The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism versus the International Law Obligations

Ziyad Motala
FOREWORD

This article is based on a speech delivered as part of the Frank E.A. Sander Lecture at the plenary session of the American Bar Association’s Section of Dispute Resolution Meeting. The Truth and Reconciliation Commission (“TRC”), created pursuant to the South African Constitution, has been touted as an alternative model for the resolution of past conflict in a society marked by deep divisions and conflict. The epilogue to the Interim Constitution stated that the adoption of the Constitution provides a foundation for South Africans to transcend the divisions and strife of the past. It called on South Africans to achieve reconciliation, understanding and reparation, but not for vengeance and retaliation. The epilogue further required that “amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past.” Pursuant to this requirement, the Legislature of South Africa passed the Promotion of National Unity and Reconciliation Act of 1995 (“Amnesty Act” or “the Act”) to grant amnesty to persons who have committed political acts in the past, and who make a full

* Professor of Law, Howard University School of Law. This is a paper presented as part of the Frank E.A. Sander Lecture at the plenary session of the American Bar Association Section of Dispute Resolution Meeting in New York City on April 15, 2004.

disclosure of their past deeds. The Amnesty Act provides that the Amnesty Committee shall grant amnesty to all persons who comply with the provisions of the Act, namely that they have committed a political offense during the prescribed period, and have made a full disclosure. A person who has been granted amnesty enjoys full immunity from all criminal and civil actions.

This article asserts that the TRC, although it serves an important purpose of providing a factual record, does not constitute an adequate mechanism under principles of international law for addressing serious human rights violations. International law requires that victims of gross human rights violations be provided an effective remedy before a competent tribunal. Moreover, international law requires that individuals who commit serious violations of human rights—particularly war crimes and crimes against humanity—are punished. This obligation to punish for serious violations of international law is a superior norm of international law, which rises to the level of jus cogens and from which there can be no derogation. Apartheid has been characterized as a grave breach under the definition of a war crime under the Additional Protocol of the Geneva Conventions. Apartheid has also been consistently proclaimed as a crime against humanity. Under international law, this means that victims of apartheid should be accorded all the remedies that are accorded to victims of a war crime and a crime against humanity. The granting of amnesty to individuals engaged in war crimes and crimes against humanity deprives the victims of their right to an effective remedy. Apart from depriving the victim of gross human rights violations of an effective remedy, the success of the TRC is largely exaggerated because there has been no sociological study to demonstrate that the mechanisms created under the Amnesty Act, which bypass the normal judicial structures, promote truth and reconciliation.

I. INTRODUCTION

It is an honor and privilege to appear before the ABA Section of Alternate Dispute Resolution. On April 14, 2004, South Africa celebrated its third democratic elections and the first ten years of its democracy. In these first ten years of democracy, the new South Africa has generally demonstrated
an adherence to human rights and has firmly placed itself in the mainstream of democratic international practice. However, the granting of amnesty for gross human rights violations and its validation by the Constitutional Court of South Africa constitute a notable exception.\(^2\) It is one thing for political actors to make an argument that political, economic, and sociological reasons prompted the adoption of the Amnesty Act. It is entirely different to assert that the Amnesty Act is consistent with international human rights norms because it clearly is not.

Under current prevailing views of international human rights norms, war crimes demand that their perpetrators be punished. A war crime, or for that matter a crime against humanity, is not a "common" criminal offense. Nor is a war crime a "political offense." As such, where a person is alleged to have committed a war crime, it would not comport with norms of international law for that person to receive amnesty simply by claiming that the crime was of a political nature.\(^3\) Because the South African TRC grants amnesty to those accused of war crimes in exchange for simple truth-telling, it violates fundamental principals of international law.

II. BACKGROUND

Before turning to the legal principles, it is important to first consider the horrific nature of the crimes at issue and how they, and similar acts, have been addressed in South Africa and elsewhere. First of all, it is important to note that the following crimes were committed by the South African army and police, as well as by other elements of the apartheid state. The apartheid regime indirectly caused serious destruction and death by aiding and abetting insurgent movements in Mozambique and Angola in committing indiscriminate attacks, killing and maiming civilian populations, and destroying civilian property. The apartheid regime also perpetrated widespread torture, arbitrary


