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Minor dissertation in International Criminal Law  
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**A minor dissertation examining the  
“Limits of National Amnesty Legislation under  
International Criminal Law”**

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LLM 2000

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## 1. Introduction

International law traditionally refers to the actions of sovereign states as subjects of international law and thus provides no punishment for individuals.<sup>1</sup> It has however been established as a general rule since the Nuremberg trials<sup>2</sup> after World War II that international law in certain cases also imposes duties and liabilities upon individuals as well as upon states.<sup>3</sup> The Court emphasised that violations of international law can be committed by men and not by abstract entities. Therefore, the punishment of individuals coexists as a sanction next to the classic international liability for states for their wrongful acts. (torts and damages). The crimes individuals can be held liable for are the ones now held to be of international jurisdiction.

The categories of offences were established by the Nuremberg trials, stating that war crimes, crimes against peace and crimes against humanity should be under international jurisdiction. There is, however no straightforward way in international law to deal with these issues.<sup>4</sup> Historically, the international community taken as a whole has relied upon four alternative options for responding to such crimes:<sup>5</sup>

(1) granting de jure or de facto amnesty, (2) creating a truth commission, (3) assisting in national investigations or prosecutions and (4) creating an international criminal court to try the offenders. Among other factors, it very much depends on the nature of the conflict and whether there is a victory or defeat, as in the case of Germany, or a negotiated settlement, as it happened in South Africa or in some Latin American countries.<sup>6</sup> Every society has to come up with their answer about whether the perpetrators should be punished or whether an amnesty is called for in the interest of reconciliation and internal stability? As the rules of international criminal law are evolving, it seems clear that there are certain crimes that cannot go unpunished.

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<sup>1</sup> The Nuremberg judgement supra, p.220

<sup>2</sup> Established by the four powers: The United States, Russia, The UK and France

<sup>3</sup> The Nuremberg judgement

<sup>4</sup> Rwelamira and Werle, *Confronting past injustices*, see foreword by Schillinger, p.v

<sup>5</sup> I. Brownlie, *Principles of Public International Law*, p 566

The goal for this dissertation is to examine the amnesty legislation in this regard and the effects on this under international criminal law. The problem that has concerned the international community is the incompatibility of amnesties with a state's international obligations.<sup>7</sup> There are state obligations arising under both public international law and international criminal law. The main focus will be on the questions arising from this under international criminal law, as these problems are of a more significant nature than those arising under public international law, because of the lack of an enforcement mechanism in international criminal law.

This dissertation is intending to investigate the consequences of potentially far-reaching national amnesty legislation on the future development of international criminal law in general and the International Criminal Court in particular.

There is a need to clarify the concept of amnesty, and I will try to give a general presentation of it by using illustrative examples of amnesty granted internationally. I will try to go deeply into the work of the Committee of the South African Truth and Reconciliation Commission and the amnesty granting process, as this is the most up to date example in the world. Further, I will examine the compatibility of national amnesty legislation with Public International Law and the different state obligations arising thereof. This will be an investigation of treaty law, international customary law and *Ius Cogens*.

My intention is thereafter to examine the impact of amnesty legislation under international criminal law by raising the question whether, and if, to what extent the International Criminal Tribunals or Courts are bound by amnesty granted under national jurisdiction. Using examples of the two present ad-hoc criminal tribunals and various examples of concurring international criminal jurisdictions I will make an attempt to analyse the consequences of this for the future permanent international criminal court.

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<sup>6</sup> Rwelamira and Werle, see foreword by Schillinger, p v

<sup>7</sup> Ibid p xix

## 2. The Concept of amnesty

When dealing with the general presentation of this subject, two preparatory steps are necessary to be taken. The first step concerns a terminological problem, as there is no set definition of the term “amnesty”.<sup>8</sup> Thus, as a first step it will be necessary to define what “amnesty” means for the purpose of this address. The second preliminary step is to clarify the conception of amnesty as a legal term. The usual conception in many European countries is that amnesty is more of an act of mercy than one of law. This act becomes something the state is allowed to enact “before” or “instead of” the law.<sup>9</sup> The question of legal limitations of amnesty and the reason for setting these must be explained before the investigation of the limits itself.

## 3. Definition of amnesty

When defining this term some arbitrariness is inevitable and I will try to curb the degree of arbitrariness by using the term in a wide sense. The word amnesty comes from the Greek word *amnestia* or *amnesis* which means to forgive, to lose memory; and it has been defined as the ‘act of the legislative power that orders official forgiveness of one or many categories of crimes, thus ending proceedings already initiated or that are to be initiated, or verdicts that have already been pronounced’.<sup>10</sup>

A definition of the term is naming four main characteristics:<sup>11</sup>

1. An amnesty grants reduction of, or a complete exemption from, punishment.
2. Amnesty involves an undefined number of cases as opposed to an individual pardon.

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<sup>8</sup> Rwelamira and Werle, p.33

<sup>9</sup> Ibid

<sup>10</sup> El Salvador: Supreme Court of Justice Decision on the Amnesty Law – proceeding no.10-93(May 20 1993) found in Kritz; Transitional Justice Vol III,p.549

<sup>11</sup> Cf Marxen in “Rechliche Grenzen der amnestie”, in Rwelamira and Werle, p.34

3. These cases can be in any stage of a criminal hearing. Amnesty may be used to avoid prosecution or to quash a pending case. It may also be used to prevent the execution of a judgement, which has already been passed.

4. The exemption from punishment created by amnesty is of a lesser legal quality. The amnesty does not cancel out the criminal offence. Indeed, it plays a role specifically with regard to acts of a criminal nature. It only waives the practical consequences of the punishable offence.

With regard to the second preliminary step it has been claimed that amnesty is no longer a pure act of mercy. Amnesty has developed into a practical political device in modern societies. It has become an instrument to support law reforms, to save money in penal institutions and to save politically-minded persons from punishment. Purely political instruments, like politics itself, have to be subject to the rule of law.<sup>12</sup>

When making provisions for amnesty, distinctions are being made between political offences or offences associated with political offences on the one hand and ordinary offences on the other. No one can claim to have a precise definition of a political offence and it is probable that no such definition exists. This must be the major stumbling block in defining amnesty.<sup>13</sup> Of course different tests will normally be taken into account by different legal systems in drawing the distinction between political offences and ordinary offences.

The legal status of amnesty has been the subject of a vehement and sometimes ferocious debate.<sup>14</sup> Some would argue that the granting of amnesty would hinder a peaceful reconciliation as the victim's rights to a legal remedy are forgotten. At the same time, some organisations argue that amnesty cannot be granted in respect of certain crimes.

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<sup>12</sup> Rwelamira and Werle, p.35

<sup>13</sup> Rwelamira and Werle, p.15

<sup>14</sup> Rwelamira and Werle, p.8

The latter argument has been that prosecution and punishment will not endanger the transition and that it will enhance the respect for democratic rights in the new democratic culture.<sup>15</sup> Other arguments have been that failure to prosecute can undermine the very edifice of the law “sapping the power to deter proscribed conduct with serious consequences particularly where the crimes concerned are of grievous nature”<sup>16</sup>. The basic question confronting all transitional governments is, therefore, whether to undertake a prosecution of the former leaders or to leave the past behind by means of a blanket amnesty.<sup>17</sup> Often the best approach is to grant a so-called mutual amnesty where both the sins of the former government and the opponents are forgiven. The difference between an unconditional amnesty and a conditional amnesty is that the conditional amnesty often has the format of a truth commission whereas the major task is to investigate the fates of the individuals and to make a full disclosure of all human rights abuses that has taken place.<sup>18</sup>

#### **4. The scope of amnesty**

There has been considerable debate about what the scope of amnesty should be. Who should benefit from amnesty? What acts and offences are legitimate targets for amnesty? Should amnesty cover only criminal acts or should it cover civil liability as well. As mentioned above, in the making of amnesty provisions a distinction has been made between political offences or offences associated with political objectives on the one hand and ordinary offences on the other.<sup>19</sup>

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<sup>15</sup> Rwelamira and Werle, p.8

<sup>16</sup> “The Folktales of Justice: Tales of jurisdiction” 14 Cap.U.L. Rev.179, in *Confronting past injustices*, p.9

<sup>17</sup> N. Kritz, in N Kritz (ed), *Transitional Justice. How emerging democracies reckon with former regimes*, Vol 1: General Considerations, 1995, XIX-XXX (page 4)

<sup>18</sup> Luc Huyse, *Justice after Transition: on the choices successor elites make in dealing with the past*, p.338.

The factors that normally will be taken into account are the nature of the offences, the circumstances under which the act was performed, the objectives to be achieved and sometimes the relationship between the act and the objectives pursued. I will return to the questions arising from this matter later on in my thesis.

## **5. Illustrative examples of amnesty granted internationally**

Even though the amnesty process in South Africa will be greatly emphasised in my dissertation, it is worth noticing that the dilemma of how to deal with crimes committed by the officials and agents of a prior regime is not unique for South Africa. It is a general principle in international law that legal obligations can be put on states that are normally left to their discretion. Since 1945 a variety of methods have been employed. Prosecution by international courts was chosen for the leaders of the defeated Nazi and Japanese regimes. Prosecution before domestic courts is currently in progress in Rwanda and international tribunals have been established to try those responsible for international crimes in the former Yugoslavia and in Rwanda. In Argentina, Chile and El Salvador amnesty accompanied by truth and reconciliation commissions replaced prosecution.

### **5.1 Argentina**

Human rights abuses were committed in Argentina during the period of military government from 1976 to 1983. The opposition became more vocal within Argentina, demanding information on the whereabouts and fates of their missing relatives. Ultimately, the disgrace of military defeat in a 1982 war with Great Britain over the disputed Malvinas – Falklands Islands forced the military to prepare for a return to civilian rule.<sup>20</sup>

The transitional military junta prepared the way for popular elections in October 1983 and, in order to ensure that the military officers would not be prosecuted, the government took three steps to avoid accountability. One of them was the “self-amnesty” law, granting immunity from prosecution for every member of the armed

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<sup>19</sup> Rwelamira and Werle, p. 15

<sup>20</sup> Kritz: Transitional Justice. Vol. II, p.323

forces. The democratically elected president, Raul Alfonsin, was inaugurated in December 1983 and, within his first week in office, he appointed a National Commission on Disappeared Persons. The Commission's final report, '*Nunca Mas*', (never again), was widely read and provided a powerful documentation of the systematic attack by the military regime.<sup>21</sup> The "Law of National Pacification", the amnesty law which the government granted themselves was quickly repealed. The law was declared null in regard of the principle of '*nemini dolus suus prodesse debet*' – no one can benefit from their own bad faith. The new government undertook prosecution of members of the first three juntas of the dictatorship for violations of human rights and mishandling of the Maldivas war.

