „The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. [..]“[276]

The absence of immunities attached to the official capacity of a person, whether under national or international law is confirmed by Principle III of the Nuremberg Principles[277], the Statutes of the Yugoslavia and Rwanda Tribunals[278] and Article 27 of the ICC-Statute. Furthermore, nine military commanders of Argentina between 1976 and 1982 were tried by the Argentine Supreme Court of Justice[279] and President Luis Gracia Meza and his collaborators were sentenced by the Bolivian Supreme Court of Justice on multiple charges relating to gross human rights violations.[280] In 1992 the German Constitutional Court ruled that the former East-German Head of State, Erich Honnecker may be tried for his criminal conduct as head of state[281] and *In re Estate of Ferdinand Marcos*[282] the 9th Circuit Court of the United States hold that the Foreign Immunity Act did not prevent, American courts from exercising jurisdiction over the estate of the former President of the Philippines for alleged acts of torture and wrongful death since those acts were not official acts committed within the scope of his authority. Finally, the House of Lords held in the *Pinochet Case*[283] that the former military ruler of Chile may be extradited to Spain, although he was granted indemnity for human rights violations under the Chilean decree law 2191 and claimed to possess diplomatic immunity as a former head of state. The Lords found that genocide, torture, hostage-taking

[274] Article 27 ICC-Statute.
[275] Article 7, Charter of the International Military Tribunal of Nuremberg.
[276] Judgement of the International Military Tribunal at Nuremberg from 1 October 1946, reprinted in 41 *American Journal of International Law* (1947) Suppl., 172-333 at 221
[277] Yearbook of the United Nations (1950) at 852.
[278] Article 7(2) and Article 6(2) respectively.
[279] Trial of the nine military commanders who had ruled Argentina between 1976 and 1982, Argentinean Federal Court of Appeals, Judgement on 9 Dec. 1985, Argentinean Supreme Court of Justice, Judgement 30 Dec. 1986.
[280] Judgement on 21 April 1993.
[281] *Bundesverfassungsgericht* (Third Chamber, 2nd Senate), Order on 21 February 1992, 80 ILR (1984) 36.
[282] 25 F.3d 1467 (9th Cir. 1994).

and crimes against humanity may not be regarded as official acts that qualify for diplomatic immunity according to Articles 31, 38 and 39 of the Vienna Convention on Diplomatic Relations and Section 20 of the British State Immunity Act. As Lord Nicholls maintained:

> „It hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.“[284]

In the same judgement Lord Steyn concluded that otherwise „when Hitler ordered the "final solution" his act must be regarded as an official act deriving from the exercise of his functions as Head of State.“ Lord Steyn stressed,

> „the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.“[285]

In similar vein, the Federal Court of Germany decided on the 19 November 1998, that the privilege of immunity of General August Pinochet does not necessarily preclude his trial before German courts.[286]

The jurisdiction of national courts confirms that states accept a duty to try and punish international crimes before their own courts and that this rule of international law entitles every state to try and punish any suspected individual for these crimes.

3. Evidence of Crimes against Humanity in South Africa

I will return to South Africa. The questions is, what kind of acts and gross human rights violations were actually crimes against humanity. The overview starts with murder, torture,

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[283] *Regina v. Bartle and others* (ex parte Pinochet) & *Regina v. Evans and others* (ex parte Pinochet), Judgment of the House of Lords on 25 Nov. 1998.
[284] Id.
[285] Id.
[286] Bundesgerichtshof of the Federal Republic of Germany (BGH), AZ: 2 ARs 471/98 u. 2 ARs 474/98, quoted in *Die Tageszeitung*, 20.11.1998.

enforced disappearances, and continues with acts of deportation, imprisonment and persecution, crimes that fall outside the mandate of the Truth Commission.[287] Special focus is given to the question whether certain gross human rights violations committed during the apartheid past, meet the requirements of a „widespread or systematic attack against any civil population" and were „pursuant or in furtherance of a State or organisational policy to conduct such attack"[288]. The evidence is based on the official Report of the Truth Commission and supplemented by publications of human rights organisations.

Murder. The apartheid state targeted deliberately civilian 'enemies' of the apartheid regime for elimination inside and outside[289] the country. 'Enemies' of the state were systematically murdered by the C1, Vlakplaas police unit, under the command of Dirk Coetzee and Eugene De Kock, Soweto, Port Elisabeth, Western Cape and Northern Transvaal Security Branch and Special Force operatives of the South African Defence Force, later operating under the name „Civil-Co-operation Bureau".[290] These units closely co-operated in the 'elimination' of political opponents. They were inter alia responsible for the murder of the Durban lawyers Griffiths and Victoria Mxenge, the poisoning and killing of Siphiwe Mthikulu and Topsy Madaka, the PEPCO Three (Sipho Hashe, Champion Galela and Qaqawuli Godolozi of the Port Elizabeth Civic Organisation), four members of the Cradock Civic Association, Florence and Fabian Ribeiro and the academic David Webster. In false flag operations, student activists were recruited for guerrilla training by operatives of the Security Branch and later killed in ambushes or by manipulated hand grenades (Operation Zero Zero, Gugulethu Seven, Nietverdiend Ten). Often weapons were placed to the bodies of the deceased, in order to convince the public that they were operatives of the liberation movement.[291]

Although military structures of the liberation movement were also targeted by the South African security forces, the above mentioned killings confirm that elements within the South African security forces deliberately attacked a „civilian population", namely civilian opponents, who were regarded as a political threat to the apartheid regime.

At least after 1985 the elimination of civilian opponents became part of official state policy. As the General Officer Commanding the Special Forces of the defence force, AJM 'Joep' Joubert stated in his amnesty application:

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[287] Some cases of banning and detention without trial were however as well considered as severe-ill-treatment by the TRC. See TRC-Report I, 81, para. 119.
[288] Article 7(1) and 7(2)a of the ICC-Statute.
[289] See Chapter IV, B 1 and 2.

> „[B]y this time it was also clear that the ANC was not going to be stopped by normal conventional methods and that revolutionary methods would have to be used. As the institution of external operations, Special Forces would also have to intensify its external operations [...] since the necessity for *unconventional action* was already clear, it was also clear that covert operations would have to take place internally, for which Special Force members would be used. [...] The revolutionary and covert nature of the *plan*, amongst other things, involved:
>
> a) that ANC leaders and *people who substantially contributed to the struggle* would *be eliminated;* [...]
>
> c) *activists, sympathisers,* fighters *and people who supported them* would also *be eliminated;*"[292]

The 'targets' were chosen by a special unit of the intelligence services of the apartheid state, the Counter-Revolutionary Information Target Centre (TREWITS) and discussed by internal meetings, afterwards the Chief of Staff would brief the Minister of Defence.[293] The Truth Commission found that:

> „Extra-judicial killings were often the end result of a process of operationally directed intelligence collection on targeted individuals. All three primary security intelligence arms - National Intelligence Service (NIS), Section C2 of the Security Branch, and Military Intelligence - undertook such activities and co-ordinated their information trough joint participation in so-called target workgroups formed in 1986 in certain selected strategic areas [...]
>
> Extra-judicial killings were targeted primarily at high-profile activist inside and outside South Africa; those both connected to both military (MK and APLA) and non-military structures; at those activist or perceived activists whose conviction had not been secured through judicial process or where it was believed that judicial action would not succeed; as well as own forces whose loyalty came into question.[294]

The use of lethal force against civilians was also explicitly condoned in the suppression of civilian protest and demonstrations. Responding to the Soweto uprising the Minister of Police, Jimmy Kruger, proposed at a cabinet meeting on the 10th of August 1976 that: „This movement must be broken, and the police should perhaps act a bit more drastically an harshly, bringing about more deaths."[295] During the state of emergency a signal message containing a meeting held in Pretoria on 2 May 1985 by the Joint Staff's joint intelligence structure read as follows:

> i. The feeling of this GIS is that before a riot situation can be effectively defused, the ringleaders must be selectively *eliminated*.

