

Namibia and Blanket Amnesties: Challenging the Namibian Blanket Amnesties on the basis of International Law in the Namibian Courts

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Abstract

Amnesty laws issued by Administrator General Pienaar in 1989 and 1990 still show their effect by preventing prosecutions and investigations of situations that occurred before Namibia's independence. Unlike South Africa, Namibia did not establish a truth-finding body such as the Truth and Reconciliation Commission. The result is a situation of silence, oblivion and impunity without any kind of accountability. On this basis, crimes such as international crimes or serious human rights violations have never been prosecuted or even investigated. As this article argues, the amnesty laws from 1989 and 1990 qualify as blanket amnesties. Up until today, Namibians as well as the members of the South African Defence Force benefit from those amnesties. Against this backdrop, the question of whether the Namibian blanket amnesties apply in relation to international crimes and grave human rights violations will be addressed. This article argues that based on international law, the application of the Namibian blanket amnesties can be challenged in a potential criminal case that deals with international crimes or grave human rights violations in the Namibian courts. Therefore, this article illustrates how international law applies in the Namibian legal system. In this context, Namibia follows a monist approach which makes it quite receptive of international law and international standards. On this basis, this article points out binding international law at the time before and after Namibia's independence as well as examining Namibia's binding treaty obligations which arise under the Geneva Conventions, Torture Convention and the International Covenant on Civil and Political Rights. In the next section, an examination of domestic and international jurisprudence lays the foundation for the argument that the Namibian blanket amnesties can be challenged in a Namibian court when the crimes in question constitute international crimes, such as crimes against humanity or war crimes.

Keywords: Blanket amnesties; crimes against humanity; international crimes; Namibia; war crimes

Introduction*

Amnesty laws in Namibia have so far prevented any investigation or prosecution of the most serious crimes such as torture, crimes against humanity or war crimes that occurred before its independence in 1990. In this context, Namibia did not establish a truth-finding body as South Africa did with the Truth and Reconciliation Commission (TRC).

It has been almost thirty years, and the Namibian state has still not shown any initiative to shed light into situations that occurred before the country's independence. Hage Geingob, the current president of Namibia, recently reiterated this position. He rejected a proposal to investigate crimes that were allegedly committed by the South-West Africa People's Organisation (SWAPO) against its political prisoners during the liberation struggle. The president stated that adopted amnesty laws at the time of the independence of Namibia constitute a bar to any investigation.¹

In this context, the United Nations (UN) Committee against Torture (CAT) remarked in its latest report on Namibia from 1 February 2017 that:

[T]he Committee is concerned that serious allegations of torture committed during the liberation struggle have not been investigated, which could lead to impunity for those crimes.²

The Committee further reminded Namibia in its report that:

[T]he absolute prohibition of torture is a recognised norm of jus cogens and that article 2(2) of the Convention makes clear that no exceptional circumstances whatsoever may be invoked as a justification of torture. Subjecting acts of torture to amnesty regulations or statutes of limitations for prosecution contradicts the object and purpose of the Convention and the Committee's jurisprudence.³

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1 Sakeus Likela, 'Geingob Rejects Probe into Dungeon Crimes' *The Namibian* (Windhoek, 16 May 2019) <<https://allafrica.com/stories/201905160664.html>> accessed 15 July 2019.

2 United Nations Committee on Torture 'Concluding Observations on the Second Periodic Report of Namibia' (1 February 2017) UN Doc CAT/C/NAM/CO/2 para 22.

3 *ibid* para 23.

While amnesty laws and their compliance with international law has been the subject of a vivid debate in the scholarship in general⁴, an examination of the Namibian amnesty laws has not been conducted in detail. Therefore, against the backdrop of international law, the question has to be raised whether the amnesties granted in the case of Namibia are in accordance with international law or whether they could be challenged in a proceeding before a Namibian court on the basis of international law.⁵

This article, therefore, illustrates that the amnesties that were granted in the case of Namibia constitute blanket amnesties.⁶ In the next step, I examine the application of international law in the Namibian legal system. On this basis, I discuss Namibia's binding obligations under international law. Furthermore, in order to make the argument that blanket amnesties cannot apply in respect of the most serious international crimes or gross human rights violations, I present international jurisprudence that dealt with the matter of amnesties and the investigation and prosecution of atrocious situations. By virtue of binding international law, I argue that the Namibian blanket amnesties can be challenged in a Namibian court.