The government did, however, place a limit on the trials with the 1986 "Full Stop Law", which established a two month deadline for the filling of all criminal complaints. This was due to the armed forces exerting heavy pressure on the government. In 1987, Alfonsin proposed the "Due Obedience Law". This law created a presumption that all but the most senior military officers had only committed abuses under orders from their superiors and thereby the law exonerated virtually all military personnel.<sup>22</sup>

The successor of Alfonsin, Carlos Menem, granted pardons to the military junta and to the convicted leaders of the junta in 1990. It was claimed that the "Due Obedience Law" was in fact an amnesty law. It was cited to the Supreme Courts precedent that granting indiscriminate pardons for atrocities and inhuman acts that had no connection to the *political motives* alleged by the perpetrator " borders with arbitrariness in the exercise of legislative powers".<sup>23</sup> The law was being upheld, but it was questioned whether the legality of an amnesty law for torture and other heinous crimes was in accordance with well-established legal and political arguments against the use of general amnesty for such crimes. There is no doubt that the crimes committed was of such a degree. The torture and disappearances were severe and it had been stated as recently as March 1995 that the disappeared people had been

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<sup>21</sup> Kritz: Transitional Justice. Vol. II, p. 324

<sup>22</sup> *ibid*

<sup>23</sup> Justice Petracchi in his analyses of the law

thrown naked into the ocean from an aeroplane.<sup>24</sup> It was stressed that the settled legal tradition recognises that the primary goal of an amnesty is to cover only political crimes or common crimes reasonably connected. It was claimed that it has always been understood that no political objectives may justify atrocious or aberrant crimes, and no amnesty may be applied to them.<sup>25</sup> It is obvious that the trials of the military junta members in 1985 did not comply fully with Argentina's international obligations to investigate human rights violations and guarantee the right to truth and justice for victims and their relatives. The "Due Obedience Law", along with the presidential pardons, denied the victims all possibility of obtaining legal reparation in Argentina.<sup>26</sup> I will return to the issue whether such amnesty laws are compatible with the "law of nations" – international law when I examine whether amnesty laws are compatible with public international law.

## **5.2 El Salvador**

Between 1980 and 1991, the Republic of El Salvador was engulfed in a war which plunged Salvadorian society into violence, left it with thousands of thousands of people dead and exposed it to appalling crimes, until the day – 16 January 1992 – when the parties reconciled, signed a Peace Agreement and 'brought back the light and the chance to re-emerge madness to hope'.<sup>27</sup> The United Nations "Commission on the truth for El Salvador" was created through the peace accords and its mandate was to investigate 'serious acts of violence' that occurred in the time of the war.<sup>28</sup>

The UN Report was published, including names of people responsible for human rights abuses. Within five days of the publication, a general amnesty was passed by the legislature. The Supreme Court later stated in the Justice Decision on the Amnesty Law that amnesty is 'an exceptional measure destined to procure in a given moment of a nation's life, social tranquillity and political appeasement, and that its application depends on the political branches of public power and not on the jurisdictional branch' – amnesty constitutes an eminently **political act**, to the degree it manifests

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<sup>24</sup> Argentina: The long Road to Truth,p.2

<sup>25</sup> Kritz: Transitional Justice. Vol. II,p.371

<sup>26</sup> Argentina: The long Road to Truth,p.2

<sup>27</sup> Excerpted from: "From Madness to hope: The 12-year war in El Salvador", Report of the Commission on the Truth for El Salvador.(United Nations Publication,S/25500,1993).

itself through a legislative act.<sup>29</sup> There is, therefore, probably no chance that the people responsible will be held accountable for their actions during the war. It is, however, not within the competence of the Supreme Court to decide whether amnesty is compatible with international law and that remains to be seen.

### **5.3 South Africa**

The South African Amnesty Process originates from a political compromise arrived at during the negotiations between the ANC and the National Party Government in 1993.<sup>30</sup> The option of prosecution was abandoned as the leaders of the Apartheid state were themselves part of the negotiated settlement. The imposition of an amnesty obligation led to a detailed legislation on the subject in the Postamble of the Interim Constitution ( Act 200 of 1993) In terms of this, the new government was bound to pass detailed legislation on the subject of amnesty.

The postscript, however, did not mention any details about the type of amnesty that was envisaged.<sup>31</sup> In compliance with the constitutional duty to pass an “amnesty law”, The Promotion of National Unity and Reconciliation Act No.34 of 1995 was enacted. It is based on the final clause of the South African Interim Constitution of 1993 and was passed in Parliament. The Act provides for the creation of particular organs with the power to grant amnesty, and contains the provisions and requirements for the granting of a conditional amnesty. The compromise between the two parties made it clear that an unconditional amnesty would counteract the very concerns of a national policy of reconciliation, therefore a conditional amnesty was chosen.<sup>32</sup>

The promotion of national Unity and Reconciliation Act called for the establishment of a Truth and Reconciliation Commission. The Commission is organised into three committees: Human Rights Violations, Amnesty, and Reparation and Rehabilitation of Victims. The Truth and Reconciliation Commission’s goal is to restore moral equilibrium to South Africa by revealing the truth about what had actually transpired

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<sup>28</sup> Hayner, Priscilla B.: “Fifteen truth Commissions – 1974 to 1994: A comparative Study”, p.241

<sup>29</sup> El Salvador; Supreme Court of Justice decision on the Amnesty law, in Kritz, Vol. III, p.549

<sup>30</sup> Kistner, *The Legacy of the Past in the new South Africa*, p.2-5

<sup>31</sup> Now the 1996 Constitution refers directly to the Promotion of Unity and Reconciliation Act, No 34 of 1995. ( Transitional Arrangements: Section 22 – National Unity And Reconciliation )

<sup>32</sup> Kistner, p.8

during the apartheid era and by providing a forum in which victims can tell their stories. The work of the 3<sup>rd</sup> Committee of the Truth and Reconciliation Commission procedures did not arise from an idealistic vision of reconciliation, but rather as a means by which to escape a political dilemma. According to Paul Van Zyl, Nelson Mandela learned that right-wing groups planned to sabotage the first democratic elections since the end of apartheid. Leaders of the South African armed forces offered to safeguard the elections, but only if they were guaranteed amnesty from prosecution when the new government investigated crimes committed during the apartheid era. Therefore, the ANC chose election stability over chaos and established the process. This included a grant of amnesty to those who testified before it.<sup>33</sup>

The Amnesty Committee is in charge of dealing with amnesty related matters.<sup>34</sup> The Act provides – subject to certain limitations and qualifications – for amnesty for all offences associated with a political objective and committed in the course of conflicts with the past.<sup>35</sup> The following provisions need to be fulfilled:

- a) only acts that constitute crimes under South African law are in question
- b) the offence must have taken place during the period from 21 March 1960 (the day of the Sharpeville Massacre) to the cut-off date stipulated in the Constitution (10 May 1994 when the inauguration of the first democratically elected president, i.e. Nelson Mandela took place) – Long title of the Act.
- c) the act must be associated with a political objective, either the act itself or a relation to such an act – section 18 and 19 of the Act.
- d) it does not matter if the act has been committed within or outside the country – Long Title of the Act.
- e) a full disclosure of all relevant facts is necessary from the applicant – Section 20 of the Act.

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<sup>33</sup> Caron: Truth and Justice in South Africa – Human Rights Brief,p.2

<sup>34</sup> See: long title and section 16 in Chapter 4 of the Promotion of National Unity and Reconciliation Act no.34 of 1995. Unfortunately, the appointment procedure of the members of the Committee lacked the democratic legitimacy that could have been expected.

<sup>35</sup> Presentation at University of Cape Town , 9 October 1999 by Antje Pedain, Humboldt-University Berlin: “ Is the South African Amnesty Process Compatible with international law? “

- f) The act must not be committed for personal gain, out of will, malice or spite – section 20 of the Act
- g) The act must not constitute a “gross violation of human rights” if the Committee decides in Chamber – Section 19 of the Act.<sup>36</sup>

The decision of an application of amnesty is taken in Chamber. In the case of “gross violations of human rights” a public hearing must follow as part of the procedure as these crimes are regarded as more controversial.<sup>37</sup> In this case, the granting of amnesty is disputed as it is unsettled in international law whether there exists a duty to prosecute “gross violations of human rights”.

These crimes are namely regarded as an international crime. I will return to this matter under my examination of the compatibility of amnesty legislation with public international law.

## **6. Effects of the granting of amnesty**

A person that has been granted amnesty with respect to any act, omission or offence should enjoy full immunity from all criminal and civil actions.<sup>38</sup> The case, on the other hand, will be forwarded to the Committee on Reparation and Rehabilitation, in the event that reparations for the victim are recommended.<sup>39</sup> Even though the Truth and Reconciliation Commission is not a judicial body with powers to punish or apportion criminal or civil liability, it is rather unique that it has the power to grant amnesty to people who make a full disclosure of acts, omissions or offences associated with political objectives and that are in the course of conflicts in the past. It is necessary to point out that the legislation does not explicitly rule out the possibility of criminal prosecution, but those granted amnesty under this process will be given full indemnity from both civil and criminal prosecutions for the acts or offences concerned.<sup>40</sup> This is argued to be a rather controversial aspect in regard to the amnesty legislation.

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<sup>36</sup> The Act is found in the “Statutes of the republic of South Africa – Constitutional Law”

<sup>37</sup> Definition of “gross violation of human rights” can be found in Section 1 of the Act.

<sup>38</sup> Section 21(7) of the Act

<sup>39</sup> Section 22 of the Act

The only mitigation to this seemingly broad amnesty is the latitude given to the Commission to recommend measures in order to prevent future gross violations on human rights. It must also be pointed out in this regard that the fulfilment's needed provide for a conditional amnesty as opposed to a blanket amnesty or impunity. "An unconditional amnesty would not only suppress the truth about the past, which is the goal to find, but also undermine the rule of law and undermine a future attempt to build a human rights friendly society."<sup>41</sup>

As mentioned above certain crimes are not objecting to amnesty if they constitute what we call "gross violations on human rights". When asking about possible obligations of states to prosecute some or all the acts defined as "gross violations of human rights"<sup>42</sup>, two basic distinctions needs to be borne in mind: one with regard to the source of the obligation – is it merely based on a treaty or is it part of customary international law? This will be examined in the next part of this dissertation. The other with regard to the scope of the norm – does it only apply in specific situations, for instance in cases of an armed conflict or specific types of violations?<sup>43</sup>

## **7. Compatibility with Public International Law**

The issue to be investigated is whether national amnesty legislation is compatible with State obligations under Public International Law, arising from treaty law, international customary law, *Ius Cogens* and other bilateral and multilateral obligations. Three different international crimes will be emphasised in this regard, as I will examine the scope of amnesty under Public International Law when the hard core international crimes are committed; war crimes, genocide and crimes against humanity.

Public international law regulates the law between states and consists of two systems: dualism and monism.<sup>44</sup> "Both these schools of thought assume that there is a common field in which the international and municipal legal orders can operate simultaneously

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<sup>40</sup> Rwelamira and Werle, p.5

<sup>41</sup> Rwelamira and Werle, p.6

<sup>42</sup> There is no established definition of the term, but it functions as an "illustrative formula" which is meant to point simultaneously to the serious character of the violations (especially to the existence of a pattern of violations) (van Boven)

<sup>43</sup> Presentation at University of Cape Town, 9 October 1999 by Antje Pedain, Humboldt-University Berlin: "Is the South African Amnesty Process Compatible with international law?"

in regard to the same subject matter, and the problem then arises in regard to the question of which of the two is supposed to be the master”<sup>45</sup> The dualistic approach requires international law to be part of a separate foreign legal system, whereas the monist one regards the systems as one.<sup>46</sup> This is called the doctrine of incorporation. The schools of thought will make a difference for the different legal systems and the different states’ obligations to deny amnesty and rather prosecute.