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[290] TRC-Report II, 220-267, and 272, para. 446.
[291] TRC-Report II, 257-267.
[292] TRC-Report II, 135-6, para. 382 (emphasis by author).
[293] TRC-Report II, 284, para. 478.
[294] TRC-Report II, 288, para. 509.
[295] TRC-Report II, 175, para 41.

> ii The idea around elimination is twofold:
>
> 1 The *physical gunning-down of leaders* in riot situations who make themselves guilty of Annexure 1 offences.
>
> 2 The removal of intimidators [...]
>
> The feeling is that when ringleaders are removed, they also need to be restricted physically, to such extent that they are *removed from circulation* and kept away.[296]

The 'elimination' of civilian opponents was approved by the top of government, the State Security Council (SSC), chaired by former state president PW Botha. The SSC included as well the Ministers of Defence, Law and Order and the highest commanders of military and police. In August 1986 the SSC adopted a document entitled „Strategie ter bekamping van die ANC" (Strategy for the combating of the ANC), which included the recommendation to „neutralise the power and influence of key persons in the ANC, and their fellow travellers".[297] A similar SSC document, adopted on 1 December 1986, stated that „*intimidators* must be *neutralised* by way of formal and *informal policing*" and a strategy document, dated 24 January 1987, suggested to „identify and *eliminate* the *revolutionary leaders*, especially those with charisma".[298] The TRC-Report states that:

> „[t]he rhetoric did not always readily distinguish between persons engaged in military operations or acts of terrorism and those who opposed apartheid by lawful or peaceful means; nor did it provide a definition of 'terrorists'. Nowhere in any of the SSC documents is a clear an unambiguous definition provided for any of the terms *eliminier* (eliminate), *neutraliseer* (neutralise), *fiesiese vernietigning* (physical destruction), *uithaal* (take out) or *ander metodes as aanhouding* (methods other than detention)."[299]

The Truth Commission concluded furthermore that „certain members of the SSC (the State Presidents, Minister of Defence, Minister of Law and Order, and heads of security forces) did foresee that the use of words such as 'take out', 'wipe out', 'eradicate', and 'eliminate' would result in the killing of political opponents."[300] Further „there is no evidence of any attempt by the SSC to set in motion any substantive or comprehensive investigation into the killing of political opponents once this began to happen. Although there were police investigations after each killing, these were often manifestly inadequate and often took the form of cover-ups."[301]

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[296] TRC-Report II, 176, para. 46 (translated by the TRC, emphasis by author).
[297] TRC-Report II, 274, para. 451 (translated by the TRC).
[298] TRC-Report II, 274, para. 452 (translated by the TRC, emphasis by author).
[299] TRC-Report II, 274, para. 453 (emphasis in original).
[300] TRC-Report V, 218, para. 99
[301] TRC-Report V, 217, para. 97e.

From the above mentioned evidence, it is obvious that members of State Security Council, the Security Branch of the Police and the Special Forces of the defence force must incur individual criminal responsibility for crimes against humanity. Civilian opponents of the apartheid state were systematically murdered by these formations. This attack against civilian opponents involved „the multiple commission of acts" and was clearly „pursuant to or in furtherance of a State or organisational policy to commit such attack." Individual criminal responsibility for these crimes against humanity applies as well to the former State President, as chairperson of the SSC and highest military commander, and other Ministers and security force officers, who were, in accordance with Article 28 of the ICC-Statute, effectively acting as a military commanders during the state of emergency and failed to exercise properly control over their forces.

Torture: Torture was systematically and widespread used by the security branch of the South African Police against political opponents of the apartheid regime.[302] The Truth Commission lists several cases of death in detention resulting from the effects of torture.[303] In its report the Truth Commission concluded that „torture was used by the security branch at *all* levels, junior and senior, and in *all parts of the country*" and that „many of those about whom either clear evidence existed or substantial allegations had been made of their involvement in torture [...] were *promoted* to higher ranks". Furthermore the Commission noted that „despite national and international concern at the evidence of *widespread and systematic* use of torture by South African security forces, little effective action was taken by the state to prohibit or even limit its use and that, to the contrary, legislation was enacted with the *specific intent* of preventing intervention by the judiciary and removing any public accountability on the part of the security forces for their treatment of detainees." The Commission concluded that „the use of torture was condoned by the South African government as *official practice*" and „constituted a *systematic pattern of abuse* which entailed *deliberate planning by senior members* of the [South African Police]."[304] With regard to torture cases in ANC camps the Commission found that „although it was not ANC policy to use torture, the security department of the ANC routinely used torture to extract information and confessions from those being held in camps, particularly in the period 1979-89." While the use of torture in ANC camps may fall short of the requirement of widespread or systematic commission, the torture

[302] TRC-Report II, 187-220.
[303] TRC-Report II, 205-218. See as well the list of 38 political deaths in detention in Coleman (1998), Appendix 1, 245-6
[304] TRC-Report II, 220, para. 220 (emphasis by the author).

of the South African security police does not. This is also confirmed by the figures released by the Truth Commission. They record 10.541 acts of torture, of which over 7.000 are attributed to the South African Police or to the Homeland police forces of the apartheid state and less than 500 to the ANC.[305] In 20 percent of all cases the organisation of the perpetrator is not known. These findings are also confirmed by reports of the UN Special Committee Against Apartheid[306], local and international human rights organisations[307], rehabilitation centres for torture victims[308] and scientific research[309].

Enforced disappearances of persons The Truth and Reconciliation Commission traced about 250 secret graves of persons that were murdered by the security forces of the apartheid state. Only 50 bodies of these persons were exhumed by the TRC. Most of the bodies were found to be MK operatives who were often tortured before they were killed.[310] Some were abducted from exile and then either 'persuaded' to become a security force operative or to be killed and buried in secret locations or unnamed graves.[311] With this policy the apartheid state tried to avoid funerals for ANC members, which became political protest marches and were used to express solidarity with the liberation movement. From the evidence obtained by the TRC most victims of enforced disappearances were members of the armed wing of the ANC and not civilians. Although the deeds are obvious severe breaches of humanitarian law, it cannot be proven beyond doubt, that the policy of enforced disappearances was directed against the civilian population. These crimes do therefore not necessarily amount to crimes against humanity.

Deportation and forcible transfer of population. According to Article 7(2)d of the ICC-Statute, deportation or forcible transfer of population means forced displacement of persons by expulsion or other coercive acts from an area in which they are lawfully present, without grounds permitted under international law. In 1950 the entire country of South Africa was demarcated by the *Group Areas Act*[312] into zones for exclusively occupation by designated racial groups. Contrary to international law, about 3,5 Million people were forcefully removed

[305] TRC-Report III, 11, para. 43.
[306] See e.g. UN Special Committee Against Apartheid: Torture and Ill-Treatment of Detainees by the Racist Regime of South Africa in 1982. UN Doc. A/AC 115/L. 586, 17 Jan. 1983.
[307] Detainees' Parents Support Committee (1983). Report on torture in detention, reprinted in : Coleman (1998) 53-56; Amnesty International (1978): *Political Imprisonment in South Africa*. London: Amnesty International.
[308] Donald Skinner (1998): *Apartheid's Violent Legacy. A Report on Trauma in the Western Cape.* Cape Town: The Trauma Centre for Victims of Violence & Torture.
[309] Don H. Foster et al. (1987): *Detention and Torture in South Africa*. Cape Town: David .
[310] TRC-Report II, 543-554.
[311] TRC-Report II, 123, para. 328.
[312] Act No. 41 of 1950.

on the basis of this legislation. Forced removals were ordered to 'clean' white towns and farmland from black settlement, and to establish the racial and ethnically based townships and homelands.[313] Whole communities, like Sophiatown in Johannesburg, District Six in Cape Town and South End in Port Elizabeth were destroyed. Most of the victims were black citizens. This policy was clearly a systematic and widespread attack directed against the non-white civilian population of South Africa. It is a crime against humanity. Those who passed legislation in order to implement these deportations, and those who ordered or actively participated in them, incur individual criminal responsibility under international law.