The Case of Namibia: A Blanket Amnesty

Sebba and Frase define the term 'amnesty' as follows:

Amnesty ... derives from the Greek word *amnestia* ('forgetting') and has come to be used to describe measures of a more general nature, directed to offences whose criminality is considered better forgotten.⁷

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- 4 See Alexandra Garcia, 'Transitional (In)Justice: An Exploration of Blanket Amnesties and the Remaining Controversies around the Spanish Transition to Democracy' (2015) 43 Intl J Legal Info 75; Juan Carlos Portilla, 'Amnesty: Evolving 21st Century Constraints under International Law' (2014) 38 Fletcher F World Aff 169; Kirsty McNamara, 'Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo' (2013) 12 Wash Univ Global Stud LR 653; Leila Nadya Sadat, 'Exile, Amnesty and International Law' (2006) 81 Notre Dame LR 955; Garth Meintjes and Juan Méndez, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 International Law FORUM Du Droit International 84; Max Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 Ethics & Global Politics 1; Miles Jackson, 'Amnesties in Strasbourg' (2018) 38(3) Oxford J of Legal Studies 451; Onkemetse Tshosa, 'The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy' (2010) Namibia LJ 7–9; Faustin Z Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff 2007).
 - 5 The granted amnesty could be challenged in a criminal case where individual conduct from the time before Namibia's independence that qualifies as international crime or serious human rights violation would be prosecuted before a Namibian court.
 - 6 For a qualification of the Namibian amnesties as blanket amnesty see following section.
 - 7 Leslie Sebba and Richard Frase, *Amnesty and Pardon* (Free Press 1983) 59.

Unfortunately, there is no settled definition of ‘blanket amnesty’ in international law. For the purpose of this article, I will, therefore, use a working definition of the term. According to the United Nations High Commissioner for Human Rights, a blanket amnesty ‘exempts broad categories of perpetrators from prosecution without requiring any application on the part of the beneficiary or an inquiry into the facts of each situation.’⁸ In addition, blanket amnesties do not distinguish between the nature of the crime, whether it is a political, international or an ordinary crime.⁹

Before Namibia became independent, amnesties were granted by two proclamations. On 7 June 1989, the then Administrator-General for the territory of South-West Africa (Namibia), Louis Pienaar, signed a proclamation with the headline ‘Granting of Amnesty to Certain Persons’.¹⁰ While section 1 of this proclamation limits the territorial scope of the amnesty to the territory of what we know today as Namibia, section 2 of the amnesty proclamation defines to whom the amnesty in this proclamation will apply. Section 2 states that:

(1) No criminal proceedings shall after the date of commencement of this Proclamation be instituted or continued in any court of law against any person referred to in subsection (2) or (3), in respect of any criminal offence committed by such person in the territory or elsewhere at any time before the said date.

(2) The provision of subsection (1) shall, subject to the provisions of subsection (3), apply only in respect of a person born in the territory or the spouse or child of such a person, who immediately before the date of commencement of this Proclamation was ordinarily resident at any place other than within the territory at any point of entry specified in the Annexure.¹¹

Section 2(1) of this proclamation grants amnesty in respect of any criminal offence that occurred in the territory of Namibia or elsewhere to persons that were born in Namibia or who were spouses/children of a person born in Namibia. While the proclamation defines ‘territory’ as the territory of South-West Africa, the proclamation does not define ‘elsewhere’ which means that the territorial scope might encompass any location in the world. Therefore, this proclamation is not limited to a particular time, person, location or crime.¹² It further does not define any obligation or requirement on the part

8 See UNCHR ‘Rule of Law Tools for Post-conflict States’ (2009) UN Doc HR/Pub/09/1 at 8; see also Meintjes and Méndez, (n 4)84.