\(^3\) See B.A. Wortley, Political Crime in English Law and in International Law, 45 BRIT. Y.B. INT'L L 238-39 (1971).
deprivation of life (sometimes through hit squads\textsuperscript{4}), and inhumane treatment of the civilian population and members of the former South African liberation movements. The regime also engaged in conduct "unique" to apartheid (which the international community has targeted), including widespread discrimination, dislocation, denationalization, torture, arbitrary arrest and imprisonment, and a host of other gross violations of human rights. Overall, much indignity was perpetrated on the South African majority by the crimes of the apartheid regime. In response, the postamble to the Act rightfully sought to achieve national unity and reconciliation amongst the people of South Africa by the creation of a truth commission.\textsuperscript{5} A truth commission set up to investigate abuses of the past has served in many countries the important purpose of fact-finding and correcting past wrongs and injustices.\textsuperscript{6} Recreating an accurate picture of the horrific events prevents a distortion of history, and allows society to learn from its past to prevent such a repetition of abuses in the future.\textsuperscript{7} Many human rights lawyers observe that full truth-telling accompanied by self-reflection is necessary for national healing.\textsuperscript{8}

The idea of providing amnesty for political offenses and omissions, as is called for in the post-amble to the South African Constitution, is a sound choice that one hopes all South Africans would support. Granting amnesty for political

\textsuperscript{4} A "hit squad" is a squad or team of state-sanctioned paramilitary forces organized for carrying out a political assassination. Reed Kramer, \textit{Apartheid Leadership Linked to 'Hit Squad,'} \textsc{Wash. Post}, June 12, 1997, available at http://allafrica.com/stories/200010250256.html (last visited Apr. 15, 2005).


\textsuperscript{6} In addition to South Africa, truth commissions have been established in Uganda, Bolivia, Argentina, Uruguay, Zimbabwe, The Philippines, Chile, Chad, Germany, El Salvador, Rwanda, and Ethiopia. \textit{See} Priscilla B. Hayner, \textit{Fifteen Truth Commissions—1974 to 1994: A Comparative Study,} 16 \textsc{Hum. RTS. Q.} 597, 597 (1994).

\textsuperscript{7} \textit{Id.} at 607.

\textsuperscript{8} \textit{See id.}
THE AMNESTY ACT

offsenses is something that a state may legally do, and this option has been pursued in numerous emerging democracies. Conversely, there can be no amnesty granted for the violation of non-derogable rights. A war crime or a crime against humanity is not a "common" criminal offense, and someone alleged to have committed war crimes cannot receive amnesty by claiming that the crime was of a political nature. This distinction can be seen in the amnesty laws of the former German Democratic Republic, Romania, and Hungary, which provide amnesty for political offenses but have excluded amnesty for crimes against humanity.

Where amnesty has been granted for gross human rights violations, or violations of other non-derogable rights, it has been universally condemned by international tribunals. For instance, in a 1992 decision, the Inter-American Commission of Human Rights, declared that the "application of the Salvadoran amnesty decree constitutes a clear violation of the obligation of the Salvadoran Government to investigate and publish the violations of the rights of the Las Hojas victims." The Inter-American Commission also declared that the application of amnesty constitutes a grave violation of non-derogable guarantees.

The Commission went on to say

[t]he present Amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial

9. Non-derogable rights can be defined as:
The set of rights from which no derogation is possible, not even in times of emergency . . . . It includes the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the right not to be imprisoned for failure to perform a contractual obligation, the right not to be subject to retroactive penal measures, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion.


10. See Wortley, supra note 3.


13. Id.
guarantees, denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders.\textsuperscript{14}

Similarly, in the case of Uruguay, as part of the transition to a new constitutional order, political parties provided amnesty to perpetrators of all crimes. The Uruguayan government argued that the granting of amnesty was within its sovereign prerogative and should be viewed in the political context of reconciliation.\textsuperscript{15} The argument raised by Uruguay is the same as the conclusion the Constitutional Court arrived at in the Amnesty Decision.\textsuperscript{16} Both decided that it is within the power of a particular nation's legislature to override international law, and that the granting of widespread amnesty must be viewed as a necessary means to achieve reconciliation. However, the Inter-American Commission ruled that Uruguay had violated its international law obligations by failing to protect the inalienable right of its citizens to a fair trial. The Commission also ruled that the effect of the amnesty "was to deny the victim or his rightful claimant the opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced, determine criminal liability and impose punishment on those responsible, their accomplices and accessories after the fact."\textsuperscript{17} In the Honduran case of Velasquez Rodriguez, the Inter-American Court of Human Rights recognized a duty existed on the part of the Honduran government not only to investigate but also to prosecute those reliably accused of disappearances.\textsuperscript{18} Based on these decisions, it is clear that granting amnesty to those accused of human rights violations does not meet international law

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{16} Azanian People's Org. (AZAPO) v. President of the Republic of South Africa 1996 (8) BCLR 1015 (SA), \url{http://www.icrc.org/ihl-nat.nsf} (last visited Feb. 23, 2005).
\item \textsuperscript{17} Mendoza, ¶ 40.
\end{itemize}
III. THE SOUTH AFRICAN MODEL

There were political realities and a constellation of other political factors that constrained the role players drawing up the Constitution. The apartheid generals were the most significant constraining force, and their influence on the drafting of the Constitution cannot be overstated. Political and economic considerations also likely played a role in the decision not to proceed down the path of endless prosecutions and litigation.