Before attempting to investigate this further I find it necessary to give a brief overview of the different sources of the law. In this study the sources of international law and the law of treaties must be regarded as fundamental. The sources of international law are described in article 38(1) of the Statute of the International Court of Justice as:<sup>47</sup>

- (a) international conventions (treaties), whether general or particular;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) judicial decisions and the teaching of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

In most instances treaties are viewed upon as the primary source, even though no provision is made for a hierarchy of sources. Customs are therefore viewed as the secondary source.<sup>48</sup>

## **7.1 Treaties and conventions**

A treaty is a written agreement between states, or between states and international organisations, operating in the field of international law. The rules relating to the capacity to enter into treaties, the procedure to be followed for entering into treaties and the termination of treaties, are governed by the Vienna Convention on the<sup>49</sup>Law of Treaties of 1969. Treaties generate binding rights and obligations upon states and a

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<sup>44</sup> Brownlie,p.32

<sup>45</sup> Brownlie,p.31

<sup>46</sup> John Dugard, International law – A South African Perspective, p. 42

<sup>47</sup> John Dugard, p.23

<sup>48</sup> “The Lotus Case” ( France v Turkey) 1927, where this was stated by the Permanent Court of International Justice.

<sup>49</sup> John Dugard, p.23

signing and ratification of it is necessary for it to take force. This is a general rule of international law. Treaties and Conventions that are relevant in this regard are the:

- (1) Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment of 1984;
- (2) Geneva Conventions of 1949;
- (3) International Covenant on Civil and Political Rights of 1966;
- (4) Genocide Convention of 1948;
- (5) Convention on the non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and
- (6) International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

It is worth noting that these conventions are only applicable on the states that had ratified and signed them at the time the acts in question were committed. This is the elementary principle of treaty law that Conventions only bind states that are parties to the treaty. If the states are not party to the treaty, the obligations and rules are, at first glance, inapplicable. Furthermore, the general rule in international law is that the treaties must be incorporated into municipal law to be binding upon *individuals* in addition to states. This is an outcome of the general principle of law: '*nullum crimen sine lege*'. ("no crime without law" which is interpreted as a general prohibition against retroactive criminal law.) It is rather unlikely that a court will find that it had the competence to try a person for international crimes in the absence of a domestic statute.

The principle would probably constitute a bar to any such prosecution. There are, however, theories that make exemptions from this rule: By the force of prerogative power a convention does not require legislative incorporation to come into force.<sup>50</sup> Certain crimes are also regarded as so severe that they have to be punished even if they are not part of a national legislation. I will return to this matter in the next part of the thesis.

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<sup>50</sup> Dugard, Is the TRC-process compatible with international law, p.262

The task is now to investigate whether any of these treaties oblige the signatory parties to prosecute and punish those individuals guilty of grave breaches of the conventions, and therefore constitutes an obstacle for national amnesty legislation.

#### 7.1.1. The Convention Against torture and other Cruel, Inhuman or Degrading Treatment or punishment of 1984

This is the principal torture convention and it came into force in 1987 after being ratified by over sixty states.<sup>51</sup> For the purpose of the convention, the term “torture” is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining information or confession by a public official, or other persons acting in an official capacity.<sup>52</sup> The ban on torture is to be enforced by both municipal criminal law and international supervision. The convention obliges states to either try or to extradite torturers.<sup>53</sup> A state has the jurisdiction to try the offender where the offence of torture is committed within its territory and when either the offender or the victim is a national.<sup>54</sup> The state also has the force to extradite the offender on the same conditions, but the Convention prohibits extradition if the fugitive is in danger of being subjected to torture by the requesting state.<sup>55</sup>

To summarise; the Torture Convention imposes an unambiguous duty to prosecute the acts it defines as criminal.<sup>56</sup> The Convention also establishes a form of universal jurisdiction to ensure punishment in the event a State Party fails to prosecute torturers.<sup>57</sup> “The explicit duty to institute criminal proceedings against alleged torturers precludes adherents to the Convention from enacting, or at least applying, an amnesty law that forecloses prosecution of torturers.”<sup>58</sup>

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<sup>51</sup> John Dugard, *Is the TRC-process compatible with international law*, p.215

<sup>52</sup> See art 1 of the Torture Convention

<sup>53</sup> See art 4 and 8 in the Convention

<sup>54</sup> See art 5 in the Convention

<sup>55</sup> See art 3 in the Convention

<sup>56</sup> The Inter-American Convention to Prevent and Punish Torture similarly requires State Parties to criminalize torture and to punish violations.

<sup>57</sup> See art 5(2) in the Convention

<sup>58</sup> D. Orentlicher, “Settling Accounts: the duty to prosecute human rights violations of a prior regime”, p.391

### 7.1.2. The Geneva Conventions of 1949

The Geneva Conventions codify the duty to prosecute war crimes. According to Protocol 1 in the Convention<sup>59</sup>, a war crime includes *armed conflicts* in which people are fighting against colonial domination and alien occupation and against racist regimes in their exercise of the right to self-determination, as enshrined in the Charter of the United Nations. War crimes are defined as acts that are grave breaches of the Convention and result in death, great suffering or serious injury to any protected party, prisoner or civilian. The Conventions will apply to all cases of declared war or any other armed conflict, which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.<sup>60</sup> The Geneva Convention is widely accepted and signed by a large number of states. The Convention obliges the signatory parties to punish those guilty of grave breaches of the Convention. Breaches are committed if the offences in question are war crimes. Consequently, they have to be committed in times of war. The Geneva Conventions were, however, amended by two protocols in 1977, which expanded the protection to non- international armed conflicts.

The contracting states are required 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 Convention”.<sup>61</sup> States are, according to the Convention, obliged to take action against their own nationals and aliens guilty of such grave breaches as mentioned above.<sup>62</sup> Again it seems like an amnesty law would be a breach of a states’ obligations in the case of violations of the rules of law. A problem addressed by Dugard, and worth mentioning, is the one arising when the Conventions are not enacted into municipal law. If the country in question builds its laws upon the dualistic approach, it will be doubtful whether these treaties may be applicable for punishment. It would probably be wiser to enact the Geneva Conventions into municipal law, as done by some states.<sup>63</sup> The Geneva Convention effect belligerent

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<sup>59</sup> See art 1(4) in the Geneva Convention

<sup>60</sup> See art 2 in the Convention

<sup>61</sup> See First Convention, art 49 and 50 and Second Convention, arts 50 and 51. The Third Convention, arts 129 and 130, and The Fourth Convention, arts 146 and 147, contain substantially similar provisions.

<sup>62</sup> John Dugard, p.336

<sup>63</sup> Israel in the Eichmann case (1961), Germany, France, The United Kingdom, Russia, Canada and Australia have municipal law punishing war crimes.

rights and therefore national legislation should not be necessary, but it would surely be wiser as the principle of “*nullum crimen sine lege*” would not be endangered.<sup>64</sup>

### 7.1.3. The International Covenant on Civil and Political Rights (ICCPR)

The UN General Assembly adopted this treaty in 1966, but it only came into force in 1976 following ratification by 35 states. Today it is widely accepted and ratified by over one hundred states. The covenant prohibits torture, cruel, inhuman or degrading treatment and slavery.<sup>65</sup> The possibility of requiring State Parties to punish violations was never seriously considered by the drafters. Nothing in the drafting history is, however, inconsistent with such a duty.<sup>66</sup> Even if the convention is silent on the duty to punish violations on the rights it ensures, it is beyond doubt that there exists a general understanding of the text that requires the State parties to investigate serious violations on the rights to attend to the interest of justice.

Several writers have also found a duty to discipline wrongdoers implicit in states’ ‘duty to ensure’ rights. “State Parties must exercise due diligence to prevent intentional deprivation of life by individuals, as well as to apprehend murderers and to prosecute them in order to deter future taking of life”.<sup>67</sup> It is, however, unclear whether a requirement to ‘hold offenders responsible’ connotes criminal penalties. It is reasonable to assume that State Parties must use the most effective means available to ensure their enjoyment and that administrative disciplinary procedures as, for instance, a truth commission and a continuous amnesty legislation, might be sufficient to satisfy a states’ duty.

### 7.1.4. The Genocide Convention

The most explicit obligation to punish international crimes is established by the Convention on the Prevention and Punishment of the crime of Genocide. (The Genocide Convention) The principal purpose of the Convention was to prevent genocide by ensuring punishment of the crime. The Convention arose in response to the Nazi atrocities of World War II and the prosecution aimed to capture the

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<sup>64</sup> John Dugard, pp.56-57

<sup>65</sup> see art 7 and 8 in the ICCPR

<sup>66</sup> Orentlicher, p.392

<sup>67</sup> Buergenthal in Orentlicher, p.392

uniqueness of those particular crimes.<sup>68</sup> Virtually, the entire convention is designed to serve this purpose.<sup>69</sup> Genocide is defined as one of the following acts when committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”, as such:

- (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 in part;
- (d) imposing measures intended to prevent births within a group and
- (e) forcibly transferring children of one group to another group.

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of human beings: Such denial shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations.<sup>70</sup> Genocide is a crime under international law whether it is committed in times of peace or times of war, and the jurisdiction to try offenders is given to the courts of the state in which the crime was committed or to ‘an international penal tribunal’.<sup>71</sup> International tribunals are already established to prosecute and punish the persons indicted of the crime of genocide in the former Yugoslavia and in Rwanda. In Rwanda, the world saw the first international pronouncement of a genocide judgement in the case of the *Prosecutor v. Jean Paul Akayesu*, (2 September 1998), a former Rwandan bourgmestre, who was found guilty of both genocide and crimes against humanity.

The international community has perceived the act of genocide as so evil, and the Genocide Convention somehow sets a precedent for the requirement for states to act through their domestic administrative and judicial criminal law where there is no international tribunal.<sup>72</sup> “We have reached a position in respect of these areas where the domestic legal institutions have an obligation to either prosecute or extradite those

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<sup>68</sup> Slye: Apartheid as a Crime against Humanity: A submission to the South African truth and Reconciliation Commission, p.27

<sup>69</sup> Orentlicher, p.389

<sup>70</sup> Slye, p.28

<sup>71</sup> see art 6 in the Convention

charged, and one should seek to ensure that there are no safe havens for those who breach the international communion".<sup>73</sup> This should imply that an amnesty law in such cases would not be valid. There is, however, a problem to prosecute all the individuals involved in the matters.

In Rwanda the financial situation is one where neither the national nor the international prosecutions are likely to ever be able to prosecute all those responsible for genocide. This in addition to the continued unrest in Rwanda leads one to assume that the prosecutions, although necessary and called for, may not be quite enough for Rwanda to start its voyage towards democracy and national reconciliation. The idea in international law seems to be to prosecute the leaders of the former regime promptly and as swiftly as possible, whilst leaving middle- and lower ranking officials of prosecution.<sup>74</sup> This concept would, however, imply that several of those imprisoned in Rwanda would be given amnesty.

This is an action that would certainly suffer criticism, but remains, at the end of the day as the one feasible option because there is no realistic vision to conduct fair, let alone successful, trials for all those in custody at the moment. The idea corresponds well with the concept in transitional law; to achieve reconciliation, a truth commission and amnesty legislation might be a better solution than to prosecute and punish.<sup>75</sup> The question is, however, if the Convention of Genocide and principles of International Criminal Law open up for derogation's like the one mentioned. I will return to the conflict when examining the issue whether International Courts are bound by amnesty given nationally.