9 William W Burke-White, ‘Reframing Impunity: Applying Liberal International Law Theory to An Analysis of Amnesty Legislation’ (2001) 42 Harvard Intl LJ 482.

10 No AG 13 Amnesty Proclamation by Administrator-General for South West Africa, Official Gazette Extraordinary (7 June 1989).

11 *ibid* 2.

12 See s 2 of No AG 13 Amnesty Proclamation by Administrator-General for South West Africa, Official Gazette Extraordinary (7 June 1989): In terms of the territorial application, the proclamation refers to

of the beneficiary to apply for amnesty as well as it does not set up any inquiry mechanism to ensure full individual disclosure and details of the crime. Therefore, this proclamation constitutes a blanket amnesty in terms of the definition that has been set out above.

On 9 February 1990, five weeks before Namibia became independent, Administrator-General Pienaar extended the amnesty proclamation from 7 June 1989 also to South African and South-West African forces in the territory of Namibia:

Under subsection (3) of section 2 of the Amnesty Proclamation, 1989 (Proclamation AG. 13 of 1989), I hereby direct that the provision of subsection (1) of that section shall apply to the persons who, while they were members of the South African police, the South West African Police, the South African Defence Force, including the South West African Territory Force, in the performance of their duties and functions in the territory have performed or failed to perform any act which amounts to a criminal offence as contemplated in that subsection.¹³

Again, this extension of the blanket amnesty from 7 June 1989 does not set any requirements on the part of the beneficiary nor does it provide any mechanism to ensure full disclosure of the truth. Therefore, both proclamations constitute a blanket amnesty for any crime that was committed by any Namibian or South African forces in the territory of Namibia. The blanket amnesty includes the most serious crimes such as crimes against humanity, war crimes or torture. Due to Namibia being a state party to the Rome Statute and therefore dedicating itself to the idea to fight impunity for the most serious international crimes, the question is whether the Namibian blanket amnesties can prevent the investigation and prosecution of such crimes under binding international law.

Application of International Law in Namibia

In order to make an international law-based argument, I examine the application of international law in the Namibian legal system in this section. Namibia's legal system

the 'territory and elsewhere'. While the proclamation defines 'territory' as the territory of South-West Africa, 'elsewhere' is not defined by the proclamation. Therefore, 'elsewhere' could mean anywhere in the world or even on another planet. In addition, the proclamation applies to any time before the date of commencement of the proclamation. Any time before the commencement of the proclamation extends the temporal scope to the beginning of time. Moreover, the proclamation does not limit its application to a certain type of crime. Therefore, I argue that there is no clear territorial, temporal or subject-matter scope set down in the proclamation.

13 Proclamation No AG 16 Government Notice by Administrator-General for South West Africa, Official Gazette Extraordinary (9 February 1990) 1.

is rooted in its Roman-Dutch common-law history preceding its independence.¹⁴ Common law legal systems usually follow a dualist approach when it comes to the application of international law, which requires an act of incorporation.¹⁵ This requires the implementation of international law by the legislative power. By contrast, under the monist concept, ‘international and municipal law is a single legal system and therefore connected to one another logically and coherently.’¹⁶ Article 96(d) of the Namibian constitution states in this context that the state should ‘foster respect for international law and treaty obligations.’¹⁷ Article 144 of the Namibian constitution regulates the application of international law and states:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The wording of Article 144 of the Namibian constitution shows that the Namibian legal system follows a monist approach which does not require any act of incorporation of international law. While Dausab observes that the legislature in practice tends to apply a dualist approach, commentators agree that, on paper, international law does not require an act of incorporation.¹⁸

Therefore, international law becomes part of national law upon ratification, and no further legislation is required to enforce international agreements or standards of international law. Any violation of binding international law upon Namibia is therefore unlawful under the Namibian legal system. Considering the wording of Article 144 of the Namibian constitution, one might, however, raise the question of what ‘general rules of public international law’ means. According to Tshosa, ‘general rules of public international law’ include customary international law as binding law and therefore such rules become Namibian law.¹⁹ That means that the courts of Namibia are bound by conventional and customary international law as part of Namibian law and individuals

14 See Tshosa (n 4) 7–9; see also Yvonne Dausab, ‘International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective’ in *Constitutional Democracy in Namibia—A Critical Analysis after Two Decades* (Macmillan Education Namibia 2010) 269.