Imprisonment and other severe deprivation of liberty. The apartheid state detained systematically and in violation of fundamental rules of international law more than 73.000 people under security and emergency legislation.[314] The security legislation, phased in with the *General Laws Amendment Act* in 1963[315], provided for up to 90 days of detention, in isolation, without access to the courts, for the purposes of interrogation. Detention was renewable at expiry. The period of detention was increased in 1965 to 180 days and later to indefinite detention.[316] In 1967 the *Terrorism Act*[317] was passed. The legislation was retroactive applied to thirty-seven SWAPO activists, that were arrested in 1966. The trial was condemned as illegal by the UN Security Council.[318] Emergency regulations proclaimed under Section 3 of the *Public Safety Act*[319] also gave any member of the security forces, including police, defence force and prison services, the power to detain and interrogate, without access to lawyers, family or friends during the duration of the emergency. Since successive emergencies were declared, this means that the time of detention was often open-ended.[320]

Between 1950 and 1990 more than 1.700 persons were banned or restricted.[321] The effective length of a banning order varied from 1 to 5 years, but, successively applied, orders could extend well beyond this period. The longest period on record is 26 years. Section 10 of the *Suppression of Communism Act* of 1950[322] empowered the minister of justice to issue an

[313] Laurine Platzky & Cherryl Walker (1985).
[314] See Human Rights Commission: Detention without trial, November 1988; reprinted in Coleman (1998) 43 at 50.
[315] Act No. 37 of 1963, S 17.
[316] S 215b is Criminal Procedures Amendment Act, Act No. 96 of 1965; S 28 and S 29 Internal Security Act, Act No. 74 of 1982.
[317] Act No. 83 of 1967.
[318] See TRC-Report II, 64-5, para. 86.
[319] Act No. 3 of 1953.
[320] See Human Rights Commission in: Coleman (1998) at 47.
[321] See Human Rights Commission: Banning and Restriction of Persons, March 1989, reprinted in Coleman (1998) 68 at 70.
[322] Act No. 44 of 1950, later known as Internal Security Act, Act No. 79 of 1976.

order imposing severe restrictions from freedom of movement and expression of any person, when he is satisfied that such a person advocates communism or engages in activities that further the aims of communism (which was widely defined). People could be confined to a particular area, to his or her residence. In most cases, house arrest was accompanied by prohibition on having more than a certain number of visitors at home. The *Internal Security Act* of 1982 made it an offence to quote a banned person or a person convicted of security offences or treason.[323] It banned as well the publication or dissemination of any statement made by a listed person, except with the permission of the Minister of Law and Order.[324] The banning orders were usually signed by the Minister of Justice or the Minister of Law and Order.

The banning and the detaining of persons without trial were a widespread and systematic attack on civilian opponents of the apartheid state. These practices were official state policy and in fundamental disregard of the right to liberty and the freedom of expression. They are crimes against humanity. Those who committed these crimes, especially the Minister of Justice and Law and Order, incur individual criminal responsibility under international law and must therefore be prosecuted and punished.

Persecution. Since the Nuremberg Charter crimes against humanity include the crime of persecution on political, racial and religious grounds.[325] The ICC-Statute defines persecution as „intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity“[326]. These acts must be „universally recognised as impermissible under international law“ and be of similar nature than any other act recognised as a crime against humanity, genocide or war crime.[327] Although often used, the term of persecution has never been clearly defined in international criminal law nor is it known as such in the world's major criminal justice systems.[328] M. Cherif Bassiouni has attempted to summarise the crime of persecution by writing:

> Throughout history [...] the term 'persecute' and 'persecution' have come to be understood to refer to discriminatory practice resulting in physical or mental harm, economic harm, or all the above. [...] The word 'persecute' and the act of 'persecution'

[323] S 19(1) and 20 of Act No. 74 of 1982.
[324] S 56(1).
[325] Article 6c Nuremberg Charter, Article 5c Tokyo Charter, Principle VIc of the Nuremberg Principles, Article 5h and Article 3h Statute of the Yugoslavia and Rwanda Tribunal, Article 7(1)h ICC Statute.
[326] Article 7(2)g ICC-Statute.
[327] Article 7(1)h ICC-Statute.
[328] Bassiouni (1992), 318.

> have come to acquire a universally accepted meaning for which a proposed definition is: State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.) [...].[329]

The essence of the crime of prosecution is entailed in the Nuremberg judgement. The Tribunal considered the following acts as persecution: discriminatory laws limiting the offices and professions open to Jews; restrictions placed on family life and their right to citizenship; the creation of ghettos; the plunder of their property and the imposition of a collective fine.[330] The Tribunal stated:

> With the seizure of power [by the Nazi Government], the persecution of Jews intensified. a series of discriminatory laws was passed, which limited the offices and professions permitted by Jews; and restrictions were placed on family life and their rights to citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, the movement of Jews restricted by regulations to certain specific districts and hours. The creation of the ghettos was carried out on an extensive scale, and by order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back. [331]

From the Nuremberg Judgement it is as well apparent that the systematic introduction of discriminatory laws against a specific population group in itself must be regarded as persecution:

> With the coming of the Nazis to power in 1933, persecution of the Jews became official policy. On 1 April 1933, a boycott of Jewish enterprises was approved by the Nazi Reich Cabinet, and during the following year a series of anti-Semitic laws were passed, restricting the activities of Jews in the civil service, in the legal profession, in journalism, and in the armed forces. In September 1935, the so-called Nuremberg laws were passed, the most important effect of which was to deprive Jews of German citizenship.[332]

Based on a intensive review of international criminal law, the Yugoslavia tribunal found that „[p]ersecution can take numerous forms, so long as a common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and [that] persecution does not necessarily require a physical element"[333]. The Tribunal concluded in its *Tadic* Judgement that „the crime of prosecution encompasses a variety of acts, including, *inter alia*,

[329] Id., 317.
[330] See Nuremberg Judgement, 243-247.
[331] Id. at 244.
[332] Id. at 181.

those of a physical, economic and judicial nature, that violate an individual's right to equal enjoyment of his basic rights."[334]

After 1948 the apartheid government systematically entrenched traditional racism by various discriminatory laws.[335] The legal status of each human being followed the racial classification of the *Population Registration Act*.[336] Voting rights were limited to white South Africans and the franchise still retained in the Western Cape for Coloureds was soon removed.[337] Forced removals were accompanied with a rigid residential permit system, excluding black South Africans the right to stay in 'white' towns. Millions of blacks were prosecuted and punished for contravention against these pass laws. Many black South Africans were deprived of their citizenship and made foreigners in their own country by the introduction of so-called homelands, a rural ghetto-system. Similar to the Nuremberg Laws, the *Immorality Act*[338] and the *Mixed Marriages Act*[339] interdicted and criminalized sexual encounters and marriages between white and black South Africans. In the field of labour law, a colour bar was introduced, barring particular jobs to black workers. There was even discrimination in the provision of public facilities. The Reservation of *Separate Amenities Act*[340] provided for racial segregation in hospitals, schools, sports, hotels and restaurants, on the beaches and in parks, busses, trains and theatres and toilets.

There is no doubt, this system of racial discrimination amounted to the crime of persecution in international law. The international community clearly condemned apartheid as a crime against humanity.[341] International law obliges South Africa to try and prosecute people who installed and actively enforced these apartheid laws.

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[333] *Prosecutor vs. Tadic* (Opinion and Judgement), 7 May 1997, 279 para. 707; 36 ILM (1997) 908 at 959.
[334] Id. at 281, para. 710.
[335] See generally Dugard (1978); Murriel Horrell (1982): *Race Relations as Regulated by Law in South Africa*, 1948-1979. Johannesburg: SAIRR.
[336] Act No. 30 of 1950.
[337] Separate Representation of Voters Act 45 of 1951.
[338] Act No. 23 of 1957.
[339] Act No. 55 of 1949.
[340] Act No. 49 of 1953.
[341] See Chapter VI, C.