#### 7.1.5. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

The search for legal standards governing transitional societies' policy towards past abuses has led to renewed interest in the substantive law generated by the Nuremberg

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<sup>72</sup> Roger S. Clark, "Nuremberg and Tokyo in Contemporary Perspective", p.186

<sup>73</sup> *ibid.*

<sup>74</sup> Huntington, S "The Third wave of Democratisation in the late Twentieth Century", p.81, in Kritz (ed) *Transitional Justice*, Vol.I, 1995, 65-81

trials.<sup>76</sup> Several analysts have interpreted the law to require punishment for crimes against humanity. Crimes against humanity are as old as humanity itself, but did not surface in positive international law until the Nuremberg Charter appeared. The Charter defines the crime as prohibited acts committed against civilian people.<sup>77</sup> The crimes were added to the Charter because it was feared that under the traditional formulation of war crimes, many of the defining acts of the Nazi - regime would go unpunished.<sup>78</sup> This was due to the fact that war crimes, which are generally defined in terms of prohibited acts directed towards citizens, soldiers or property, must be part of an adversary armed conflict. The roots of the Prohibition of Crimes against Humanity and War Crimes have been plagued with incoherence. The problem with defining these crimes is, however, not in need of analysis for the purposes of this dissertation.

The terms are still evolving and this proves that the area of law in this regard is still shifting. The guiding principle has been the concern with condemning injurious conducts and guaranteeing the accountability of individuals who are subject to inhuman acts.

The Nuremberg progeny was a codification of the prohibition of Crime against Humanity that appeared in Control Council Law No.10 (CCL 10): Punishment of persons guilty of War Crimes, Crimes against the Peace and Against Humanity. The Allied Control Council of Germany enacted it almost immediately after promulgation of the Charter “ in order to give effects to the London Agreement and the Charter.”<sup>79</sup> The law was to form the basis for prosecution of non-major defendants and, even though the legislative history is sparse, its provision in paragraph five of Article II is of importance in this analysis. Article II is nullifying pardons for crimes committed and statutes of limitation would be rendered meaningless because the Article states that “ *in any trial or prosecution for a crime herein referred to, the accused shall not be entitled to benefits of any statute of limitation in respect of the period from 30 January 1933 to July 1945, nor shall any immunity, pardon or amnesty granted under*

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<sup>75</sup> This idea is based views aired in a seminar on Transitional Justice given by Prof. Jeremy Sarkin at University of the Western Cape, 23 March 1999.

<sup>76</sup> Orentlicher, p.401

<sup>77</sup> See the Nuremberg Charter art 6(c)

<sup>78</sup> Van Schaack, The definition of Crimes Against Humanity: Resolving the Incoherence, p.2

*the Nazi regime be admitted as a bar to trial or punishment.*"<sup>80</sup> Of interest in the Post-war Legacy is the United Nations endorsement of the principles of international law in 1946. It directed the International Law Commission (ICL) in order to promote "the progressive development of international law and its codification"<sup>81</sup> The ICL began to prepare a Draft Code of Offences Against the Peace and Security of Mankind, but it remained virtually dormant until the 1980s due to the inability of the delegates to agree.

In that period, however, the General Assembly drafted the 1968 "**Convention of the Non-Applicability of the Statutory Limitations to War Crimes and Crimes against Humanity**". The General Assembly adopted and opened the Convention for signature and ratification on November 1968, and it entered into force 11 November 1970.

The Convention is considering that war crimes and crimes against humanity are among the gravest in international law and that effective *punishment* of such crimes is an important element in the prevention of the crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security.<sup>82</sup> The Convention States that the State Parties undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to, and that where they exist, they shall be abolished.<sup>83</sup> The Convention is, however, not well subscribed to in international law.<sup>84</sup> This might be due to the fact that the convention is attempting to apply its terms retroactively, thus violating the basic principle of criminal law: '*nullum crimen sine lege*'. To summarise: the Convention consists of an explicit obligation to prosecute and punish perpetrators of international law and treaties and it is therefore clear that, as a principal rule, the Convention imposes a duty to prosecute and as a consequence

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<sup>79</sup> *ibid*,p.19

<sup>80</sup> *ibid*,p.24

<sup>81</sup> G.A. res. 174, U.N. GAOR, U.N. Doc. A/519, at 105 (1945)

<sup>82</sup> See preamble in the Convention in Kritz; *Transitional Justice*, Vol. III,p.615

<sup>83</sup> See Art IV in the Convention.

<sup>84</sup> Van Shaack, p.32

establishes an obstacle for amnesty legislation for the states which are party to the Convention.

#### 7.1.6. The International Convention on the Suppression and Punishment of the Crime of Apartheid.

Although apartheid is one of the worst examples of human rights abuses that humans have endured, it may not fit within the narrow definitions of genocide or crimes against humanity. In the mid-1970s, the international community adopted a convention specifically designed to define and criminalize apartheid as a crime against humanity. This Convention was approved by general Assembly Resolution 3068 (XXVIII) of 30 November 1973. Although 89 States had ratified the Convention in 1991, no Western European State had done so. The Convention requires that Apartheid Criminals be prosecuted and it states that, regarding such crimes, prosecution must be hard to escape from via an amnesty.<sup>85</sup> It denounces apartheid as a crime against humanity in violation of international law and is not limited to South Africa (a former Apartheid regime), but includes similar practices in other countries.<sup>86</sup>

Contracting states are required to either try or to extradite persons guilty of the crime of apartheid and to enact the necessary legislation for the purpose of trying the offenders.<sup>87</sup> The Convention has had small practical impact and rather a symbolic value. This is probably due to the character of the crime necessary to constitute a crime of apartheid. The crime is defined as covering the denial and suppression of basic rights committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. (Art 2). No prosecutions have been instituted under this Convention, and as South Africa is the only country in history practising an apartheid regime, the prosecutions of the crimes has not been possible since South Africa was not a party to the treaty when the country was on the point of confronting the past in 1994 and the amnesty legislation was decided to come into force.

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<sup>85</sup> Art 1 in the Convention

<sup>86</sup> Dugard: International Law – A South African Perspective, p.214

<sup>87</sup> See Art 4 in the Convention

In the case of individuals of a state party to the Convention committing crimes of apartheid, it would have a practical impact, as amnesty laws then would be inapplicable. A question arises in this regard about other sources of international law. There might be the case that these were applicable and would have led to a different result. The rules set up by customary international law and *ius cogens* could make the obligations arising from treaty law applicable even if States are not parties to a treaty. I will try to explain this assertion in the following.

## 7.2. International Customary law

If a State refuses to become party to a treaty, its content, through customary law, may still bind it. In this case, it does not matter if the state has not incorporated the law into municipal law by an act of parliament or objecting to become party of a treaty. The rule is therefore an exemption from the general rules of law as it constitutes a breach with the principle of "*nullum crimen sine lege*". Generally, this law does not bind a state but, under certain circumstances, the exercise of prerogative power replaces the incorporation.<sup>88</sup>

The level to which a norm rises to an international customary law is therefore bound to be high as the consequence of such a norm is that all countries are bound by it. Customary law arises when two requirements are fulfilled: there must be a general settled practice with consistency during a longer period and this practice must be accepted as law by the states – the so-called *opinio iuris et necessitatis*.<sup>89</sup> It is very much a matter of appreciation and a tribunal will have considerable freedom of determination in many cases. Universal acceptance of the rule is not necessary and as long as the state does not permanently object to this practice, it is bound by it.<sup>90</sup> The essential problem in this regard is surely one of proof, and especially the incidence of the burden of proof. Practice of the International Court of Justice, which provides a general guide to the problem, establishes two methods of approach. In many cases the court is willing to assume the existence of an *opinio iuris* on the basis

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<sup>88</sup> Dugard: Is the TRC process compatible with international law, p.262

<sup>89</sup> Brownlie, p.6-7

<sup>90</sup> Dugard: International law – a South African Perspective, p.27

of evidence from a general practice, consensus in the literature, or the previous determinations of the Court or other international tribunals. In a minority of cases, the Court has adopted a more rigorous approach and has called for more positive evidence.

The choice of approach seems to depend upon the nature of the issues in the case.<sup>91</sup> In the *Asylum case (1950) Colombia v Peru*, the Court could not find that the Colombian Government could prove the existence of a custom for diplomatic asylum. "...the Colombian Government has referred to a large number of cases in which diplomatic asylum was in fact granted and respected. But it has shown that the alleged rule of unilateral and definitive qualification was invoked for...."<sup>92</sup>

The question of interest is, in this regard, whether there exists a general obligation under customary international law to punish international crimes.

Although publicists disagree about the range of rights protected by customary law, there seems to be a general agreement that customary law prohibits certain crimes of an international nature, such as torture, disappearances, and extra-legal executions and that these prohibitions are peremptory norms.<sup>93</sup>

It is, however, not clear whether customary law imposes a duty to prosecute violations when they occur. The duty to prosecute grave violations has been rendered in several international instruments and this implies that the duty to punish is arising as a customary norm.

If it does, this means that this duty under international law is obligatory.

A national government cannot relieve a state of its duties under such norms and a ratification of an amnesty law through some form of democratic procedure would not alter this conclusion; "nations cannot extinguish their international obligations by enacting inconsistent law"<sup>94</sup> Further, the question to be answered is whether there exists such state practice as to constitute a rule of customary international law that obliges states to punish and prohibits a state to grant amnesty if violations have taken place.

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<sup>91</sup> Brownlie, p.7

<sup>92</sup> D.J Harris: Cases and Materials on International Law, p.26

<sup>93</sup> Orentlicher, p.399

### 7.2.1. The Geneva Convention

The Geneva Conventions stating that war crimes are punishable are regarded as an instrument which bind the international community under international customary law. There is, however, a dispute whether there really is an obligation to prosecute those who have committed grave breaches of the Convention and its two additional Protocols. The issue was debated in the *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*. (The Cape Provincial division at 1996 (4) SA 562 at 573 E-H) and the Constitutional Court in South Africa (at 1996(4) SA 671 (CC) at 691), and it was decided on the question. The Constitutional Court held that there was no prohibition to grant amnesty in the Convention, and that Protocol II would actually encourage the granting of the broadest possible amnesty in Art 6(5) of the Protocol II.<sup>95</sup> Diane Orenlicher who stresses the obligation to prosecute crimes against humanity denies this. Both Courts did not refer to international customary law in their judgements, which makes them disappointing from the perspective of international law.

It fails to address adequately the question whether customary international law obliges a successor regime to punish the officials and agents of the prior regime for violations of international law.<sup>96</sup> Policy considerations, notably the importance of amnesty to the 1993 political settlement in South Africa must have weighed heavily in this judgement. It is worth noting that the obiter dictum in the Azapo judgement contains an unfortunate comment about the article 1(4) of Additional Protocol being inapplicable to the situation in South Africa during the apartheid era. This comment takes no account for that, historically, this clause was included to deal with apartheid in South Africa in particular.<sup>97</sup>

Today it is convincingly argued that not only treaties, but also customary international law, oblige a successor regime to punish members of the previous regime for acts that constitute crimes under international law.<sup>98</sup> It is argued that

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<sup>94</sup> *ibid*,p.403

<sup>95</sup> Dugard: Is the Truth and reconciliation Process Compatible with International law? An unanswered question,p.264

<sup>96</sup> Dugard: Is the TRC-Process...,p.262

<sup>97</sup> Dugard: Is the TRC-Process...,p.265

conventional prohibitions on the crime of genocide, torture and the crimes against humanity have attained the status of international customary law. There seems to be no doubt in **theory**, today that there exists an obligation under international customary law to prosecute these crimes and that international customary law occupies a higher status than municipal law when there is a conflict. This was stated in the *Velasques Rodrigues* case (July 1988) involving a successor regime in Honduras. Based on the decision from the Inter-American Court of Human rights and the reports from the inter-American Commission on Human Rights, it is held that there exists a duty to prosecute those responsible.<sup>99</sup> African precedents such as Ethiopia and Rwanda also supports prosecution.