15 Tom Bennett and Jonathan Strug, *Introduction to International Law* (Juta 2013) 32–35.

16 *ibid* 31.

17 Article 96(d) of the Namibian Constitution (entered into force 21 March 1990) (hereinafter Namibian Constitution).

18 See Dausab (n 14); Tshosa (n 4) 12–13; Dunia Zongwe, *International Law in Namibia* (Langaa RPCIG 2019) 82; Nico Horn and Anton Bösl, *Human Rights and the Rule of Law in Namibia* (Macmillan Education Namibia 2008) 142.

19 Tshosa (n 4) 12–13: Tshosa refers to the German constitution which uses the same terminology and which includes customary international law as ‘general rules of public international law.’

could approach the courts to assert their rights and receive protection under international law that is binding upon Namibia.

The review of the jurisprudence by the Supreme Court of Namibia shows two ways in which the legal system implements international standards or international law. Either the court takes international and foreign jurisprudence as an interpretive tool into account, or the court applies international law directly based on Article 144 of the Namibian Constitution if it is binding upon Namibia.²⁰

One of the few judgments of the Supreme Court of Namibia that accepted international agreements as applicable law and not just as an interpretive tool was the *Caprivi Treason* case.²¹ The Supreme Court concluded in this case that international agreements binding upon Namibia form part of the law of Namibia.²² In this case, the respondents' trial was postponed numerous times, and it was in question whether they should be provided with legal representation based on provisions of the Legal Aid Act. It was argued that the state's conduct, especially the denial of legal representation, was not only a violation of the right to a fair trial under Article 12 of the constitution but also a violation of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) which formed part of the Namibian law based on Article 144 and 96(d) of the constitution.²³

The court concluded that Article 14(3)(d) of the ICCPR is not part of the constitution but accepted as part of Namibian law, which had to be given effect.²⁴ The court held in this context:

the interests of justice lie at the root of a fair trial and the provisions of the Covenant [ICCPR] is therefore clearly compatible with the tenets of a fair trial.²⁵

Moreover, the court elaborated on the binding nature of international law and concluded that:

the State not only has an obligation to foster respect for international law and treaties as laid down by Article 96(d) of the Constitution but it is also clear that the International

20 *Government of the Republic of Namibia v Mwilima* (Supreme Court of Namibia) 2002 NR 235 (SC); *S v Mushwena* (Supreme Court of Namibia) 2004 NR 276 (SC); *S v Tcoeib* (Supreme Court of Namibia) 1999 NR 24 (SC) 15; see also *Gaingob v S* (Supreme Court of Namibia) 2018 (1) NR 211 (SC) paras 54–56.

21 *Government of the Republic of Namibia and Others v Mwilima* (Supreme Court of Namibia) 2002 NR 235 (SC).

22 *ibid* 259, 260.

23 *ibid*.

24 *ibid*.

25 *ibid*.

Covenant on Civil and Political Rights is binding upon the State and forms Part of the law of Namibia by virtue of Article 144 of the Constitution.²⁶

With regard to the temporal aspect of the application of the ICCPR, the court found the date of accession to be decisive:

By virtue of Article 144 of the Namibian constitution itself, the provisions of the Covenant became part of the law of Namibia as from 28 November 1994 and as from that date all concerned, including the Namibian Government and the Director of Legal Aid, had to give effect to that.²⁷

In *S v Mushwena*, the Namibian Supreme Court confirmed this decision and concluded that the ICCPR and the Convention Relating to the Status of Refugees ‘have become public international law and by virtue of Article 144, have become part of the law of Namibia.’²⁸

These cases illustrate the awareness of the court with regard to international standards and international law, especially in the field of human rights law. The jurisprudence by the Supreme Court of Namibia further supports the view that under Article 144 of the Namibian constitution, the Namibian legal system is a monist one. This means that if Namibia is under a conventional or customary international law obligation to investigate or prosecute certain crimes or human rights violations, the Namibian courts will have to decide whether the blanket amnesties can override international binding obligations.