As a result, the drafters of the Republic of South Africa Constitution Act in the post-end bill provided that the adoption of this Constitution provides a foundation for South Africans to transcend the divisions and strife of the past. The post-end bill goes on to provide that there is a need for reconciliation, understanding and reparation, but not for vengeance and retaliation. In order to advance such reconciliation and reconstruction, the post-end bill provides that “amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past.” Pursuant to this clause, the South African legislature also created a Truth and Reconciliation Commission under the terms of the Promotion of National Unity and Reconciliation Act.

A. The Issues Created by the TRC and the Act

Before discussing the applicable norms of international law, let me comment first on the premise of the Act. The Act is called the “Promotion of National Unity and Reconciliation

21. Id.
22. Id.
Whether or not the TRC in fact set the country on the path of "unity and reconciliation" is an open question. One hears the view that the truth-telling contributed to a kind of healing and catharsis, but these claims are untested and arguably exaggerated. There are no sociological studies that document this catharsis or healing. The notion that if the torturers or murderers come forward and state that they tortured someone's relative, and killed him in a certain way, that there will be some kind of healing is unsubstantiated.

No doubt, there were instances where individuals came forward simply because they needed to know what happened to their relatives or friends. There were also likely instances where the victim's family came forward and said they needed to know where the body of their relative was so that they could provide a dignified burial. There were instances where individuals derived some level of "satisfaction," and a feeling that the TRC gave them significance by allowing them to tell their stories. These were all very moving occasions. In this context, the TRC contributed to the engendering of allegiance to the new order in South Africa, and during a particularly fragile period immediately after the first democratic elections. But the simple fact that the truth may be known is only the beginning of the story.

Some frame the choice as truth versus justice. On the one hand, the work of the TRC in uncovering the truth in many instances where the information would not ordinarily have come out is important. In the AZAPO decision, the Constitutional Court recognized the value of uncovering the truth in ruling that, absent amnesty and the coming forward of the perpetrators, the country and the world would never have known who the perpetrators of those human rights abuses were. But on the other hand, the international law perspective places more importance on bringing the perpetrators of heinous crimes to justice.

For example, in the Rodriguez case, the Inter-American

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23. Id. at cl. 49.


Court of Human Rights emphasized, "[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result." Nevertheless, it noted, the duty to investigate must be undertaken seriously. However, the Amnesty Act and the approach of the South African Constitutional Court are not within this mainstream view of democratic international law.

In South Africa, it is a matter of common knowledge what crimes were committed under apartheid and, in many cases, even who the perpetrator was. The reality of death squads, torture squads, repression, dispossession, and other grave human rights violations was something these citizens experienced first hand. For these South Africans, there is less value to the truth-telling than there is in holding the perpetrators accountable. Like the Biko family and Mxenge family demanded before the Constitutional Court in the AZAPO case, some of the victims of apartheid seek redress and reprimand.

On the other hand, we hear many whites saying "we never knew this happened under apartheid," and the argument is made that it was important that those citizens knew the truth. If we are to accept this view, that truth is as important as justice, it would give credence to the notion that the TRC contributed more to the education and benefit of the whites than for the black majority. Under prevailing views of international law, this is an unacceptable result.

B. The Actual Effect of the TRC and the Amnesty Act

In any event, the purported benefit of the truth-telling must be weighed against the fact that relatively few perpetrators have actually come forward and made sincere apologies for their actions. Instead, those accused of war crimes have simply gone through the motions and followed the requirements of the Amnesty Act as a means to avoid any

27. Id.
28. Biko and Mxenge, South African citizens and apartheid-crimes victims, were among the applicants in the AZAPO case who sought to invalidate the Amnesty Act in order to bring human rights violators to justice. See AZAPO, at 1015.
criminal or civil liability. In this sense, some would argue that the TRC did more for the perpetrators than for the victims. For telling their story, even without an apology, the perpetrators avoided any liability and were not required to compensate the victims in any way.