Hence, one must probably reveal that state practice and international customary law is too unsettled to prosecute those alleged to have committed international crimes in **all circumstances**, and that there is still room for a justification of the granting of amnesty based on the necessity of political compromises to prevent further unrest and civil strife. It must therefore be doubted whether an obligation to punish under international customary law rules out the possibility of amnesty completely.

Be that as it may in a war crime or a crime of non-international armed conflict, amnesty has been granted subsequently to the entry of the Geneva Convention, most notably the Indian-Pakistani war in 1977. One could perhaps say that the parties of the conflict are free to agree upon amnesty as part of a peace agreement.<sup>100</sup>

### **7.3. Ius Cogens**

Certain rules of international law have, nonetheless, always been considered so fundamental to the legal system that states may not opt out of them. A theoretical basis for these “peremptory norms” is now found in a nationally combined will of the world community. There are principles in all municipal systems from which individuals may not derogate from. The norms of this kind were largely unknown to

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<sup>98</sup> Dugard: Is the TRC-Process...,p.262

<sup>99</sup> Antje Pedain in presentation at the University of Cape Town, 9 October 1999

<sup>100</sup> *ibid*

international law until the 1960s when the doctrine of *ius cogens* developed.<sup>101</sup> This doctrine now finds recognition in art 53 of the Vienna Convention on the Law of Treaties, which provides that; ‘ a treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm 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 ’.

Principles of *ius cogens* are not immutable; the usual processes of creating new customary law can change them. There still exists considerable uncertainty about the principles included in the *ius cogens*.<sup>102</sup> Only the prohibition of the use of force of aggression is clearly accepted as *ius cogens*. Other rules that enjoy a wide measure of support are the prohibitions of genocide, racial discrimination, slavery, the denial of self-determination, and the suppression of certain human rights.<sup>103</sup> The number of Conventions and the number of signatories, therefore warrant the conclusion that the duty to prosecute and punish has become part of *ius cogens*.<sup>104</sup>

It can also be said, that besides the conventional law, there exists a duty to punish under customary law and that this principle is strengthened if it rises to the level of *ius cogens*. It does not change the content of existing law or introduce new rules, but if a rule of law rises to this level, it is not subject to derogation. The rules are derived from international customary law, but are on the top of the hierarchy within the sources of international law. Even in times of a public emergency, such rights cannot be derogated from – this is to protect the most fundamental rights of mankind; the right to life and the prevention of torture, slavery and retroactive punishment.<sup>105</sup>

As we have seen, the rules of prosecuting violations of international crimes have been derogated from by the granting of amnesty in many states. I would, however, presume that this rule is by nature so important for the world community that it qualifies as a rule of *ius cogens*. The system is in a conflict with the aim to reach the goal of inner

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<sup>101</sup> Dugard: International law – A South African Perspective, p.35

<sup>102</sup> Compare Article 50 and 53 in the Vienna convention on the Law of Treaties

<sup>103</sup> Dugard, p.35

<sup>104</sup> Kritz, Vol III, p.569

<sup>105</sup> See the Barcelona Traction Case in Brownlie, p.515

unity and reconciliation and, apart from that, it is also lacking the necessary enforcement mechanisms to prevent states from granting amnesty in such cases. It is therefore understood that, in **practice**, rules of international law can be derogated from by agreement in particular cases.<sup>106</sup>

I have tried to make a survey of the rules arising from treaty law, custom and general principles of law recognised by all civilised nations. As these are the principal sources of lawmaking in an international society and in international law it has been necessary to give a broad explanation of them. It is however, an obvious reflection to be made, that the character of international law is changing radically. Customary law was predominant in the formative period of international law, but has now become slow moving in the area. It is unsuitable for the regulation of international crimes, where the law can only be effective by special formulations, enactment and enforcement mechanisms. Multilateral conventions arising out of preparatory work of international legal bodies; courts and international conferences, now tend to replace some of the public international law in this regard, and customary law in particular.

The effects of the amnesty granted to individuals responsible for committing crimes of international jurisdiction on international criminal law will therefore be examined further as this dissertation intends to examine the real effects of amnesty granted to *individuals* responsible for committing crimes of *international jurisdiction*.

## **8. The impact of amnesty legislation on international criminal law**

From examining the effects of amnesty granted, where states have obligations to punish under public international law, I would make a voyage to the question of the impact of amnesty legislation on international criminal law.

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<sup>106</sup> D.J Harris,p.31

## 9. International Criminal Law

As an introduction to this new area, I must give an examination of the problem of an international criminal law.

International criminal law (ICL) is hardly known to exist and, indeed, there are those who have questioned its existence as a coherent discipline. Doubts about the existence of ICL usually are doubts about the reality of ICL *strictu sensu* and goes further to the question of whether there actually is a body of international law that can be said to be the material or functional equivalent of municipal criminal law. Those, who consider international criminal law to form part of an existing law of nations, regard ICL as a product of the convergence of the international aspects of municipal criminal law and the criminal aspects of international law. M. Cherif Bassiouni defined the international aspect of criminal law as: those aspects of the international legal system and of municipal legal systems which regulate International Co-operation in those criminal matters involving individuals who committed violations against the criminal laws of a given state. The simple issue must be whether international law knows of rules of international criminal law in a sense comparable to municipal criminal law. This would alone constitute an ILC in the true meaning of the word. The rules must be of a *prohibitive character* and be endowed with special *penal sanctions*. The question is now whether there is any evidence for the existence of such rules of international criminal law.

## 10. Evidence for the existence of an International Criminal Law

It was held that as long as international law was a law between sovereign states, it could not have a proper penal system. Furthermore some were of the opinion that 'in so far as States are the subjects of international law, they cannot be the subjects of criminal penalties for misdoing'. On the other hand, it was argued that 'it is impossible to admit that individuals by grouping themselves into States.... can confer upon themselves a degree of immunity from criminal liability and its consequences'.<sup>107</sup> Be that as it may, States have limited their independence by acknowledging the existence of acts of their own or of individuals which other States

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<sup>107</sup> Schwarzenberger: The Problem of an International Criminal Law, pp3-7

may treat as international crimes, then such a state of affair is compatible with their sovereignty; for this only exists within the limits drawn at any time by international law. The question whether any subjects or objects of international law are the addressees of rules of international criminal law depends on a very simple criterion: the evidence produced by those who assert the existence of an international criminal law.<sup>108</sup>

Even though the field of international criminal law is an area of considerable definitional ambiguity, and by some eminent scholars claimed not to exist in its true sense, this issue has lost much of its poignancy because of the establishment of the Yugoslavia and Rwanda tribunals. These tribunals exercise jurisdiction over crimes that are clearly international crimes because they appear in and are defined by the statutes of the tribunals.<sup>109</sup> These Statutes are established by binding Security Council resolutions. Further, the Rome Treaty of 17 July 1998, Statute of the International Criminal Court, was adopted and opened for signature, and this historic event represents a major step forward in the field of an international criminal law. The International Criminal Court (ICC) will be exercising jurisdiction over crimes defined under international law. These crimes are mentioned earlier, but I will give a brief excursus on them.

There may be as many as twenty different international crimes. For the purposes of my consideration of the obstacles to prosecution of international crimes, it may be useful to distinguish between the so-called 'core crimes': genocide, war crimes and crimes against humanity, and other international crimes for instance: terrorism, drug-offences and environmental offences. Only the 'core crimes' will be subject to a brief explanation here.

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<sup>108</sup> *ibid*

<sup>109</sup> Murphy, John; *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, p.3

## 11. Genocide

Scholars and practitioners of international law often regard genocide as the most heinous international crime. A primary reason for this view is the extraordinary barbarism that characterised the Holocaust, history's most traumatic instance of genocide.<sup>110</sup> The Charter of Nuremberg did not expressly use the term 'genocide', but the definition of crimes against peace covered many acts today regarded as genocide and the prosecution used the term during the proceedings. As already mentioned, the crime of genocide has been defined in a widely ratified Convention: the Genocide Convention of 1948, and the prohibition of the crime is regarded as *ius cogens*.

The International Court of Justice, for example, has stated that the prohibition against genocide is an *ius cogens* norm.<sup>111</sup> However, the definition of genocide still remains controversial and the Convention has been regarded as a singular failure both as a deterrent to acts of genocide and as a legal instrument facilitating prosecution and punishment of the crime. This must, however, be said to have changed after the case of the International Criminal Tribunal of Rwanda: "*the Prosecutor v Jean Paul Akayesu*". (2. September 1998) As mentioned above, this is the very first judgement on the legal definitions of genocide, and on the crime the Chamber recalls in its judgement that the definition given by Article 2 in the Statute of the International Tribunal<sup>112</sup>, is echoed exactly by the Genocide Convention. Thus, punishment of the crime of genocide did exist in Rwanda – Rwanda acceded by legislative decree to the Convention in 1975 - and the perpetrators were liable to be brought before the courts of Rwanda to answer for their crimes.

The Genocide Convention did after this Judgement prove its influence on international law and can no longer be regarded as a failure. Having said that, there is still a definitional problem regarding genocide, but the requirements needed to constitute genocide are clear; there must be killing or cause of serious bodily harm to members of a group (ethnic) and this must be committed with the intent to destroy, in

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<sup>110</sup> *ibid*,p.12

<sup>111</sup> Slye,p.26

<sup>112</sup> See the statutes of the International Criminal Tribunal of Rwanda

whole or in part, this particular group.<sup>113</sup> Notably, also the Yugoslavian Tribunal has jurisdiction over the crime of genocide.<sup>114</sup> The invocation was by Bosnia-Herzegovina in its claim before the International Court of Justice that Yugoslavia (Serbia and Montenegro) committed genocide during the conflict in Bosnia, in violations of its obligations as a party to the Genocide Convention. On July 6, the Yugoslavia Tribunal (ICTY) began the trial of a Bosnian Serb charged with the crime of genocide, the first time such a trial had taken place in Europe. Unfortunately, this trial came to an abrupt halt when the defendant died in his cell of an apparent heart attack. The definition of genocide in the statutes of the two tribunals, however, tracks the definition in the Genocide Convention. Accordingly, as pointed out by Ratner and Adams, ambiguities in this definition and the exclusion of protection for political, economic and social groups may make successful prosecution problematic.<sup>115</sup>

## 12. War Crimes

The law of war crimes has a long vintage and was arguably well established by the time of the Nuremberg Trials. As noted earlier, the Geneva Conventions of 1949, as well as Additional Protocol I, designate certain 'grave breaches' as universal and extraditable offences within criminal jurisdiction of each state party and require state parties to search for the alleged offenders, submit them for prosecution or extradite them. For its part, in 1953, the United Nations General Assembly adopted a resolution that, *inter alia*, reaffirms that war crimes are subject to universal jurisdiction and that calls upon states to assist each other in "detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them," and provides that "persons accused of war crimes and crimes against humanity should be tried in the countries where they committed their crimes, that states shall co operate on questions of extraditing such persons and that states shall not grant asylum to any person who is suspected of having committed a "crime against peace, a war crime or a crime against humanity"<sup>116</sup>

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<sup>113</sup> See the Genocide Convention art II

<sup>114</sup> See art 4 in the ICTY Statute

<sup>115</sup> Murphy: Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, p.14

<sup>116</sup> In 1968 the General Assembly adopted the Convention on the Non-Applicability of statutory Limitations to war Crimes and Crimes against humanity. G.A. Res.2391,u.n.GAOR,23d Sess, Supp.No.