In terms of the international obligations that predate the independence, Article 140(3) of the Namibian Constitution states that:

Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia.²⁹

Article 140(3) of the Constitution further has to be read in conjunction with Article 143, which states that:

All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides.³⁰

26 *ibid.*

27 *ibid.*

28 *S v Mushwena* (n 20) 237.

29 Article 140(3) of the Namibian Constitution.

30 Article 143 of the Namibian Constitution.

A draft resolution circulated during the UN Conference on Succession of States in Respect to Treaties concluded that ‘South Africa is not the predecessor State of the future independent State of Namibia’ and that the UN Council of Namibia should be regarded as such.³¹ However, in practice, South Africa is regarded as the predecessor state of Namibia.³² Therefore, the treaties that were signed by South Africa before the independence of Namibia bind Namibia unless the government decides otherwise. In the case of *Mwandinghi v Minister of Defence*, the court held that the state accepted liability for damages that resulted from a conduct by the South African Minister of Defence.³³

International Law and Blanket Amnesties Relating to the Most Serious Crimes and Human Rights Violations

This section focuses on how international law deals with the issue of blanket amnesties. There seems to be a universal tendency that the most serious international crimes such as genocide, crimes against humanity, war crimes or gross human rights violations such as torture cannot be subject to any amnesty.³⁴ First, this section analyses Namibia’s treaty obligations under international law. Second, this section presents an analysis of domestic and international jurisprudence and how the respective courts dealt with amnesties in terms of the states’ obligations under international law.

As the Namibian blanket amnesties demonstrate, the effect of amnesties can be far-reaching. Bassiouni considers blanket amnesties as a breach of the ‘social contract’ and states:

[I]f the right of punishment originally belonged to the victim and the international legal community exercises it on behalf of the victim, it cannot be traded in for blanket amnesties ... Political negotiators acting on behalf of major powers have compromised the victim’s right and breached the “social contract” for international criminal justice by bartering accountability for political settlements ... Granting pardon without justification clearly hinders the pursuit of justice because it destroys all beliefs of

31 UN Conference on Succession of States in Respect to Treaties, ‘Resolution Concerning Namibia’ (1977 session and resumed session 1978) UN Doc A/CONF.80/16/add.1, Vol III, 96, 177.

32 See *Mwandinghi v Minister of Defence*, High Court of Namibia, Judgment (14 December 1990) 343, 352–353; *Government of the Republic of Namibia v Cultura* 2000 (Supreme Court of Namibia) (SA 2/92) [1993] NASC 1 (15 October 1993) 32; see also Patrick Dumberry, ‘The Controversial Issue of State Succession to International Responsibility Revisited in Light of Recent State Practice’ (2006) 49 German YB Intl L 437–443.

33 *Mwandinghi v Minister of Defence* (n 32) 343, 352–353.

34 See analysis of the international and regional court in the sections below.

fairness, equality of application of the law ... it also eradicates hopes of deterring similar crimes from being committed in the future.³⁵

Assuming that Bassiouni is correct in his analysis, it is essential to note that there is no rule in international or domestic law that prevents a state from granting amnesties or even blanket amnesties. The state, as the sovereign, has the power to make such a decision. For instance, the Lomé Agreement, which provided an amnesty provision and put an end to the conflict in Sierra Leone, was even welcomed by the UN.³⁶ Therefore, one might argue a customary rule that prohibits amnesties under international law has not developed based on constant practice by states to grant amnesties. However, the more critical question and the focus of this section is whether a state can still fulfil its obligations under international law despite a blanket amnesty.