For example, see the testimony of Gideon Nieuwoudt, an apartheid agent and former security policeman, the perpetrator showed no remorse as he recounted how he blew up four black colleagues he believed were African National Congress sympathizers. Remorse, or lack thereof, is not even one of the factors that the TRC will ultimately consider in deciding whether Mr. Nieuwoudt receives amnesty. As in all such cases, the amnesty panel decides only whether the perpetrator has made full disclosure and whether he acted with a political motive. He or she is not even required to make any restitution.

The irony of this situation is that the new South African state, now ruled by Nelson Mandela, Thabo Mbeki, and others, is expected to take reparation measures and address the consequences of these very same human rights abuses. On the other hand, in the AZAPO case, the Constitutional Court recognized that the state could not compensate every victim of apartheid. In light of this conclusion, the Constitutional Court stated that the state should have the discretion to use its resources "imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process ... for the benefit of the entire nation."

1. The Victim's Right to Compensation

It is important to note that the term "reparations," as used in the Act, is not used therein to mean "compensation" (as it is generally understood to mean in other legal contexts). Most of the "reparations" envisioned by the Act are instead symbolic acts such as: the building of symbols and monuments, measures to rehabilitate the community, granting of medical benefits and social assistance, renaming streets to reflect the struggle, and only a very limited amount

30. See AZAPO, ¶¶ 44-46.
31. Id. ¶ 43.
of monetary grants were given—the approximately 22,000 victims received, in terms of U.S. dollars, just over $4,000 each. These reparative acts, with or without the intervening efforts of the TRC, are important for the legitimacy of the new South African state. They are necessary in any revolutionary context where there is a radical break from a previous order to a new dispensation. Moreover, the social transformation and uplifting of the historically disadvantaged is a form of reparation that the majority of people expect.

However, when viewed from an international human rights perspective, what is offered as “reparations” does not constitute a sufficient and effective remedy for the victims of apartheid. What these reparations offer is not necessarily personalized to the individual victim, and in fact, the only benefit to the victim at all is a confession from the perpetrator of a gross human rights violation. Truth-telling is no tradeoff for justice, or for true compensation ordered by a competent tribunal. The observation has been made that “human rights without effective implementation are shadows without substance.”

Almost all the seminal instruments of international human rights guarantee victims a right to an actual and effective remedy before an impartial and competent tribunal.


34. For example, the Universal Declaration of Human Rights, which is widely accepted to embody norms of customary international law provides in article 8 that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” G.A. Res. 217 (III 1948), U.N. GAOR, adopted by the General Assembly on Dec. 10, 1948. Article 2.3(a) of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M 368 (1967), provides that each state party undertakes “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons
For example, in 1985, the United Nations General Assembly passed a resolution entitled the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that reiterates the right of the victim to seek individual redress and compensation.\textsuperscript{35} This authoritative and widely accepted recognition of the right to an actual remedy arguably elevates that right to at least a norm of customary international law. Because the Amnesty Act fails to provide an effective and individual remedy for victims in South Africa, it cannot be viewed as complying with international law.

2. The Victim's Right to a Hearing before an Independent and Impartial Tribunal

The Amnesty Act takes from the victim his or her fundamental right of seeking redress from a court and instead asks the victim to place his or her confidence in the bureaucracy of the state. The Amnesty Act does not guarantee the victim any redress. Instead, whether any redress is provided, as well as the kind of redress, is entirely within the discretion of the Legislature and the Executive.\textsuperscript{36} The words "independent" and "impartial" are contained in Article 10 of the Universal Declaration of Human Rights and Article,\textsuperscript{37} Section 14(1) of the International Covenant on Civil and Political Rights,\textsuperscript{38} Article 6(1) of the European Convention on Human Rights,\textsuperscript{39} Article 10 of the African Charter on Human and Peoples' Rights,\textsuperscript{40} Article 25 of the American Convention on Human Rights,\textsuperscript{41} Article 13 of the European Convention of Human Rights,\textsuperscript{42} Article 7(1)(a) of the African Charter,\textsuperscript{43} and Article 6(1) of the African Charter.


\textsuperscript{38} International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).
on Human Rights,\textsuperscript{39} and Article 8(1) of the American Convention of Human Rights.\textsuperscript{40} The importance then, of allowing victims of human rights violations to come before an independent and impartial tribunal to seek redress is both apparent and widely accepted. The ordinary meaning of "independent" is independent of other organs of government.\textsuperscript{41} In his concurring opinion in the AZAPO case, Justice John Didcott stated that the Committee on Amnesty and the Committee on Reparation and Rehabilitation appear to be independent and impartial.\textsuperscript{42} But this finding is not consistent with international human rights interpretations, because the ordinary meaning of "independent" is independent of other organs of government in terms of the doctrine of separation of powers.