Hence, most authorities agree that war crimes shall be punished, but war crime cases tried by tribunals have been quite rare. States have seemed to be reluctant to fulfil their obligation to exercise jurisdiction over grave breaches of the Geneva Convention and to become involved in the trial of war criminals. This hampers efforts to provide an impartial tribunal for the trial of these offences. This was one of the main reasons for establishing the permanent international criminal court as the lack of will to bring perpetrators of war crimes to justice have been especially evident in the recent years. In such major conflicts as the Iran-Iraq war (1981-1988) and the Soviet intervention of Afghanistan (1981-1989), no war crimes trials were ever held. Similarly, although Iraq, during the Gulf War (1991), committed numerous war crimes, no trial was held to try Saddam Hussein or other Iraqi leaders. Only the gruesome atrocities committed in Bosnia broke the pattern of inaction with the establishment of the Yugoslavia Tribunal. Thus, there seems to be a trend in the international community to commit to their obligations of the Geneva Conventions and to punish the perpetrators when war crimes are being committed and the ratification of the Rome Statute approves of this.

### **13. Crimes against Humanity**

Crimes against humanity have not been subject to development through widely ratified multilateral treaties. Hence, the development has primarily been through customary international law.<sup>117</sup> The scope of the crime is uncertain and the definition is plagued with incoherence. The primary issue has been whether the crime must be in connection with an armed conflict, the so-called '*war nexus*' and whether the motive behind the crime should play any role in the definition. As the goal is the same as with war crimes, which is to protect civilians and punish the perpetrators, there must be an extension of what the scope is of war crimes. The first step towards abolishing the war nexus was taken by the draft Code of offences against the Peace and Security of Mankind (1954). The structure of other Conventions also became ignorant to the question of 'time of war or time of peace'. A new legal structure was built to protect

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18, at 40, U.N. Doc. A/7218 (1968). The Convention has not been widely ratified, in part because apartheid is listed as a crime against humanity.

<sup>117</sup> Murphy: Civil liability .....p.18

human rights through the criminalization of one of its most serious violations.<sup>118</sup> The issue was solved in “*the Prosecutor v Dusko Tadic*”, 2.October 1995, when the ICTY confronted the definition of crimes against humanity and confirmed that a conviction for such crimes no longer required a link to a state of war or to war crimes.

The Trial Chamber in the “*Tadic case*” went further and stated that the requirements to the crime had to be put in connection with the motives of the defendant. Thus, the Chamber transformed the war nexus into a substantive *mens rea* element of crimes against humanity.<sup>119</sup> Hereby, the state of crime refers to the state of mind of the perpetrator. As the Chamber stated that it was the occurrence of a “widespread or systematic attack on a civilian population” that makes the crime a crime against humanity, the accused must act with the knowledge that the act can be widespread or systematic.<sup>120</sup> Article 3 in the ICTR differs from the ICTY one as the crime is no longer linked to an armed conflict, and specifies the requirements established by the ICTY in the “*Tadic case*”.

In the “*Akayesu Judgement*”, the Chamber increases the threshold of application as it specifies that the crime does not need to be part of both a systematic **and** a widespread attack. The most authoritative definition today, is the one found in the Rome Statute for the International Criminal Court. This is the result of deliberations stretching over several years and it is involving more than 160 countries, non-governmental organisations and private experts. Art 7 of the Rome Statutes provides:

1.For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread **or** systematic attack directed against any civilian population, with **knowledge** of the attack.

The ICC statute hereby adopts the core elements in both the *Tadic* and the *Akayesu Judgements*. This resolved all the issues and establishes a new pattern with regard to

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<sup>118</sup> Bassiouni: Crimes Against Humanity,p.471

<sup>119</sup> Van Schaack: The definition of Crimes Against Humanity; Solving the Incoherence,p.41

<sup>120</sup> *ibid*,p.44

individuals responsible for committing such crimes and should be regarded as the authoritative one in this regard in the future.

As noted above, for a variety of reasons, states have been unwilling or unable to prosecute perpetrators of the core crimes, at least since the Nuremberg and the Tokyo Trials. (World War II). It remains to be seen whether the Yugoslavia and Rwanda Tribunals prove to be successful instruments for such prosecutions. As for the Rome Statute, there are still questionable propositions that may constitute barriers to the court effectiveness.

**One of the barriers could be amnesty granted under national jurisdiction, and this is the one to be investigated further in this paper.**

#### **14. General Observations**

The issue to be addressed in this section is whether a States jurisdiction is limited by the universal jurisdiction arising with the International tribunals and Courts. Although sovereignty is fundamental to international law, it is probably the most controversial and ambiguous in the system.

The “state volutarist” holds the view that a state can do absolutely as it wishes. During the nineteenth century, state voluntarism left the way open for states to behave in any manner they saw fit and the states exploited their freedom to engage in war whenever they chose.<sup>121</sup> In the Western world, universalism has characterised thinking about international law, at least since the Second World War. The universal approach implies that sovereignty must be modified to become a residual concept. States are free to behave as they choose only in the absence of a rule of international law to the contrary. In addition, universalism implies rejection of the sovereign will of states as an explanation for the binding force of international law, for law can have no meaning unless it is external to the will of members of the society which it governs. To base the validity of law on consent would involve arguing in circles, because consent could not, in itself, create

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<sup>121</sup> Bennet: Compendium handed out at UCT – Public International Law

obligations unless they were already in existence as rules of law according to which consent had that effect. (*pacta sunt servanda*)<sup>122</sup>

States has a general rule jurisdiction over their geographically defined portions of the earth, and their competence extends to all persons who happen to be there. The jurisdiction of international tribunals and courts allows them to prosecute offenders of any nationality, and crimes committed in certain areas defined by the Courts themselves. This power is, however, restricted to international crimes. While the ICC has the authority to exercise its functions on the territory of any state party, its jurisdiction is limited by a general concern that national criminal jurisdiction should be complemented, not overridden. Whilst the ICC's jurisdiction is limited to 'the most serious crimes of international concern', this must imply that immunity and national amnesty granted in these cases are not valid. The Court has established a superior position into these crimes.<sup>123</sup> It is worth noting that the Statutes do not bind states unless it has made consent to, and ratified the Rome Treaty. It is also said explicitly in the Rome Statutes (art 10) that it does not purport to codify or establish customary international law.

To summarise, the international tribunals and the ICC have primacy over national courts and their legislation as long as these tribunals or the court have jurisdiction over the states concerned. This may be by being part of a geographic area (ICTY and ICTR), or by having ratified the treaties in question (The Rome Statute). Having said that, it may also be that international customary law or *ius cogens* establishes a rule of law that is binding upon states even if they do **not** belong to the above mentioned groups of states. As noted above, the Rome Statutes do not establish rules of international customary law, but the rules may be derived from elsewhere.

This boils down to the fact that, if international criminal law puts an obligation to states to punish, the international criminal tribunals or the Court are not bound by amnesty granted under national jurisdiction. This rule is, however, not unconditional; the States must be under the tribunals jurisdiction or bound by

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<sup>122</sup> Bennet: Compendium handed out at UCT – Public International Law

<sup>123</sup> *ibid*

general principles of international law. It is also worth noting that the principle of *'nullum crimen sine lege'* must be regarded and that retrospective punishment must be avoided. If amnesty was granted before the tribunal was established or the general rule of law was created, one must presume the international tribunals or Court to be bound.<sup>124</sup> One could also say that the principle of sovereignty is limited either way in cases like this. If a State commits crimes considered to be one of 'the most serious ones of international concern,' there rests a general duty upon democratic states to put an end to these crimes and to punish the ones responsible. This can be argued out of political and economic considerations, just to maintain – or establish - peace and security in the world.

This assumption does, however, fall within the universal principles of criminal law. There must be a **legal** approach to these matters.

### **15. When does international criminal law put an obligation on states to punish and when is the state sovereignty limited?**

The acts, which are condemned as criminal by international law, have already been mentioned, with genocide, war crimes and crimes against humanity as the most important. There is no doubt in international law that these crimes should be punished and this marks the welcome culmination of a slow, but steady process or erosion of the significance of state sovereignty in the process of international law formation.<sup>125</sup> The International Criminal Court has jurisdiction over these crimes, but the issue of jurisdiction was certainly among the most difficult and important questions to be solved and compromises had to be made. The proposal to give the Court *automatic jurisdiction* if the statute binds the custodial State was, regrettably, not accepted. If the state of where the crime was committed, or where the person is being investigated, is not a party to the Statute, the prosecution would only be possible with the states' consent or with the Security Council refers the situation to the Prosecutor under Chapter VII of the Charter of the United Nations. Only broad acceptance of the Statute would break this deadlock.<sup>126</sup> Even if a state is not party

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<sup>124</sup> See the Rome Statute, art 22-24

<sup>125</sup> Van Shcaack, p.57

<sup>126</sup> Roberge, Marie-Claude; views in the Statute adopted by the Rome Conference (ICRC),p.3

to the Rome Treaty, the duty to punish these crimes are established as a rule of international customary law or *ius cogens*.

Nonetheless, international criminal law is not fully equipped to answer clearly and precisely all questions relating to prosecution and punishment of individuals responsible of committing crimes of international jurisdiction. “ The tree is there and branches are slowly growing but has not yet attained full maturity”.<sup>127</sup> The issue examined in my thesis is solved, as we can see, in the sphere of legal theory. However, the practical problems arising with regard to this issue, and the enforcement of rules, are still new - born questions in international criminal law and need time to evolve.

This is where the International Criminal Court will have a vital role to play and hopefully contribute towards putting an end to impunity. Therefore, to answer the question of whether amnesty granted on national level prevents the international community from prosecuting, various examples of concurring international jurisdiction will be investigated.

I will limit my exemplification to the crimes against humanity as a detailed discussion of all the crimes will be beyond the purpose of the explanation, namely because they constitute the same rules. Crimes against humanity can also be regarded as the most important ones today, as they also have importance in peacetime. The change in the nature of conflicts witnessed by the world today caused by mainly racial, religious or political issues are not always part of the unhappy event of an international **armed conflict**.

## **16. The Absence of immunity**

It is now widely recognised that all states are under an obligation to try persons suspected of having committed crimes against humanity under the principle of ‘*aut dedere aut iudicare*’.<sup>128</sup> Those responsible for torture or other crimes against humanity cannot invoke the immunity or special privileges as means of avoiding

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<sup>127</sup> Roberge, Marie-Claude: jurisdiction of the ad-hoc tribunals, p.7

<sup>128</sup> Bassiouni, p.499-508

criminal or civil responsibility (amnesty).<sup>129</sup> This is a general rule of law recognised in the Treaty of Versailles of June 28, 1919: Immunities of heads of state have limits when crimes of international law are involved. During the Nuremberg trials it was declared that "we do not accept the paradox that legal responsibility should be the least where the power is the greatest".<sup>130</sup> Therefore, no state has the power to enact *national legislation providing immunity for any individual from criminal or civil responsibility for crimes against humanity*.