B. Genocide

The international community has recognised genocide as a special form of crimes against humanity. The Convention on the Prevention and Punishment of the Crime of Genocide contains its definition.[342]

1. Definition in International Law

According to Article II of the Genocide Convention, genocide are acts „committed with the intend to destroy, in whole or part, a national, ethnical, racial or religious group, as such" by a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part; d) Imposing measures intended to prevent births within the group; or e) Forcibly transferring children of the group to another group."

2. The Duty to Punish

The Crime of Genocide and the provisions contained in the Genocide Convention are widely regarded as an expression of international customary law, that have acquired the status of *ius cogens.*[343] South Africa is therefore bound by to adhere to its provisions. Article IV of the Convention obliges states to punish the crime of genocide. Persons charged with genocide shall be tried before national courts or before an international penal tribunal[344], whether they are constitutionally responsible rulers, public officials or private individuals.[345] The duty to punish genocide includes its attempt, direct and public incitement, complicity or conspiracy to commit genocide.[346]

3. Evidence of the Crime in South Africa

Some writers have argued that certain human rights violations of the apartheid regime would fall within the preview of the Genocide Convention.[347] Kader Asmal et al. claim for example, that the resettlement and homeland-policies of the apartheid government had genocidal effect.[348] Although the apartheid regime systematically repressed black South

[342] UN GA Res. 260 A (III), 9 Dec. 1948, 78 UNTS 227 [Genocide Convention].
[343] See Ian Brownlie (1991): *Principles of Public International Law.* Oxford: Clarendon Press, at 513-15
[344] Article VI Genocide Convention.
[345] Article IV Genocide Convention.
[346] Article III in conjunction with Article IV and V Genocide Convention.
[347] Christopher O Quaye (1991) *Liberation struggles in international law.* Philadelphia: Temple University Press, 144-145; Motala (1995) at 352.
[348] Kader Asmal, Louise Asmal & Ronald Suresh Roberts (1996): *Reconciliation through truth. A reckoning of apartheid's criminal governance.* Cape Town: David Philip, 198-202.

Africans, and jailed tortured or killed those who opposed its rule, its inhumane policies fell in most cases short of the intention, to destroy black South Africans as ethnical or racial group in whole or part. Heribert Adam rightly points at important differences to the holocaust.[349].

The apartheid regime was however on the brink to genocide, when its biological warfare programme researched for poisons killing black people exclusively, or vaccinations that should reduce substantially the fertility rate of black women. The evidence presented so far in the TRC-Report[350] does however suggest that such research was far from realisation.

Human rights violations in South Africa do probably not fulfil the facts of the crime of genocide. The South African amnesty process does therefore not collude with the duty to punish the crime of genocide.

[349] Heribert Adam (1997): Africa's Nazis: Apartheid as holocaust? 14 *Indicator South Africa*, No.1, 13 at 15.
[350] TRC-Report II, 504-523.

C. Apartheid as Crime Against Humanity

The crime of apartheid confirms the duty to punish certain gross human rights violations under international criminal law.

1. Definition in International Law

In 1973 apartheid was declared by the International Convention on the Suppression and Punishment of the Crime of Apartheid[351] as a crime against humanity. The Convention confirmed previous General Assembly Resolutions.[352] Apartheid is also recognised in the 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes[353] and in several Security Council Resolutions[354] as a crime against humanity.

According to Article II of the Apartheid Convention the „crime of apartheid" includes legalised state criminality, like forced removals and persecution on racial grounds. The Apartheid Convention explicitly allows to prosecute members of the executive, legislative, and judiciary, for acts which have been legal under South African law.[355] The crime of apartheid includes „legislative and other measures calculated to prevent a racial group or groups from participation in political, social, economic and cultural life of the country [...], in particular by denying to members of a racial group or groups basic human rights and fundamental freedoms, including [...] the right to a nationality, the right to freedom of movement, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association."[356] As crime of apartheid are also recognised „[a]ny measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups"[357]. „Arbitrary arrest and illegal imprisonment of members of a racial group and racial groups" is mentioned in Article II a iii of the Apartheid Convention. According to the Apartheid Convention all of these acts amount to a crime of apartheid, when they are systematically „committed for the purpose of establishing and maintaining domination

[351] UN GA Res. 3068 (XXVIII), 30 Nov. 1973, *ILM* 13 (1974) 50. [Apartheid Convention]. The Resolution was adopted by a vote of 91 in favour, 4 against, with 26 abstentions. It entered into force on 18 July 1976 after the Syrian Arabic Republic became the 20th state to ratify the Convention.
[352] see e.g. UN GA Res. 2202 (XXI), 16 Dec 1966, GA Res. 2922 (XXVII), 15 Nov. 1972.
[353] GA Res. 2391 (XXIII)
[354] UN Security Council Res. 392 (1976), 19 June 1976; UN SC Res. 473 (1980), 13 June 1980; UN SC Res. 556 (1984), 13 Dec. 1984.
[355] See Article II c, d and f Apartheid Convention.
[356] Article II c.
[357] Article II d.

by one racial group of persons over any other racial group of persons".[358] It must not be reiterated, that these crimes were already recognised as acts of deportation or persecution by the Nuremberg Charter and the jurisdiction of the Nuremberg Tribunal and both, deportation and persecution, were reaffirmed as crimes against humanity in the Statutes of the Yugoslavia and Rwanda Tribunal and the ICC-Statute.

The Apartheid Convention may however transgress the traditional scope of crimes against humanity by including infringements of social and ownership rights, like the right to work, the right to education, the expropriation of landed property, and the exploitation of labour, as acts that may constitute a crime of apartheid.[359] These infringements are not *per se* crimes against humanity under the Nuremberg Charter. Only if these acts are systematically applied in such a way that they must be regarded as acts of persecution, practices of slave labour, or forced expropriations without compensation, they are covered by the Nuremberg Charter and its jurisdiction.

Besides this, the Apartheid Convention includes as well crimes, which fall under the mandate of the TRC and for which amnesty may be granted. Murder, torture and the infliction of serious bodily and mental harm are according to the Article II a of Apartheid Convention crimes against humanity if such acts are systematically „committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons".[360]

The crime of apartheid was explicitly reaffirmed as crime against humanity by the Rome Statute of the International Criminal Court.[361] According to Article 7(1)j and 7(2)h of the statute acts similar to murder, extermination, enslavement, torture, persecution, imprisonment, deportation or forcible transfer of population, amount to the crime of apartheid if they are „committed in the context of an institutional regime of systematic oppression and domination by one racial group over any other racial group or groups, and committed with the intention of maintaining that regime".[362] Thus, all acts that constitute gross human rights violations in the TRC-Act[363] and the legalised state criminality of the apartheid regime (like deportation,

[358] Article II a.
[359] Article II c, d, e.
[360] Article II.
[361] Rome Statute, Article 7(1)j read with Article 7(2)h, see FN XX-XX below and accompanying text.
[362] Article 7(2)h.
[363] See S 1(ix) TRC-Act. The only exception may be certain minor forms of severe-ill treatment and abductions not amounting to enforced disappearance of persons. Abduction may only be a crime of apartheid if they are „followed by a refusal to acknowledge that deprivation of freedom or to give information

imprisonment and persecution), must be regarded as crimes against humanity, provided that they were systematically or widespread committed in the context and with the intend to maintain an institutionalised regime of systematic racial oppression.

Although it was already argued in 1985 that the Apartheid Convention with its over 80 signatories may be part of customary international law[364] not a single Western state acceded to it.[365] Therefore it is often contended that the provisions of the Apartheid Convention have not become part of international customary law.[366] While this may be argued in respect to the more extensive provisions covering systematic infringements of social rights, most of the core criminal acts included in the 1973 Apartheid Convention are a reflection of long-settled peremptory norms of international law. Widespread or systematic murder, torture, deportation or persecution of a racial group were already recognised as crime against humanity in the Nuremberg Charter. The Nuremberg Tribunal found that the creation of ghettos and discriminatory laws limiting the offices and professions to a racial group, placing restrictions on family life, or depriving a racial group of their citizenship are acts of persecution. Thus, even before the apartheid regime came to power, these acts were considered as crimes against humanity.