Namibia's International Obligations: Geneva Conventions, Torture Convention, the ICCPR, the Rome Statute and Customary International Law

This section focuses on Namibia's treaty and customary obligations as well as whether it can fulfil those despite the blanket amnesties from 1989 and 1990. At the beginning of this analysis, it is crucial to point out the difference between a right to institute prosecutions and a duty to prosecute the most serious international crimes. Under the principle of legality, ie *nullum crimen sine lege*, there can be no prosecutions if the conduct in question did not constitute a punishable offence at the material time. The principle of legality, therefore, constitutes a key pillar of any prosecution that aims to address criminal conduct in Namibia before blanket amnesties were granted. As I illustrate further below, Namibia only became a state party to the respective treaties after its independence. According to Article 28 of the Vienna Convention on the Law of Treaties (VCLT), treaties do not apply retroactively unless the state party expresses otherwise.³⁷

However, this does not affect obligations under customary international law. In respect of crimes against humanity, the Extraordinary Chambers in the Courts of Cambodia (ECCC) concluded that those crimes were part of customary international law for the time between 1975 and 1979.³⁸ The ECCC concluded in its analysis of customary international law, the prosecution of crimes against humanity from 1975 onwards does not violate the principle of legality. Due to the customary nature of the crimes in

35 Cherif Bassiouni, *Introduction to International Criminal Law* (Brill Nijhoff 2013) 973–974.

36 Article IX of the Peace Agreement between the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (7 July 1999); For UN welcoming the agreement see UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270 .

37 Article 28 of the VCLT (adopted 23 May 1969, entered into force 27 January 1980).

38 See *Co-Prosecutors v KAINING Guek Eav alias 'DUCH'* (Judgment) ECCC , Case No 001/18-07-2007/ECCC/TC (26 July 2010) paras 288–290.

question, the Namibian prosecuting authority, therefore, has a right to institute prosecutions for conduct that qualifies as crimes against humanity and occurred before its independence. The same could be argued for war crimes, ie the Geneva Convention, which at the time of the 1980s reflected customary international law for the most part.³⁹

The question of a duty to prosecute crimes against humanity, war crimes or gross human rights violations is entirely different from the right to institute prosecutions. A duty to prosecute has no bearing for the principle of legality. Therefore, even if a duty to prosecute did not exist at the time the crime was committed, that does not affect the legality principle. At the same time, one might even apply a duty to prosecute retrospectively if the conduct in question constituted a punishable offence at the time, and the treaty does not provide a temporal limitation concerning the duty to prosecute. The following analysis of Namibia's treaty obligations will underline its duty to prosecute gross human rights violations, war crimes and crimes against humanity.

Even though the Geneva Conventions do not mention amnesties explicitly, one may argue that the Geneva Conventions themselves, to which Namibia is a state party, pose a bar to blanket amnesties. The Geneva Conventions are widely considered as reflecting customary international law and thereby may bind states even if they are not a state party to the convention.⁴⁰ Even if one should disagree with the customary status of the Geneva Conventions in the 1970s and 1980s, as discussed in the previous section, under Article 140(3) and 143 of the Namibian Constitution, treaties ratified by South Africa may bind the Namibian state. On this basis, the Geneva Conventions were already binding on Namibia before it became a state party. Therefore, a prosecution for breaches of the Geneva Conventions before the independence will not violate the legality principle. Under the Geneva Conventions, states are under an obligation to investigate and prosecute grave breaches of the Conventions.⁴¹ Furthermore, the commentary by the International Committee of the Red Cross (ICRC) concludes in Rule 158 that:

39 In 1986, there were 164 state parties to the Geneva Conventions while the UN counted 159 member states: see Theodor Meron, 'The Geneva Conventions as Customary International Law' (1987) 86 AJIL 348, 365.

40 See John Dugard, Max Du Plessis, Tiyanjana Maluwa and Dire Tladi *International Law: A South African Perspective* (Juta 2018) 772–783.