In a report from the UN Secretary General to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia it was noted that "Virtually all of the written comments received by the Secretary General have suggested that the Statute of the Tribunal should contain provisions with regard to the individual criminal responsibility of Heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions that specify that a plea of head of State immunity, or an act that was committed in the official capacity of the accused, will not constitute a defence, nor will it mitigate punishment".<sup>131</sup> Similarly, states supported the inclusion of this rule in the Statute of the International Criminal Court.<sup>132</sup> This rule is buttressed by the exclusion of statutes of limitations and asylum for persons responsible for such crimes. The question to be raised is now whether these rules are applicable in regard to the granting of amnesty.

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<sup>129</sup> "The case of General Pinochet": The Ability of any state to exercise universal jurisdiction over crimes against humanity and other crimes under international law, [www.amnesty.org](http://www.amnesty.org), p.10

<sup>130</sup> *ibid.* – Report to president Truman on the Legal Basis for Trial Of War Criminals - 1946

<sup>131</sup> Report to the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc.S/25704, 3 May 1993, para 55.

<sup>132</sup> See the report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51<sup>st</sup> session, Supp. (No.220 UN Doc. A/51/22 (1996), para. 193

## 16.1 “The Augusto Pinochet case”

The main question in this case is whether there exists an international jurisdiction that makes Heads of States, guilty of international crimes, eligible to be taken to trial even if they have legal immunity in their own national legislation.

### Background:

The 11 September 1973 Chilean military coup, which overthrew the democratically elected government of Salvador Allende, heralded the implementation of a policy of systematic human rights violations under the direct command of General Pinochet. Thousands of people were detained, tortured, executed and many also disappeared. In 1975 the General Assembly of the United Nations issued a statement which acknowledged the institutionalised practice of torture, ill treatment and arbitrary arrest. The UN Ad-Hoc working group on Chile established by the UN in 1975, together with the Inter-American Commission on Human Rights of the Organisation of American States, documented these violations.

The Ad-Hoc working group concluded that the international community should prosecute such cases.<sup>133</sup> Several mechanisms guaranteeing impunity did, however, block effective judicial investigations in Chile. In 1978, an amnesty law was passed by the Government of Pinochet, making it impossible to obtain justice by prosecution. It covered criminal acts – implicitly including disappearances, extrajudicial executions and torture – committed by uniformed agents between the date of the coup and March 10, 1978. The Law reads as follows;

The Government Junta has agreed to dictate the following:

*Art 1: that an amnesty be extended to all persons who, as principals or Accessories, have committed criminal offences during the period of state of siege, between 11 September 1973 and 10 March 1978, unless they are currently on trial or have been convicted.*

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<sup>133</sup> See UN Doc A/31/253, 8 October 1976, para 511

The Inter-American commission on Human Rights concluded in 1996 and 1998 that the self-amnesty was incompatible with international law and that its legal impact formed part of a general policy of human rights violations.<sup>134</sup> The case continued in 1998, while Pinochet was on a visit to the United Kingdom. He was arrested, based on a Spanish provisional arrest warrant alleging that he was responsible for the murder of Spanish citizens in Chile at the time he was President of that country. The English High Court stated that neither Spain nor the UK had criminal jurisdiction in a case concerning Chile. The Judge, Lord Chief Justice Bingham of Cornhill, also concluded that under English law a former head of state of a foreign country was entitled to immunity as a former sovereign from the criminal and civil process of the English Courts.<sup>135</sup> An appeal of the High Court judgement was subsequently brought before the House of Lords to address the legal concerns surrounding the arrest. On the 24<sup>th</sup> of March 1999, the House of Lords confirmed that a former Head of State is not immune from prosecution for an **international crime**. Jack Straw, the UK Home Secretary, stated that the law does not know about borders in the case of crimes against humanity.<sup>136</sup> Since the UK ratified the Convention against torture in 1988, Pinochet could be extradited for the crimes of humanity.

The ratification of the Convention can be argued to not be of significant matter as the rule is a fundamental one in international law – *ius cogens*. This rule applies to both national and international courts. However, even if the rule is a part of *ius cogens*, it has to be a crime under both countries' legislation when individuals are extradited and punished. This is to attend to the general principle of "*nullum crimen sine lege*". The decision, which could open the way to Augusto Pinochet's extradition to Spain, could eventually lead to the former General having to face a court of justice to determine his guilt or innocence on the thousands of cases of torture, killings and disappearances that took place during Pinochet's time in power. The next crucial step was for Jack Straw to stand by the request to issue an extradition warrant.

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<sup>134</sup> The Case of General Pinochet: The inescapable obligation of the international community to bring to justice those responsible for crimes against humanity committed during the military government in Chile

<sup>135</sup> United Kingdom/Chile. Pinochet –The Absence of immunity for Crimes Against Humanity: Amnesty International Submits Case to the House of Lords

After having decided on extradition, Straw ordered a medical test of Augusto Pinochet on 22 December 1999 as a result of the Chilean Government's request for a stay of the proceedings based on medical grounds. The UK Home Secretary, Jack Straw, decided the issue on 5 January 2000.<sup>137</sup> It was decided that, due to his health condition, he would not be able to participate in judicial proceedings and could not be extradited. This is unfortunate, as it would be the first criminal proceeding of that kind stating that amnesty given on a national basis is invalid under International Criminal Law. Even if Pinochet goes home on compassionate grounds, the precedent is, however, set and will be of great importance for the future development in the legal area of international criminal law. There cannot be silence anymore when it comes to this issue. Amnesty International has pronounced satisfaction in their statements, as the message to the world is loud and clear: National amnesty granted does not exempt former Heads of States for prosecution with regard to crimes against humanity.<sup>138</sup>

Limiting the rule to Heads of State comes naturally. The International Criminal Tribunal for Rwanda concluded that "this fundamental principle is a cornerstone of individual responsibility for crimes under international law which by their very nature and magnitude usually require a degree of involvement on the part of high-level government officials."<sup>139</sup> The authors of such crimes are the ones holding such high positions and are the ones able to carry them out.

There have recently been other events that can be taken into account for the rule established, for instance, NATO'S intervention in Serbia and the "war" between Nato and Dictator Slobodan Milosovic. There is no direct connection between the process concerning Pinochet and the conflict in the former Yugoslavia, but the logic behind the intervention, the moral and legal grounds, have similarities. Individuals who carry out crimes against humanity must be responsible for their deeds and punished by the international community.

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<sup>136</sup> Verdens Gang. ( Norwegian newspaper) 13.01.2000

<sup>137</sup> Briefing on the issue of the medical tests required by the UK Home Secretary,

<sup>138</sup> Aftenposten ( Norwegian newspaper), 13.01.2000

<sup>139</sup> Morris and Scharf, *supra*, 1,p.249

There were no national amnesty laws granted in the former Yugoslavia and the International Criminal Tribunal of Yugoslavia does not have this barrier in their proceedings. In Rwanda, some national amnesty laws were granted, but they were not taken into account when the International Tribunal was deciding on the case whether to extradite or punish the perpetrators responsible for the crimes of an international nature in Rwanda.

## 16.2. Other examples.

In Argentina the same issue was put on the agenda after the human rights violations that took place under the regime of the military government. International Organisations, such as the United Nations human Rights Committee and the Inter-American Human Rights Commission of the Organisation of American States came out against impunity, stating that amnesties and other measures designed to allow those responsible for human rights violations to go unpunished are incompatible with the international obligations of States in this field, in particular, their obligation to investigate the facts and impose suitable punishment of those found guilty.<sup>140</sup> In its December 1996 report to the UN Human rights Commission, the Working Group on Involuntary Disappearances observed that the Argentine State was obliged to carry out exhaustive, impartial investigations, “if the fate of a victim of a disappearance has not been clarified”, in accordance with the United Nations Declaration on the Protection of all Persons against Involuntary Disappearances. Article 18 of the declaration states that **States cannot grant an amnesty responsible for ‘disappearances’**.<sup>141</sup>

Around 9000 people were registered as ‘disappeared’ in a report published by the National Commission on Disappearances (CONADEP). The report states that “it was not only a clandestine detention centre where people were tortured, but also functioned as the operational axis of a complex organisation which possibly even attempted to cover up its crimes by eliminating its victims”.<sup>142</sup> Argentina hereby had an obligation to punish those responsible for military crimes. Although

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<sup>140</sup> Initiative by the Spanish national Court Shows Justice has no borders,p.2

<sup>141</sup> ibid

<sup>142</sup> ibid

Argentina was not a state party to either the American Convention or the Convention against Torture during the repression, the Argentine government and Supreme Court were bound when they enacted the "Due Obedience Law".<sup>143</sup> It is, as noted, a universally accepted norm that amnesty cannot be granted in cases like this. It was therefore, with great surprise, that the world witnessed the pardons issued by President Menem, covering approximately 280 members of the security forces who still faced trial for human rights abuses. The pardons included senior generals and high-ranking officials.

## 17. The Dilemma

In the strife for justice in international criminal law, with regard to this issue, one is confronted with a dilemma and the question I would like to address is how to balance the demands for justice to the many constraints that make prosecution a major risk to the new regime.

This is the substantial question in what we call transitional law. The problem this legal approach is trying to solve is the one arising when we try to create a human rights culture as well as entrench the rule of law. This can only be achieved if gross violations of human rights are dealt with, but the challenges in a political transition are more than to punish the perpetrators. The past must be dealt with in a way that satisfies the victims of the past, and also obtains a stable new democratic state. There is a broader debate around the role that international law shall play in shaping governments' policy toward violations of a prior regime.<sup>144</sup>

As I have mentioned earlier, it depends upon the conflict and the country to decide how one should deal with the past. It is, however, necessary to give a brief overview of the arguments. Diane Orentlicher states that prosecution is the most effective insurance against future repression and that it affirms the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.<sup>145</sup>

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<sup>143</sup> Kritz: Transitional Justice, Vol II, p.376

<sup>144</sup> Orentlicher, p.377

<sup>145</sup> *ibid*

Impunity and lawlessness has proved to be the root to tyranny. One does not have to look far back in history to find evidence for that. As prosecution and punishment advances the cause of building and reconstructing a morally just order, it also establishes and upholds the young democracy. Prosecution is necessary to assert the supremacy of democratic values and norms and to encourage the public to believe in them. It might be regarded as a ritual cleansing process to pave the way for a moral and political renaissance.<sup>146</sup> The other school of thought on the subject matter is the one that claims the best solution is to 'forgive and forget'. The main reason being that there is no guarantee that the prosecution will be beneficial and that it, by not being beneficial, can jeopardise the whole democratic transition.

It may force the successor elites to violate the codes of the new democratic state by judging the undemocratic behaviour of yesterday, a conflict between the two legal systems may arise, the legacy of the past and the laws of the new democracy. From a strictly legal aspect, the general principle of '*nullum crimen sine lege*' might be at stake. The risk of retrospective punishment is not one to take as this is one of the most fundamental rules we have in law to protect individuals and to maintain the law and order.<sup>147</sup> Further, there must be punctilious procedural safeguards; the accused must be given abundant opportunity to defend themselves with skilled lawyers who presumably must be provided by the states should the defendants not be able to afford such attorneys. Moreover, 'guilt must be proved beyond reasonable doubt' and to put it mildly, it is so unlikely that any transitional regime can meet such standards – to pay for the lawyers would alone bankrupt many struggling regimes – that it is better to forego any attempt to corrective justice.<sup>148</sup>

There are plenty of eminent scholars claiming that amnesty is the only way to achieve reconciliation due to the fact that this is the only way to achieve a full disclosure of what happened, to maintain the state stable and to attend to the general principles of both national and international law. This is, however, debated in judicial theory and Orentlicher states in her article that the assumption of

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<sup>146</sup> These ideas are based on seminars on Transitional Law given by Prof. Lovel Fernandez at the University of western Cape 1999

<sup>147</sup> *ibid*

amnesty laws, being the only means of achieving reconciliation and to mend social division, is false. She claims there are other means and that amnesty law is not permissible when dealing with atrocious crimes that international law requires states to punish.<sup>149</sup> The question is, however, more complicated than that.