The ICC-Statute merely confines the definition of the crime against apartheid to universally accepted breaches of international law. According to the ICC-Statute only acts of a similar gravity as those recognised as crimes against humanity may be considered as a crime of apartheid. This limitation is helpful and in line with other norms of international criminal law. It is my contention, that the definition of the crime of apartheid, as entailed in the ICC-Statute, is declamatory of international customary law.

2. The Duty to Punish

The Apartheid Convention obliges state parties „to prosecute, bring to trial and punish" persons guilty of the crime of apartheid.[367] The principle of universal jurisdiction applies,

about the whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." (Article 7(2)i, ICC-Statute.)

[364] Roger S. Clark (1986): The crime against apartheid. In: Bassiouni, Cherif M. ed.: *International Criminal Law*, Vol. 1, 299 at 317.

[365] Christian Tomuschat (1996): Crimes against the Peace and Security of Mankind and the Recalcitrant Third State. In: Yoram Dinstein, & Mala Tabory eds.: *War Crimes in International Law*. The Hague: Matinus Nijhoff, 41 at 55-56.

[366] id.

[367] Article 4.

persons may be charged and tried by any national or international tribunal.[368] Although South Africa became never a member to the Apartheid Convention, ninety-nine states, including nearly all neighbouring countries[369] of South Africa are signatories of the Apartheid Convention. They are obliged by international conventional law to prosecute and punish those responsible for the crime of apartheid. This already indicates that South African amnesties for acts amounting to the crime of apartheid have no international validity.

South Africa's duty to prosecute and punish apartheid criminals is of customary nature. The core crimes entailed in the Apartheid Convention are beyond doubt internationally recognised as crimes against humanity. As a general rule of international law, these acts must be prosecuted and punished. [370]

3. Evidence of the Crime of Apartheid in South Africa

I have already shown above, that many apartheid laws must be regarded as acts of persecution; forced removals as „deportation or forcible transfer of population"[371], and banning and detention without trial as „imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law"[372]. Nearly all of these crimes were clearly committed „in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime" [373]. Similar evidence exists that murder and torture was systematically applied, widespread and mainly directed against people, who challenged racial discrimination and oppression. Security force members and state sponsored death squads killed and tortured systematically anti-apartheid activists. Most of these acts were committed with the intend to maintain racial oppression and therefore qualify as crimes of apartheid. [374]

It follows, that those who committed, ordered, planned and supervised the commission of the crime of apartheid, incur individual criminal responsibility. Their deeds were a threat to the fundamental norms and interests of the international community. Therefore they must be tried and punished, either by South Africa or by any other state.

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[368] Article 5, the Rome Statute reflects the first attempt to set up an international criminal tribunal, that has jurisdiction over the crime of apartheid.
[369] Only Botswana and Swaziland are not party to the Apartheid Convention.
[370] See as well Chapter VI A 2.
[371] See e.g. Article 7(1)d. ICC-Statute
[372] See e.g. Article 7(1)e. ICC-Statute.
[373] Article 7(2)h. ICC-Statute, see as well Article II (chapeau) Apartheid Convention.
[374] Convention against Apartheid, Article 3.

D. Conclusion

Several acts falling inside and outside of the mandate of the Truth and Reconciliation Commission must be regarded as crimes against humanity. Although not all acts of murder and torture amount to crimes against humanity, many do. South Africa is therefore obliged to prosecute and punish those individuals, who committed gross human rights violations, that were part of a systematic or widespread attack on civilian opponents of the regime. Evidence presented to the TRC indicates that the state action fall short of the crime of genocide. South Africa is nevertheless also obliged to try and prosecute the inherent criminality of the apartheid state. Legalised criminal conduct, infringing the fundamental norms of humankind, cannot be honoured by impunity. Deportation, imprisonment and persecution was committed on a massive scale and contrary to fundamental rules of international law. These acts formed part of a systematic and widespread attack on the opponents of the apartheid regime. Most of these crimes were committed in the context of an institutionalised regime of systematic oppression of one racial group over any other racial group or groups and committed with the intention of maintaining that regime. Thus, they match as well the factual finding of the crime of apartheid. Every state, including South Africa, has the duty to try and prosecute these crimes. Only by prosecuting and punishing suspected perpetrators of legalised state criminality, the inherent criminality of the apartheid system will be exposed.

VII. The Compatibility of the Amnesty Process with International Law

My analysis may lead to the assumption that the TRC-Act and its amnesty procedures are generally incompatible with international law. A fair assessment should, however, take into account that states have two duties of similar importance. They are not only compelled to punish gross human rights violations, they are obliged to investigate them as well. In certain circumstances a state policy based on punishment may fail to unearth the truth about past human rights violations. As a consequence the state may then infringe its duty to investigate gross human rights violations.

Further, the decision practice of the Amnesty Committee of the TRC should be taken into account. While it is impossible to draw final conclusions in this regard – most amnesty applications involving gross human rights violations are still to be heard – some preliminary comments are appropriate.

Finally, international law does not oblige states to embark on criminal prosecution at all costs. Human rights law cannot have an interest in threatening the survival of young democracies by imposing duties on states that may lead to civil war. Penal sanction is not an aim of its own end. Penalties shall prevent, not encourage human rights violations. A state may, however, only refrain temporarily from its international obligations in states of necessity. While minor offences may be indemnified international law interdicts that those responsible for grave breaches of the Geneva Conventions and crimes against humanity are subject to impunity. Such severe deeds may never be honoured with a general amnesty, especially if their perpetrators have never been tried and punished. The chapter concludes with some recommendations for future truth commission based amnesty processes.

A. The Duty to Investigate

Before analysing the compliance of the South African amnesty procedures with the duty to punish, some few remarks on their compatibility with the duty to investigate gross human rights violations. This is appropriate as truth commissions may under certain circumstances be better equipped to uncover the truth about past atrocities than ordinary criminal trials.

1. The Provisions of the TRC-Act

It flows from logical reasoning that the duty to prosecute and punish entails also an obligation of states to investigate past human rights violations. The UN Principles against

Impunity stress this when they speak about the inalienable right of victims to truth.[375] According to the TRC-Act perpetrators of gross human rights violations may only be granted amnesty if they have made a full disclosure about their crime. Contrary to ordinary criminal trials the chance to avert criminal punishment is bigger when the amnesty applicant is prepared to give a detailed self-incriminating evidence about his past deed. The promise of amnesty in exchange for truth speeds up the investigation of past human rights violations, especially in situations where thousands of unsolved human rights violations have to be investigated. The South African Truth Commission is also charged to establish the historical background, context, and the consequences of the human rights violations for victims, questions which are usually not investigated in criminal trials, but are important to prevent further human rights abuses and raise public human rights awareness.

Although most amnesty applications in South Africa came from perpetrators that were already sentenced and jailed, the possible benefit of amnesty has encouraged several prisoners to give a more detailed account of their deeds. The amnesty provisions encouraged also perpetrators who were never charged or sentenced to come forward. While it must be noted that many perpetrators only made amnesty applications, when they felt the pressure of investigators on their heels, the Commission could successfully establish the truth about several unsolved gross human rights violations. Truth commission based amnesty procedures may only be successful in solving past human rights violations if they are accompanied by the real threat of criminal prosecutions. On the other hand the South African Truth Commission does not preclude any investigation of past human rights abuses by the judicial system. If amnesty is refused the applicant may face ordinary criminal proceedings through which unsolved human rights violations can be investigated.