The TRC should only serve to complement the work of a competent judicial tribunal. Since the TRC lacks any enforcement capability, it cannot force the victim to accept it as a complete substitute for a legal tribunal. Archbishop Desmond Tutu (the Chair of the TRC) who, much to the chagrin of the South African government, recently recognized this problem and lent his support to the civil action brought against major American corporations, such as Citigroup, JP Morgan Chase, IBM, and Daimler Chrysler, for benefiting from apartheid.\textsuperscript{43} Apartheid victims brought the action before the United States courts in hopes of finding a tribunal that would grant it proper redress.\textsuperscript{44}

In a written statement to the New York District Court, Archbishop Tutu declared that any compensation awarded by the American courts would not be incompatible with the TRC nor undermine reconciliation in South Africa. The Archbishop stated, "to the contrary, the obtaining of

\begin{enumerate}
\item Lillich, \textit{supra} note 33, at 141.
\item AZAPO, \textit{supra} \textsection 53.
\item Id.
\end{enumerate}
compensation for victims of apartheid [would] supplement the very modest amount per victim to be awarded as reparation under the TRC process [and] could promote reconciliation."\textsuperscript{45} The South African government viewed the action with scorn, focusing instead on the potential risks that the country could suffer from an investment and job-creation perspective.\textsuperscript{46} Arguably, the South African government saw the TRC as important in engendering confidence in the South African economy as committed to the free market system.\textsuperscript{47} 

C. \textit{The International Law Obligation to Prosecute}

The TRC has attempted to undertake the important goal of promoting a national dialogue where responsibility for harm is identified and addressed. But there are just as many victims who feel that substantive results, like accountability and justice for gross human rights violations, are equally as important. The gross human rights violations committed under apartheid include: conventional war crimes (violations of the laws of war), and the two additional categories of crimes recognized by the Nuremberg Tribunal (crimes against peace and crimes against humanity).\textsuperscript{48} By extension, gross human rights violations also include genocide, apartheid, and the systematic use of torture.\textsuperscript{49} These crimes, and their prohibition, are widely considered to be peremptory norms of international law from which there can be no derogation, even in times of emergency.

There are a number of sociological and political factors that prompted the adoption of the Amnesty Act.\textsuperscript{50} But regardless of sociological and political judgments that

45. Id.
46. Id. (statement of Presidential spokesman Bheki Khumalo).
47. See Boraine & Breytenbach, supra note 24, at 12 (views of Breyton Breytenbach).
50. For an overview of the sociological and political factors that often come into play in questions of punishment and amnesty in South Africa (and in other nascent democracies) see Lynn Berat & Yossi Shain, Retribution of Truth-Telling in South Africa? Legacies of the Transitional Phase, 20 LAW & SOC. INQUIRY 163 (1995).
political actors make, international law imposes an obligation on states to prosecute individuals who are alleged to have committed war crimes or crimes against humanity.\textsuperscript{51} This obligation is a higher norm of international law that cannot be compromised to political expediency. The Amnesty Act, to the extent that it provides for amnesty for war crimes and crimes against humanity, violates a cardinal rule of international humanitarian law, namely that there can be no amnesty for such deeds.\textsuperscript{55} Similarly, the Act, in suspending and canceling any civil action that victims of war crimes may bring against alleged offenders, violates a superior norm of international law that provides rights to individual victims regardless of the attitude of the state.\textsuperscript{53} There are similar obligatory duties, under international law, that mandate the prosecution of individuals alleged to be involved in crimes against humanity, and crimes against peace.\textsuperscript{54}

1. Apartheid as War Crimes and Crimes Against Humanity

The Nuremberg Charter defines crimes against humanity as conduct against civilian populations such as murder, extermination, deportation, and persecution on religious, racial or political grounds before or during the war.\textsuperscript{56} Subsequent developments in international law confirm that crimes against humanity can occur both in the course of war, as well as in peacetime against the state's own domestic population.\textsuperscript{56} International law now characterizes apartheid

\begin{itemize}
  \item \textsuperscript{53} With respect to war crimes, see Article 49 of the First Geneva Convention of 1949, Article 50 of the Second Geneva Convention of 1949, Article 129 of the Third Geneva Convention of 1949, and Article 146 of the Fourth Geneva Convention of 1949.
  \item \textsuperscript{54} See generally M. Cherif Bassiouni, \textit{Crimes Against Humanity}, in \textit{INTERNATIONAL CRIMINAL LAW} 500-06 (1992).
  \item \textsuperscript{55} Nuremberg Charter, \textit{supra} note 48, at art. 6(c).
\end{itemize}
as a crime against humanity, and victims of apartheid are therefore entitled to all the international law remedies afforded to victims of crimes against humanity.