When we are dealing with the past, we are also dealing with the future. When the immediate future unfolds, either in terms of a trial or in terms of a truth commission, there will be moments of pain. Many things that never have been spoken about will come to force, and become the subject matter to public discussion. At the same time, people responsible will be full of shame and, to respond to this, the process must attend to all those people's rights as well as the international standards. International norms and international law cannot be ignored.<sup>150</sup>

## **18. Consequences for the Future Permanent International Criminal Court**

Immediately after the formation of the United Nations, drafters of the Convention on the Prevention and Punishment of the Crime of Genocide contemplated the establishment of a permanent international court. The International Law Commission was commissioned to study "the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes..."<sup>151</sup> After years of relentless effort the work finally was re-invigorated by a collection of Latin American and Caribbean States. The International Law Commission completed a draft statute in 1994 and this formed the basis for consideration by an Ad Hoc Committee on the establishment of an International Criminal Court. A final Statute was achieved in July 1998 at the Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court.<sup>152</sup> The ICC will enter into force when sixty countries ratify the Rome Statute.<sup>153</sup>

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<sup>148</sup> Levinson: Symposium: "Transitions", p.6

<sup>149</sup> Orentlicher, p.382

<sup>150</sup> Rwelamira:— foreword ,p.ix

<sup>151</sup> Prevention and Punishment of the Crime of Genocide, G.A. Res.260(III)(B), U.N. Doc. A/810 (1948)

<sup>152</sup> See the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July17,1998)

<sup>153</sup> See the Rome Statute, art 26

For too long it has been possible to commit atrocities with total impunity, a situation which has given perpetrators '*carte blanche*' to continue such practices. The system of repression, when we look at this retrospectively, clearly has its shortcomings, and the time has come to adopt new rules and set up institutions to ensure the effective prosecution of international crimes. A criminal court does not put an end to crimes, but it may serve as a deterrent and, consequently, may help the number of victims. The result achieved in Rome should thus be welcomed and one must hope that the Court will be able to discharge its mandate to the full.<sup>154</sup> One might consider the ICC as the one and only missing component of an effective international legal system.

With regard to the topic addressed here, the ICC will meet challenges when it comes to prosecution and punishment. In the light of existing international criminal law there are still loopholes and also obstacles existing of general principles of law which cannot be derogated from. At first glance, the results from the Rome Conference are nothing but positive and there is no doubt that this establishes a milestone in the history of international criminal law. However, it is important to look beyond this overall assessment and to examine more closely how the court can deal with the issue arising when national amnesty is granted, before the case comes to trial in the court. As the court only has jurisdiction to prosecute when a suspected criminal has not been tried in a national court, States will still have the duty to fulfil obligations arising from international law. The ICC thereby complements national criminal judicial systems when they fail. As the loopholes give way for perpetrators to continue with their acts in many cases, there might be a need for new legislation implementing the universal obligation to prosecute and punish.

The situation today must, however, be regarded as one where the ICC still can state that national amnesty laws are not permissible, as it is not compatible with international law. When we look upon all the rules arising from treaties, customary international law and jurisprudence, there is no doubt anymore that the hard core crimes must be punished. Moreover, there are other issues that the court must apply as, for instance, the rule of '*nullum crimen sine lege*' and all the political aspects

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<sup>154</sup> Roberge: Views on the International Criminal Court, p.1

arising in a time of transition. The Rome Treaty's wording implies that the effort to prosecute crimes of an international nature is major. Even if the country in question did not ratify the treaty, the ICC can prosecute nationals of this country. As a consequence, the ICC can prosecute even if an amnesty is granted on a national level. This goes against the principle of international law that rejects the notion that States can be bound by a treaty without consent.<sup>155</sup> This may imply that, in cases like this, the possibility to prosecute must be there and one could argue that the ICC will have an impact on every state and every citizen due to the rule of international customary law and *ius cogens*. The ICC will therefore have the possibility to rule out and set aside amnesty laws given on a national level. Whether this is justifiable in every case is a question that remains to be answered. It will be of great importance for the ICC to establish a precedent in this regard, so that there exists no doubt whether this supranational court has admissibility to do so. The Rome Treaty has, however, limited its permission to prosecute the crimes committed after the ratification of the Statute.<sup>156</sup> The inadmissibility of retrospective punishment remains as an imminent rule.

To summarise: the ICC has greater prospects for the success than earlier efforts, but the primary fora for criminal accountability for mass atrocities remain domestic courts, within states, that are too prone to compromise with respect to criminal accountability. There is no doubt that the ICC accounts for accountability and that the applicable international law makes it possible for the court to declare amnesty granted as inadmissible. At the end of the day, the Court has a legal obligation to punish and is, therefore, not bound by the amnesty granted under national jurisdiction. The Court must, however, also attend to the fact that the State in question is in a transition and the main goal must be to avoid civil strife and further unrest. In some cases there must, therefore, be room left for making exemptions from the duty to punish.

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<sup>155</sup> Rodrigues; Slaying the Monster: Why the United States Should Not Support the Rome Treaty, p.10

<sup>156</sup> See the Rome Statute, art 11(1)

## 19. Analysis

Using international criminal law terms and international law as well, we find that both schools of thought on this subject matter prosecute, or forgive and forget will find support for their arguments.

We have seen that there are some legal limitations for prosecution, and that it sometimes might be a better solution to forgive and forget to maintain stability. In the case of amnesty granted, it can be viewed upon as an obstacle for the international criminal court to accomplish what is expected from them and also to carry out its legal obligations. There seems to be a trend towards prosecution and punishment. The crimes of this kind have reached too high a level and the international community seems to wish for a stricter and clearer principle of law in this regard.

The legal limitations for prosecution are, as noted above, the general rule of law "*nullum crimen sine lege*". One of the main principles of a lawful state is that it requires the criminal liability of the perpetrator at the time the act is committed. Even if an international court is not bound by amnesty legislation granted nationally, the individual cannot be punished if the country in question is not part of a treaty or is not having the rule of law as part of its own legislation. It has been glossed over the difficulties in this respect, when evaluating the work of the ad-hoc tribunals. There is no doubt that the problems with respect to this principle will emerge if trials proceed only for offences previously covered by treaty or customary law.

The scope of law has turned out to be wide indeed, when it comes to the sweeping meaning given the crimes in both the Tadic and Akayesu judgements. Both the ICTY and the ICTR have filled the gaps as best as they could, but there is no doubt that certain requirements are defined in the midst of applying them for the first time in the course of a trial. It is, however, one consideration that can be mentioned in that regard; the principle of a natural law that recognises all gross violations of human rights as always punishable. Even if a law prohibiting the crime in particular

did not exist during the repressive period, there was always this natural law.<sup>157</sup> Moreover, as the move to establish a treaty is taken, an ICC, the risk to the principle is being eroded.

All the crimes mentioned are crimes of international interest. This has a strong impact on its prosecution under international law and as the crimes affect mankind. It is an area that all states declare to protect, like mankind itself. The principle that domestic law can never justify acts that are criminal and liable under international law, is quite clear.<sup>158</sup> Amnesty granted under national legislation cannot be valid if a rule, arising under international criminal law, is stating that the crime is punishable.

## 20. Conclusion

When dealing with accountability for atrocities in international law, lawyers will have to deal with the unspeakable. The crimes are of such a tremendous scope that one can hardly comprehend its consequences. The establishment of the International Criminal Court comes at a propitious time and responds to one of the real world challenges. As the court will be caught between the temptation of collective amnesia for political and social stability and the need for criminal accountability, it is still the case as in all other cases. One has to look upon every case individually to account for measures other than the obvious reasons for punishment; rehabilitation and retribution. It is however, necessary to state an example and to establish precedence.

I will, however conclude, reluctantly, that the more feasible options are those that require the fewest resources and the least political will. These avenues will, at least, chip away at some of the impunity enjoyed so far and set the stage for even more rigorous means.

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<sup>157</sup> This principle was recognised in the Nuremberg trials.

<sup>158</sup> This principle was laid down in the Nuremberg trials and again used in the "border guard trials" in Germany

The International Criminal Court should learn from the mistakes made in the two ad-hoc tribunals. In Rwanda, where the government is fiercely struggling to re-establish the nation by dealing with the past whilst struggling to maintain its power, the society is no way near the reconciliation envisaged as the effects of the prosecutions that have been in progress for five years. One has ended up in a situation where one is likely to never be able to prosecute all those responsible for the genocide that has taken place.

For the future permanent International Criminal Court there must, from my point of view, be room for amnesties where there is no realistic vision to conduct trial for all those responsible for such crimes. The granting of amnesty might be the only realistic solution through the establishment of local Truth and Reconciliation Commissions. Truth and Reconciliation Commissions are not as limited as a trial to the concrete case and can, therefore, dig deeper and address issues never solved in the nation of constant interchanges and struggle. This is the case in South Africa, where the span of interests from the past as well as the future is covered and the body has been very successful with regard to a conflict so infected as this one. Some theorists advise Eastern European countries – or, indeed, South Africa – to stop dwelling on the past, and they are doing so for political reasons. There are certain secrets best left unexposed, either forever or at least until the exposure does not carry with it the potential for adverse political consequences.<sup>159</sup>

It must be highlighted that there is no magical connection between truth and reconciliation. Although providing the truth about South Africa's history has allowed some to forgive, for others it has led to bitterness and anger. It is clear, however, that the process has been a catalyst for South Africa regarding its new bifurcated judicial system and South Africa is now more open to political discourse and international involvement, which is positive for South Africa's future.<sup>160</sup>

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<sup>159</sup> Levinson, "Transitions" – Yale Law Journal June, 1999, p.6

<sup>160</sup> Caron: Truth and Justice in South Africa – Human Rights Brief, 1999, p.3

It is also more cost-effective to grant amnesty and to forgive and forget and that aspect must be of considerable weight when we are dealing with nations on the verge of bankruptcy.<sup>161</sup>

There is, however, a moral imperative for punishment, deterrence and closure. There must be a presumption that criminal accountability is desirable and that amnesty must be avoided. The prosecutions will, most likely, only succeed if supported by a stable and united government and, even though the ideal solution is to prosecute, it might be a step too far ahead of the situation as a whole. The International Criminal Court must approach amnesty as a second-best option and sometimes the only option if one shall accomplish the achievement of providing the full measure of justice. Furthermore, an option is to try the high level perpetrators versus the 'small fish', then international criminal law will be enforced and the future is given a chance to evolve peacefully.

Thus, amnesty granted must be upheld in some cases, even if this will suffer criticism. At the end of the day, it still remains as the solution I am chosen to believe stands the most reasonable chance for the future reconciliation and peace in the suffering parts of the world. What I am suggesting is that we might be living in a transitional moment where prices must be paid to bring about a measure of corrective justice. One must respond to the deeply felt and altogether understandable anguish of victims of often monstrous injustice<sup>162</sup>, but also try to achieve what will, at the end of the day, benefit the nations deepest interests at heart.

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<sup>161</sup> Based on views from seminars in Transitional law at the University of Western Cape 1999

<sup>162</sup> Levinson: "Transitions" – Yale Law Journal, June 1999, p.15

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