Ordinary criminal investigations without the promise of amnesty might however hamper the establishment of the truth, especially when insufficient evidence about past criminal acts exists. One may also question, whether the new government should have entrusted in good faith the judicial system with the sole responsibility of unearthing past injustices. During the apartheid past the South African judicial system was symptomatic for its failure to investigate and prosecute human rights violations. It is difficult to imagine how gross human rights violations would have been prosecuted effectively by the same prosecutors and judges, who failed to ensure the protection of human rights in the past. The attitude of the South African judiciary towards the Truth Commission gives rise to the apprehension, that most judges do

[375] Principle 1 of the UN Principles against Impunity, Fn. 226.

not have the personal strength to sit at trial over their own human rights ignorant interpretation of South African law. The unsuccessful prosecution of former Defence Minister Magnus Malan and the failure of the German judiciary to bring Nazi-criminals to justice are examples par excellence. The South African judicial system, already overburdened with high rates of ordinary criminality would also have lacked the capacity to do the investigative work of the Truth Commission. Establishing a Truth and Reconciliation Commission was probably the best answer to the problems the transitional society of South Africa faced. The UN Principles against Impunity explicitly recommend in such circumstances commissions of inquiry, similar to those of the South African Truth Commission: Their Principle 4 reads:

> Failing judicial institutions, priority should initially be given to establishing extrajudicial commissions of inquiry and ensuring the preservation of, and access to, the archives concerned.

It is also speculative, whether selective criminal prosecutions would have attracted similar media attention in South Africa. Media reporting is very essential for the general prevention of criminal activity. The preventive function of criminal law would be very limited should perpetrators be sentenced secretly without public attention.

Praising the success of the Truth Commissions investigations, one should not forget, that many gross human rights violations remain unsolved. This is apparent as only 1.666 of 7.127 amnesty applications involved gross human rights violations.[376] This stands in stark contrast to the 36.935 gross human rights violations recorded by the Human rights Committee of the Truth Commission.[377] Time and staff constraints led to a situation in which the Investigative Unit of the TRC was only able to investigate „window cases“, where additional information was received through amnesty applications or other sources. After 1997 the Investigative Unit had to concentrate its work on the mere corroboration of the evidence provided in victim's statements.[378] For most victims, the promise of truth did not materialise. They may be acknowledged as victims, but the identity of their killers and torturers remains hidden.

South Africa's duty to investigate gross human rights violations is of continuing character. The criminal justice system must take the process forward, where the truth commission stopped. Considerations to impose a statute of limitation on the prosecution of gross violations of human rights would severely infringe the rights of victims. They are also

[376] See TRC-Report I, 276. The figure of 1.666 may be calculated by adding all granted amnesties, all refused amnesties where the applicant denied guilt or made an incomplete disclosure and the outstanding hearable matters.
[377] TRC-Report III, 3.

contrary to international law. International crimes may never be subject to any statute of limitations[379], and the prosecution of other human rights violations may only be stopped, after the ordinary period of limitation for the relevant crimes has expired. According to Principle 27 of the UN Principles against Impunity, „Prescription - of prosecution or penalty - in criminal cases shall not run while no effective remedies are in existence." As non-investigation of human rights violations was an official practice during the apartheid regime, the period of limitation may only be applied beginning from the 10th of May 1994, when the first democratic government of South Africa took power.[380] The TRC's recommendation to consider a time limit for the prosecution of gross human rights violations[381] is only compatible with international law, if the UN Principles against Impunity are taken into account.

Besides this there are severe shortcomings of principal nature in the mandate of the truth commission. The commission was not authorised to investigate the legalised apartheid criminality, although these acts are regarded as crimes against humanity by international law. The TRC did its best to mention these apartheid injustices in its report, but it was not entitled to investigate legalised state criminality thoroughly. South Africa clearly disregards international criminal law by not investigating forced removals, detention without trial, and acts of persecution. Crimes against humanity are indeed treated, as if they were not criminal. This failure is appealing as apartheid laws and their enforcement are still regarded by many South Africans as 'political mistakes' and not as criminal acts. The investigation of the legalised apartheid criminality is therefore essential. While one should acknowledge that there are other institutions, like the National Land Commission, that also deal with the legacy of the apartheid criminality, they all have one important shortcoming: They fail to establish individual criminal responsibility. The mere branding of the apartheid system as a crime of humanity is not enough. A system does not commit any crime, only persons who work in it commit crimes. South Africa's duty to investigate gross human rights violations will only be fulfilled if individual criminal responsibility is also established for legalised apartheid atrocities.

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[378] TRC-Report I, 335.
[379] Convention on Non-Applicability of Statutory Limitations to War Crimes, UN GA Res. 2391(XXIII) 1968; Article 29 of the ICC-Statute and Principle 27 of the UN Principles against Impunity.
[380] Acts of the liberation movement were however prosecuted during apartheid regime. Therefore the period of limitation of human rights violations not amounting to international crimes should in these cases begin with the time of the completion of the illegal act.
[381] TRC-Report V, 309, para. 14.

2. The Decision Practice of the Amnesty Committee

The decision practice of the Amnesty Committee does generally comply with the duty to investigate past human rights violations. If amnesty is granted, the name of the perpetrator goes on public record. Furthermore, transcripts of the amnesty hearings are accessible to everybody. Moreover, amnesty has been refused, when perpetrators made no full disclosure. As the Amnesty Committee predominately relied on the written amnesty applications and statements made to it during public amnesty hearings, investigations into the relevant cases were limited. Given the time and staff limits under which the Amnesty Committee had to perform, this shortcoming could not be averted. In general the decision practice of the Amnesty Committee did satisfy the obligation imposed by international law to investigate gross human rights violations. The only exception to this was the controversial decision to grant amnesty to 137 ANC members. In this case ANC members applied for amnesty for 'any criminal act that they might have committed between 1960 and 1993 in their capacity as ANC official'. It is obvious that such applications lack full disclosure. It is to the merit of the Truth Commission that it successfully took rescue to the High Court of Cape Town against the decision of its own Amnesty Committee.

B. The Duty to Punish

1. The Provisions of the TRC-Act

Debating the obligation to punish under international law, two different categories of cases before the Truth Commission must be considered separately: The first group involves all applicants that applied from prison. They have already been sentenced and punished by an ordinary court for the respective crime, before they may be granted amnesty.[382] The other category encompasses all cases in which amnesty is granted to a perpetrator who was never punished for the relevant act.

International law does not generally interdict the granting of amnesty. No norm of international law prohibits, for example, an early release from prison. International law only forbids impunity. The definition provided by Mr. Joinet, the UN Special Rapporteur on the question of impunity, is helpful in this regard:

> „Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or

[382] The TRC-Act failed to accommodate people who were wrongly sentenced for acts that they never committed, or for political offences that may not be regarded as offences under international law.

> disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."[383]

International law would only be infringed if amnesty would automatically passed after a perpetrator is convicted and sentenced. The meaning of appropriate punishment entails that at least a part of the sentence is served.[384] As far as applications from prison are concerned, the South African amnesty process does comply fully with the duty to punish gross human rights violations.

This cannot be maintained in respect to the second category of perpetrators. If the Amnesty Committee decides to grant amnesty to a perpetrator who was never sentenced and punished for a gross human rights violation, the South African state infringes the duty to punish. Although one may argue that the public shaming of a perpetrator in front of an Amnesty Committee is a form of punishment in itself, such an interpretation is a too far fetched. Nobody has seriously argued that an accused person in an criminal trial is already subject to punishment, before being convicted and sentenced. Public court proceedings are not regarded as punishment. Article 20 (10) of the TRC-Act prevents administrative or other non-criminal sanctions if the Amnesty Committee does not decide otherwise. These provisions effectively grant some perpetrators a status of impunity. This is clearly in violation of international law.

South Africa is compelled by conventional and customary law to prosecute and punish perpetrators of severe violations of humanitarian law in international and internal armed conflict. International custom obliges South Africa also to prosecute and punish extra-judicial killings, enforces disappearances and acts of torture. The Amnesty Committee may, however, explicitly grant amnesty for these acts. The duty to punish is also infringed in respect to crimes against humanity. Killings and torture were often committed in a systematic manner on behalf of the apartheid regime and constitute therefore in many cases crimes against humanity.