The U.N. General Assembly codified apartheid as a crime against humanity in 1973, when it adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid. The Apartheid Convention also characterizes apartheid as a crime against humanity. The Preamble to the Apartheid Convention states that certain attributes of apartheid constitute genocide. But what exactly is "apartheid?"

The Convention applies the term to a host of acts including denying members of a particular racial group the right to life and liberty. Apartheid also includes murder of members of a racial group; infliction of serious bodily or mental harm upon members of a racial group (including torture or cruel or inhuman or degrading treatment); and, the arbitrary arrest or imprisonment of members of a racial group. The crime of apartheid also encompasses the deliberate imposition on a racial group of living conditions calculated to cause their full or partial physical destruction; legislative measures preventing them from participating fully in the political system or from enjoying their full human rights; measures designed to divide the population along racial lines by the creation of separate reserves or ghettos; exploitation of labor and forced labor; and, persecution of individuals and organizations "by depriving them of their

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59. See id. at art. I(1).

60. Id. at art. II.

61. Id. at art. II(a).

62. Id. at art. II(b).

63. Id. at art. II(d).

64. Apartheid Convention, supra note 58, at art. II(d).

65. Id. at art. II(e).
fundamental rights and freedoms because they oppose apartheid."\(^6\)

For persons who engage in the above-mentioned acts, the Convention attaches individual and collective responsibility.\(^6\) The Convention further imposes an obligation on state parties to bring to trial, and punish, individuals responsible for acts defined as the crime of apartheid.\(^6\) The Convention also provides for universal jurisdiction, allowing the courts of any state party who may acquire personal jurisdiction over the individual to try the individual who engaged in acts of apartheid.\(^6\) The Convention specifically mentions a duty not to apply the political offense exception.\(^7\) Overall, the provisions in the Apartheid Convention are similar to declarations made by the governments and statesmen of the Allied Powers during World War II in that each warned criminals that their terrible crimes would not go unpunished.\(^2\) To allow a different result would not reflect the fact that apartheid is an internationally recognized crime against humanity.

Given that apartheid is an international crime, there is an obligation on all states, whether party to the Apartheid Convention or not, to prosecute and punish such conduct. In other words, the obligation to punish crimes against international law, particularly crimes against humanity, is an obligation *erga omnes*.\(^7\) This obligation therefore binds South Africa even if it is not a party to the Apartheid Convention. By 1985, there were already over eighty countries that had signed on as parties to the Apartheid Convention, and it is reasonable to argue that the new South African government had a separate duty to prosecute alleged apartheid

\(^6\) Id. at art. II(f).
\(^6\) Id. at art. III.
\(^6\) Id. at art. IV(b).
\(^6\) Id. at art. V.
\(^7\) Apartheid Convention, *supra* note 58, at art. XI. The political offense exception is embodied in the *Castioni* Principle, which requires that for a criminal act to be political and non-extraditable, the crime must have been committed with a political motive and in the course of a political disturbance. Wortley, *supra* note 3, at 227-28.
\(^7\) An *erga omnes* obligation is an obligation owed by a state to the entire international community. MALCOLM N. SHAW, *INTERNATIONAL LAW* 116 (5th ed. 2003).
“criminals” under what has now become customary international law.⁷³ Significantly, the United Nations General Assembly attempted to limit the potential for individuals to escape prosecution for war crimes and crimes against humanity by adopting the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁷⁴ That Convention specifies that no statutes of limitation shall apply to crimes against humanity, and mentions apartheid and genocide by name.⁷⁵

2. Jus Cogens and the Obligation to Prosecute

This conclusion is further reflected in the fact that the punishment of war crimes and crimes against humanity has risen to the status of *jus cogens*. When an international norm reaches the status of *jus cogens*, all states are bound to refrain from any actions that are prohibited by that peremptory norm. Thus, any action on the part of a state that infringes on, or otherwise conflicts with, that peremptory norm is null and void.⁷⁶ *Jus cogens* norms are “foundational, guarding the most fundamental and highly-valued interests of international society.”⁷⁷ *Jus cogens* has been equated with the concept of natural law, and the idea of “necessary” law that all states are compelled to observe.⁷⁸ This concept invalidates state-made rules that conflict with its application.⁷⁹ It does not matter whether the state's act comes as a result of a purported agreement with another state(s), or if it is a unilateral action. In either case, if the

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⁷³ See Roger S. Clark, The Crime of Apartheid, in 1 INTERNATIONAL CRIMINAL LAW 312 (M. Cherif Bassiouni ed., 1986). Clark argues that regardless of what the views of South Africa and other countries may have been at the time of the Apartheid Convention’s conception, the Convention has so many parties that it must be regarded that this in itself has an impact on contemporary international law. *Id.* at 317.