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[383] Definition of impunity in: UN Subcommission on Prevention of Discrimination and Protection of Minorities (1997): Question of impunity of human rights (civil and political rights): revised final report prepared by Mr. L. Joinet pursuant to Sub-Commission decision 1996/119. UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

[384] In the case of international crimes, a prison sentence seems to be the appropriate state reaction. See Article 77 of the ICC-Statute, which provides only for financial penalties in addition to prison sentences. According to Article 105 (2) and 110(3) ICC-Statute an reduction of sentence shall only be considered by the ICC or after two thirds of the sentence have been served. These are quite harsh criteria and I would personally rather plead for an earlier option of release, especially if the imprisoned person, contributes to the solving of his or other human rights violations during an amnesty hearing.

The South African amnesty process also fails to respond to obligations arising out of the legalised apartheid injustices. One may of course argue, that acts of persecution, deportation and imprisonment against fundamental norms of international law are not indemnified by the TRC. Therefore the TRC-Act as it is does not infringe the obligation to punish these forms of state criminality. This does however not change the finding, that the South African judicial system as a whole disregards these crimes against humanity.

Strictly speaking, impunity for human rights violations - understood as a complete absence of criminal and non-criminal sanctions - is only compatible with international law, if

- the perpetrator has already disclosed his involvement in a gross human rights violation, during the rule of the apartheid government;[385] and
- the act did not amount to torture, extra-judicial killing, an enforced disappearance, a severe breach of humanitarian law, or a crime against humanity. (Article 6(5) of Additional Protocol II actually encourages to grant amnesty for these acts);

provided that the crime is fully investigated and the victims of the said crime are duly compensated.

I will however argue below, that a state may abstain in exceptional circumstances from *criminal* punishment for acts that do not amount to crimes against humanity. This is given, if the pursuit of justice would severely hamper the obligation to investigate gross human rights violations or lead to a state of necessity.

The TRC-Act is per se not incompatible with international law. Section 20(3)c of the TRC -Act gives the Amnesty Committee of the Truth Commission scope to consider „the *legal* and factual *nature* of the act, omission or offence including the *gravity* of the act, omission or offence;“[386] and Section 20(3)d provides that the Amnesty Committee may have regard whether the act was directed against a private individual - a civilian. Section 20(3)f states that the proportionality between the crime and the objective pursued should be taken into account. These provisions would have allowed to include international law considerations into the decision practice of the Amnesty Committee, for example, by excluding crimes against humanity from the scope of the amnesty process.

[385] See Principle 30 of the UN Principles against Impunity.
[386] Emphasis by author.

2. The Decision Practice of the Amnesty Committee

In July 1998 the Amnesty Committee had still to decide on more than 1239 applications involving gross human rights violations. A detailed review and critique of the decision practice is therefore not possible. However, several cases involving gross human rights violations have already been decided, and 47 of these decisions were published at the time of writing. An detailed analysis of these decisions reveals that 16 applications were completely refused, 23 granted, and the remaining eight applications were only granted in part.

A closer look at the decisions shows that the Amnesty Committee did not always consider the six criteria mentioned in Section 20(3) of the TRC-Act. While it may be unnecessary to discuss these criteria, when the prerequisite of full disclosure is not met, reference to them is also limited in cases where amnesty was approved. One is left with the impression, that the Amnesty Committee mainly discussed whether the applicant was acting on behalf of a political organisation, furthering a political objective, or made a full disclosure.[387] The question whether the act was in proportion with the aim pursued, was only raised in six of the 47 decisions.[388] The legal and factual nature of the act and its gravity - Section S 20(3)c, that would allow to include international law considerations into the decision practice of the Amnesty Committee - has never been raised as a reason for refusing or granting amnesty.

While the Human Rights Violation Committee relied on international humanitarian and human rights law in its consideration, whether a person should be regarded as a victim of a

[387] In 15 cases an act was not associated with a political objective, four applications were turned down because the applicants did not act on behalf of a (publicly known) political organisation *see* CORNELIUS JOHANNES VAN WYK (Application No. 1050/96), JEAN PRIEUR DU PLESSIS (Application No. 1051/96), JOHAN VAN EYK and HENDRIK GERBER, and in five of the decisions the Committee came to the conclusion that the applicant did not make a full disclosure, *see* MPAYIPHELI WILLIAM FALTEIN (Application No. 0120/96), THOMSANQA PATRICK MKHONTWANA (Application No. 1290/96), DLANJIWA GCINISIZWE (Application No. 1289/96), HENRY MKHEYI KHANYILE (Application No. 288/96), GERHARDUS JOHANNES NIEUWOUDT (AM 3920/96).

[388] see CORNELIUS JOHANNES VAN WYK (Application No. 1050/96) - the murder of three civilian victims in a private house is out of proportion for the aim of stealing firearms; JUSTICE SEKGOPA - the killing of four white civilians driving in a car is out of proportion to the aim of sending a message to abolish apartheid; NTSIKELELO DON JOHNSON (Application No. 0037/96) - the attempted murder of a former town councillor after she had fled her town, rendering her incapable to run the affairs of the town council, was out of proportion with the political aim of the liberation movement to make town councillors resign and townships ungovernable, JOHAN VAN EYK and HENDRIK GERBER - the torture and subsequently murder of a suspected security guard by his colleagues is out of proportion with the aim to recover funds allegedly stolen by the PAC; P. MAXAM (Application No. 1283/96) AND OTHERS - the killing of two civilians in order to steal firearms for the liberation struggle is out of proportion; HENDRIK JOHANNES SLIPPERS - the killing of a black man during his abduction from a „while town" is out of proportion with the political aim of keeping blacks out of a town after 21.00 h. See however the St James Massacre Case (GCINIKHAYA MAKOM AND OTHRES) were the Amnesty Committee hold the view that the killing of 11 members of a church congregation in a white residential area was not out of proportion to the aim to return the land to the African people.

gross human rights violation or not, international law considerations were completely absent from the decisions practice of the Amnesty Committee.

As nearly all cases decided to date, involved people who applied from prison, there is no problem in respect of compatibility with international law. In the case involving the Murder of Griffiths Mxenge - amnesty was however granted to Dirk Coetzee (Application No. 0063/96). Coetzee never served any prison sentence for this crime, although this crime must be regarded as crime against humanity, as it was committed by a police unit set up by the state with the intent to murder opponents. One may only support the decision on the grounds, that he was one of the few individuals who risked to disclose the truth about apartheid hit-squads before the end of apartheid rule.

In the case of the St James Church Massacre - Makom (AM 0164/96) and others - the Amnesty Committee overstretched the common understanding of proportionality between the act and purpose. The Committee followed as subjective approach towards proportionality by asking only, whether the act was in proportion to the aims and ideology of APLA. The problem with such an approach is - that given a specific fitting ideology - it may practically render every act proportional. The massacre of eleven civilians in a church must however be regarded as a grave breach of humanitarian law and of Additional Protocol I, covering wars of national liberation. The amnesty decision resulted for two of the three applicants in impunity. Only one of the applicants had already been tried and sentenced for the atrocity. Although the Amnesty Committee might have taken the age of the applicants into account - one of the applicants was only 17 years old[389] at the time of the act - the decision does not completely satisfy international law requirements.

The Amnesty Committee of the TRC has the power to refuse amnesty in those cases, were the international law obligations disallow amnesty. Further, it can recommended according to Section 20(10) of the TRC-Act, certain non-criminal sanctions against perpetrators of gross human rights violations, to ensure the protection of human rights[390] and prevent thereby impunity. It seems, however, that the Amnesty Committee of the TRC has *in practice* never considered international law obstacles. It has also failed to apply the Norgaard-principles in a coherent manner. Judging from the decisions published so far, it seems that the Amnesty Committee has refused amnesty mainly only on the grounds, that the crime was not

[389] According to Article 26 of the ICC-Statute, not person under 18 years of age, may be tried for war crimes by an the International Criminal Court.
[390] See Chapter II, A.

politically motivated or that the applicant did not make a full disclosure. The question of proportionality of the act and the aim were not been satisfactory dealt with. The decision practice of the Amnesty Committee demonstrates a severe shortcoming of the Constitutional Court judgement. The Court could have obliged the Amnesty Committee to consider relevant international law in its decision practice. Such failure does not free the Amnesty Committee from the responsibility to include international law considerations into their own interpretation of the amnesty provisions of the TRC-Act.

C. Derogation from International Obligations in States of Necessity

It is often claimed that South Africa was confronted with the alternative of granting amnesty or facing a civil war. It would be contradictory to the aim of international human rights law to oblige states to punish perpetrators at all costs. The duty to prosecute wants to safeguard human rights. International law cannot intent to force states to actions that would fundamentally threaten their integrity, and the enjoyment of democracy and human rights of its citizens. As Kader Asmal has eloquently argued, „International law - and this is its strength - is built upon the practice of states and not upon narrow legalisms. Large parts of it express the collective norms of humanity, norms that do not require - for such would be contradictory - an indifference to human consequences. No rule of international law requires the pursuit of perpetrators regardless of the risk of reducing the body politic to ashes.“[391]

This argument has its merits, but one may question whether it is valid for South Africa after the end of apartheid rule in 1994. While the inclusion of the amnesty provisions in the 1993 Interim Constitution may be justified by such considerations, one may doubt, whether South Africa was still facing an immanent threat of turmoil in 1995, when the National Unity and Reconciliation Act was passed. The argument, that the country is in a state of necessity, is definitely invalid in respect to calls for general amnesty in 1998. South Africa is not anymore at the brink of civil war. Resort to violence would be encouraged and the democracy seriously undermined if the government listens continuously to individuals who threaten the state with armed conflict - often only because they fear the rule of law. Nor does the prosecution of a limited group of individuals responsible for the most severe human rights violations, necessarily lead to a breakdown of public order. In contrary, prosecutions could rather strengthen the human rights awareness of the public, assist the purging of the public sector from criminal elements, and increase the trust in the judicial system. Reconciliation and political stability must

[391] Kader Asmal et al. (1996): Reconciliation through Truth, at 20.

be based on the rule of law. A society reconstructed on the fundament of impunity is built on shaky ground.

This view is supported by the Draft Articles on State Responsibility of the International Law Commission.[392] Article 33 recognises that the state of necessity may only be invoked in exceptional circumstances. It provides:

> 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> (a) the act was the *only means* of safeguarding an essential interest of the State against a *grave and imminent peril*; [...]
>
> 2. In any case, a state of necessity may not be invoked by a state as a ground precluding wrongfulness:
>
> (a) if the international obligation with which the act of State is not in conformity arises out of a *peremptory norm of general international law*; or
>
> (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking a state of necessity with respect to that obligation; or
>
> (c) if the State in question has *contributed to the occurrence of the state of necessity*.[393]

Firstly, one may argue that a state who systematically tortured and killed contributed by these actions to the state of necessity. I do not follow this argumentation, as it would render transitional regimes unable, to derogate from any international obligations. My reading of Article 33 is that a country facing internal instability and the threat of civil war, like South Africa in 1993, may be justified to delay the prosecution of perpetrators of human rights violations. A state may also indemnify minor offences, free serving political prisoners according to Article 6(5) of Additional Protocol II or reduce sentences for crimes related to the past political conflict. These measures are often necessary to stabilise the internal situation or facilitate the integration of former opponents into society. A state of necessity may however not preclude the state from the duty to investigate human rights violations and compensate their victims. There is usually no need to abstain from these activities in order to prevent an imminent peril. This is also confirmed by Article 35 of the Draft Articles on State Responsibility, which states: „Preclusion of the wrongfulness of an act of State [...] does not prejudge any question that may arise in regard to compensation for damage caused by the act." Furthermore, a state of necessity may never be invoked to preclude responsibilities arising out

[392] 37 ILM (1998) 440.

of peremptory norms of international law. The right to life and personal integrity are such a peremptory norms. Therefore states can never completely absolve themselves from their duties arising out of their protection. Especially, no state may lawfully derogate from the duty to try and punish the most heinous crimes, like genocide, war crimes and crimes against humanity.[394]

D. Conclusions and Recommendations

A state may temporarily derogate from its obligation to punish gross human rights in states of necessity. Amnesty leading to impunity - a complete absence of criminal and non-criminal sanction - is however incompatible with international law. Especially for international crimes, criminal punishment is the only option. In order to fulfil the duty to investigate past human rights abuses a state should offer incentives for perpetrators, to disclose the truth. These incentives may however never amount to complete impunity, at least some non-criminal sanctions must be applied. Truth bodies or courts should, for example, be able to reduce sentences or to transform them into suspended sentences. Such a graduated approach - amnesty for less severe political crimes, reduction of punishment for international crimes - would serve three important objectives: the disclosure of the truth, the duty to punish, and the reintegration of perpetrators. The reduction of sentences is compatible with the duty to prosecute and punish under international law, sends a clear message to the society that gross human rights violations remain subject to criminal law, and still gives the perpetrators an incentive to come forward and disclose the truth - even in cases, where the gravity of his or her act may disqualify him or her for a fully-fledged amnesty.

The mandate of a truth commission should include all severe human rights violations, including crimes against humanity. Individual criminal responsibility must also be established for criminal acts under international law, that were legalised under national law.

Future amnesty bodies should not only consider the legal nature of the relevant crime under national law. They should also assess the legal nature of the relevant crime under international law, before reducing a sentence or granting amnesty.

It must be stressed that any general amnesty for unsolved apartheid crimes, constituting gross human rights violations or international crimes is contrary to international and South African constitutional law. A derogation from the duty to punish is only justified in states of necessity. South Africa is not anymore facing a state of necessity. Punishment may only be set

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[393] Article 33 Draft Articles on State Responsibility (emphasis by the author).
[394] See the principle of complementarity contained in Article 17 of the ICC-Statute, Chapter VII, A.

aside or reduced, in order to establish the full truth about the past human rights violation for which amnesty is sought. A blanket amnesty for unpunished apartheid crimes does not comply with both requirements. As the decisions practice of the Amnesty Committee of the TRC already transgresses already the scope offered to transitional societies by international law, a general amnesty will definitely be incompatible with international law.

Time limits for the prosecution of acts that constitute international crimes are incompatible with international law. The prosecution of those human rights violations, not amounting to severe breaches of humanitarian law or crimes against humanity, may only be stopped after the ordinary period of limitation has ended. As far as acts form South African state officials are concerned the period of limitation should begin at the 10th of May 1994. Only from this date on the South African judicial system has made sincere efforts to investigate and prosecute human rights violations of its own security forces.

The South African amnesty decisions have no international validity. Countries who are signatories to the Geneva Conventions the Apartheid Convention or the Convention against Torture are in fact compelled by treaty law to try or extradite suspected perpetrators of severe violations of human rights. International custom obliges further all states to punish crimes against humanity. As the Pinochet Judgement has recently affirmed, no one, not even a former head of state, is beyond the rule of international criminal law.

It may sound strange - but on the turn of the new millennium - the best protection for apartheid criminals is to be punished by their national courts. Perpetrators could be sentenced to shorter prison terms and afterwards fully reintegrated into society, if they co-operate with the courts by making a full disclosure. As nobody may be sentenced for the same crime twice - neither under national, nor under international law - this would be the only option to shield apartheid criminals effectively from the possibility to face a trial in a foreign country.

The South African Truth and Reconciliation Commission remains the most advanced truth commission to date, irrespective of all its shortcomings. It has done a important contribution to the South African nation, that will be acknowledged by future generations in South Africa and abroad. The courts of the country must now ensure that South Africa does not become a save haven for apartheid criminals.

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