⁷⁵ *Id.* at art. 1(b).


⁷⁹ *Id.* at 359. See also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 220 (1989).
action conflicts with a *jus cogens* norm, the action is invalid. 80

For example, crimes against humanity, like apartheid, must be punished under international law. This duty to punish, which has risen to the level of *jus cogens*, creates an exception to national sovereignty, the cardinal principle of international law. 81 Whereas a state generally has sovereignty in deciding whom to punish, and for what, where a crime against humanity has been committed, that sovereignty must yield to international law obligations. A state cannot avoid this international law obligation to prosecute, even in order to achieve national reconciliation. 82 Under this rule, the South African government absolutely cannot provide amnesty to alleged apartheid "criminals" for crimes against humanity.

International criminal law seeks to punish any person who commits an act that is a crime under international law. This principle is derived from the Charter and judgment of the Nuremberg Tribunal, and has since been affirmed by the United Nations General Assembly. 83 The Nuremberg Tribunal noted that international law imposes duties upon both individuals and states. The Tribunal noted further that international law crimes "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision[s] of international law be enforced." 84 Several international conventions, namely the four Geneva Conventions, codified these principles espoused by the Nuremberg Tribunal. The Geneva Conventions operate on the assumption that each state will enforce the provisions of the treaties in terms of its domestic criminal law, and will cooperate in the prosecution, and punishment of individuals engaged in international crime. 85 The objective is not vengeance, but rather through prosecution and punishment, to achieve deterrence. 86

82. Id. at 2595.
83. Bierzaneck, *supra* note 71, at 44.
86. Id. See also Orentlicher, *supra* note 51, at 2542.
IV. The Conflict Between the Amnesty Act and the Geneva Conventions

The Geneva Conventions are also significant in that they expressly classify "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self determination" as "international" conflicts for the purpose of applying the laws of war.87 Viewing apartheid and acts related to colonial rule as being "international" conflicts, as the United Nations does, is logical in light of the reality that the struggle for self-determination is on its own a legitimate struggle in international law.88 Because apartheid is an international conflict for these purposes, its perpetrators are subject to punishment for "grave breaches" of the Geneva Convention. Protocol I of the Geneva Conventions specifies the types of conduct that may constitute a grave breach, and perhaps the most pertinent to the present discussion are "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination."89 Most significantly, the next sub-part states that grave breaches shall be regarded as war crimes.90

The Geneva Convention Protocol I also lists population transfers and practices of apartheid and other discriminating or degrading practices as a grave breach.91 Additionally, Protocol I states that the "provisions of the Conventions relating to the repression of breaches and grave breaches ... shall apply to the repression of breaches and grave breaches of this Protocol."92 This imposes an obligation on state parties not only to punish for war crimes, but also to punish for apartheid specifically as a grave breach of the Convention.

This is further emphasized in the next Article which provides that state parties shall "take measures necessary to suppress all other breaches, of the Conventions or of this Protocol."93 The obligation to punish for a grave breach is jus

90. Id. at art. 85(5).
91. Id. at arts. 85(3), 85(4).
92. Id. at art. 85(1).
93. Id. at art. 86(1).
Apart from the individual victims in South Africa, the actors in the apartheid state are also liable for any war crimes and crimes against humanity committed against civilian and lawful combatants from the neighboring African countries. The Geneva Convention mandates respect for civilian populations. Similarly, the rights of these victims cannot be waived by any government and thus, any attempt in the Promotion of National Unity and Reconciliation Act to suppress the prosecution and penalization of the perpetrators of such actions violates jus cogens norms. It is debatable whether Protocol I, in its entirety, reflects principles of customary international law. But it is arguably accurate to say that, at a minimum, the grave breaches identified in the main provisions of Protocol I reflect customary international law if not jus cogens.

The Amnesty Act, in so far as it provides amnesty for war crimes, is inconsistent with this international law obligation to exercise compulsory prosecution when there is an allegation of war crimes. A war crime is not a “common” criminal offense, and someone alleged to be involved in war crimes cannot receive amnesty simply by claiming that the crime was of a “political nature.” As discussed above, the Geneva Conventions codify the duty to prosecute when war crimes are committed, and they mandate states to provide effective criminal sanctions for breaches of the Conventions. In other words, there is an obligation on contracting states to prosecute and punish the grave violations mentioned in the Conventions. Under the Conventions, parties are obligated to: 1) search for persons alleged to have committed, or to have been involved in any way with a grave breach of the Conventions; and 2) to prosecute and punish them before

95. See Fourth Geneva Convention arts. 27, 32. See also JEAN PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 33-34, 46-47 (1966), for the essence and rationale of making the individual the beneficiary of the right.
96. See MERON, supra note 79, at 62-70.
98. See Wortley, supra note 3.
their own courts.\textsuperscript{100} This obligation is a peremptory norm of international law.\textsuperscript{101} But not only is the South African state bound to search and prosecute such criminals, it also cannot waive prosecution or otherwise forgive the incident. If a state purports to do so, it is in violation of international law, and this violation on the part of the state does not foreclose the right of the victim to seek redress elsewhere.

As alluded to above, there is a duality of rights granted simultaneously to the individual and the state in which the individual is a subject. The lawful combatant and the civilian stand on their own rights without having to depend on the goodwill of the state to protect those rights for them. Likewise, the state of nationality can take an action on its own without waiting for the victim to first appeal to it for help.\textsuperscript{102} The Amnesty Act violates international law in attempting to suspend all civil actions, and in doing so, it prevents victims from seeking redress against the perpetrator(s) of apartheid-related crimes. The right of the victim to seek redress is a peremptory norm from which there can be no derogation. So while the failure of the South African government to prosecute individuals accused of violations of the Geneva Conventions violates a peremptory norm of international law, the fact that the state is prepared to forget does not bind the victim.\textsuperscript{103} Neither the state nor the individual can waive the other's right. Each of the four Geneva Conventions provide: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by any other High Contracting Party in respect of breaches referred to in the preceding Article."\textsuperscript{104} This is also a peremptory norm

\begin{itemize}
  \item \textsuperscript{100} \textit{Ian Brownlie, Principles of Public International Law} 563 (4th ed. 1990).
  \item \textsuperscript{102} Common Articles 7 in the First, Second, and Third Geneva Convention, and Article 8 of the Fourth Geneva Convention provide that "[p]rotected person may in no circumstances renounce" the rights secured to them in the Conventions. \textit{See also} Yoram Dinstein, \textit{Human Rights in Armed Conflict}, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 355 (Theodor Meron ed., 1984).
  \item \textsuperscript{103} Dinstein, \textit{supra} note 102.
\end{itemize}
of international law. The requirement to prosecute the perpetrator, and the right of the victim to seek redress against the perpetrator, are peremptory norms of international law, and as a result, invalidate any provision in the Promotion of National Unity and Reconciliation Act to the contrary.

V. CONCLUSION

There has not been a ground swell of opposition to the TRC. Much can be attributed to the legitimacy of the towering personalities who led the process namely former President Nelson Mandela and Archbishop Desmond Tutu. Mandela engenders trust and confidence like no other figure, and to many, the TRC is viewed as the creation of Mandela. The renowned South African author Breyton Bretenbach remarked that the TRC was “probably intended to let off steam.” Breytenbach questions whether it has done any good. Zimbabwe, after the 1979 Lancaster House Agreements, also adopted a forgive-and-forget attitude. Like South Africa, they adopted a government of national unity with reserved number of seats for the white minority and with members of the previous regime serving in the first government of national unity. For a long time, they had an immensely popular president, Robert Mugabe. Today, the country is in near civil war, a primary source of which has been Robert Mugabe himself, no doubt because of his own self-serving needs and actions. Trevor Manuel, the South African Minister of Finance, remarked in a speech on March 2, 2004 that the patience of the poor should not be taken for granted and as “long as poverty remains at its current levels, it will test our democracy.” Big businesses, the mines, and farmers profited under apartheid and were able to reap supernatural profits under the discriminatory laws, pass system, denial of worker rights, and low wages. These sectors have not taken responsibility for this. Those that historically

105. Parker & Neylon, supra note 101, at 455-56.
106. Boraine & Breytenbach, supra note 24, at 12.
107. Id. at 15.
benefited through the color of their skin still control the natural resources, property, and wealth. At some stage, the question is likely to be posed—what does the Constitution and the Truth and Reconciliation Act mean to the ordinary South African? Does it serve as an instrument and framework for fulfilling their critical needs such as food, education, medical care, housing, and the like? As to whether the TRC has made an enduring contribution to national unity and reconciliation, I suspect the jury will be out on this question for some time.