41 See Article 49 of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 31; Article 50 of Geneva Convention II (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 85; Article 129 Geneva Convention III (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 135; Article 146 Geneva Convention IV (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 287.

States must investigate war crimes allegedly committed by their nations or armed forces, or on their territory, and, if appropriate, prosecute the suspects.⁴²

Addition Protocol II (APII) which addresses non-international armed conflicts does, however, mention amnesties and states under Article 6(5) that:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.⁴³

Assuming that Article 6(5) APII would apply, the question is what ‘broadest possible amnesty’ means. One might argue that amnesties in such a case have to exclude conduct that forms part of a state’s binding international obligation to investigate or prosecute certain conduct. Besides, one might also argue that a state which consents to certain obligations under international law also consents to restrict amnesties that were given before. The ICRC commentary suggests in Rule 159 that a power to grant amnesty cannot include crimes like war crimes or crimes against humanity.⁴⁴ That is also in line with the Inter-American Court of Human Rights (IACHR) assessment of that provision, which is based on the premise that states must prosecute such crimes under international law.⁴⁵ Moreover, APII does not constitute customary international law, and Namibia only became a state party in June 1994.⁴⁶

Furthermore, Namibia is also a state party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). Article 7 of the Torture Convention requires state parties to prosecute or extradite persons alleged to have committed torture.⁴⁷ In terms of the temporal scope of Article 7 of the Torture Convention, the ICJ concluded in the *Habre* case that such a duty to prosecute

42 ICRC Database on Customary International Humanitarian Law, Rule 158 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158> accessed 17 July 2019.

43 Article 6(5) Additional Protocol II to the Geneva Conventions (adopted 8 June 1977, entered into force 7 December 1978).

44 ICRC Database on Customary International Humanitarian Law, Rule 159 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159> accessed 17 July 2019.

45 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Judgment) IACHR Series C No 252, (25 October 2012) para 286.

46 See ICRC Database on State Parties relating to Additional Protocol II <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475> accessed 31 July 2019.

47 Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987): Namibia acceded to the Convention on 28 November 1994.

could not apply retroactively before the respective state party ratified the Convention.⁴⁸ While the court did acknowledge that the prohibition of torture constitutes *jus cogens*, it seems that the Court tried to put a temporal lock on the Pandora's box it had just opened.⁴⁹ As the Separate Opinion by Judge Cancado Trindade illustrates, the main judgment did rely on an outdated decision by the UN Committee Against Torture (CAT) from 1989 which denied an application of Article 7 of the Torture Convention before the ratification date. However, as Judge Cancado Trindade pointed out, the CAT has not made a distinction between acts that occurred before or after the ratification of the Convention in decisions from 2003 and 2006.⁵⁰ Therefore, one might argue that Article 7 of the Torture Convention can apply to acts that occurred before the date of ratification.⁵¹

On 28 November 1994, Namibia also acceded to the ICCPR. In 1992, the UN Human Rights Committee (UNHRC) concluded in its General Comment 20 with regard to Article 7 of the ICCPR, which embodies the prohibition of torture, that:

The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.⁵²

In 2004, the UN Human Rights Committee reiterated this position about the obligation of state parties to the ICCPR in General Comment 31 and concluded:

[A] failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law ... When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity ... Accordingly, where public officials or State agents have committed violations of the Covenant ... the States

48 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) 2012 <<https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>> accessed 20 January 2020, para 102.

49 *ibid* paras 99–100.

50 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Separate Opinion by Judge Cancado Trindade) 2012 <<https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-04-EN.pdf>> accessed 20 January 2020 paras 161–162; UN CAT, *Bouabdallah Ltaief v Tunisia* (Decision) 14 November 2003, 207, paras 1.2, 2.1 and 10.1–10.9; UN CAT, *Souleymane Guengueng and al v Senegal* (Decision) 19 May 2006.

51 *ibid* *Belgium v Senegal* paras 161–166.

52 UNHCR 'General Comment No 20: Article 7 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (1992) UN Doc HRI/GEN/1/Rev.9 para 15.

Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities.⁵³

The application of the Namibian blanket amnesties, therefore, prevents Namibia from fulfilling its obligations under the ICCPR as set out in General Comment 20 and 31 by the UNHRC. The blanket amnesties prevent any investigation or prosecution of the crime of torture for the time before independence. Therefore, the blanket amnesties prevent individuals whose protected rights have been violated from their right to effective remedy.

As a state party to the International Criminal Court (ICC), Namibia is also bound to the Rome Statute which recalls in its preamble that:

[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.⁵⁴

While the wording of the preamble of the Rome Statute does not pose a direct obligation on the state party, it sets out that a state party to this treaty agrees with the idea that international crimes must be prosecuted. Concerning this provision of the preamble, Triffterer concludes that ‘there is a class of “crimes under international law” for which States should prosecute even if these crimes do not fall within the jurisdiction of the Court.’⁵⁵ One might argue that if Namibia is serious about the idea of the Rome Statute to fight impunity, that idea cannot be reconciled with blanket amnesties that are specifically directed to prevent any investigation or prosecution of the most severe crimes in its history.

Therefore, I submit that the Namibian blanket amnesties prevent the state from fulfilling its obligations under the Torture Convention, Geneva Conventions, the ICCPR and customary international law today. Although Namibia might not have been under any such obligation at the time the blanket amnesties were granted, such obligations emerged with the date of ratification. As the Torture Convention, ICCPR and the Geneva Conventions do not provide a temporal limitation in their wording, breaches of the Geneva Conventions or acts of torture could be prosecuted. As illustrated at the example of Article 7 of the Torture Convention, that might include acts that occurred before the ratification date. Therefore, one may argue that under the Torture Convention, ICCPR and the Geneva Conventions, there is an obligation to investigate or prosecute crimes that have been committed even before Namibia became a state party

53 UNHCR ‘General Comment No 31: The General Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 18.

54 The Preamble of the Rome Statute Statute (adopted 19 July 1998, entered into force 1 July 2002).

55 Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Nomos 2016) 11.

to those treaties. Even if one might disagree and argue that according to Article 28 of the VCLT a retroactive application is prohibited, the right to prosecute gross human rights violations, war crimes or crimes against humanity still persists.⁵⁶

To further support this argument that the Namibian blanket amnesties are not in accordance with standards of international law and that higher-ranking international law limits the scope of blanket amnesties, the following section examines how international jurisprudence has addressed the issue of amnesties and the prosecution of the most serious crimes or human rights violations.

International Jurisprudence: Blanket Amnesties and the Prosecution of the Most Serious Crimes and Human Rights Violations

As already mentioned, one way through which international standards find application in the Namibian jurisprudence is when courts take jurisprudence by international, regional and foreign domestic courts into account. The Supreme Court of Namibia has applied such a comparative analysis in several cases in order to interpret Namibian law.⁵⁷ Since the ICCPR, the Torture Convention and the Geneva Conventions became part of Namibian law under Article 144 of the Namibian constitution, the following comparative analysis of jurisprudence in this field is decisive for the question whether the blanket amnesties still bar prosecution today.

The examination of jurisprudence in this section will also show to what extent a rule of customary international law has emerged that prohibits the application of amnesties in relation to the most serious international crimes (hereinafter core crimes) or gross human rights violations. In a first step, I illustrate domestic jurisprudence and legislation that limited or invalidated a state's own amnesty laws. In a second step, I discuss international jurisprudence on the non-application of amnesties in relation to gross human rights violations and core crimes in order to determine whether a new rule of custom has emerged.

Article 38 of the Statute of the International Court of Justice (ICJ) embodies a traditional inductive approach of custom by requiring evidence of state practice and *opinio juris*. However, the jurisprudence by the ICJ itself shows that the court does not always apply

56 For a retroactive application of treaties see Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford UP 2011) 722, referring to S Maljean-Dubois, 'L'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie) Arrêt du 11 juillet 1996, exceptions préliminaires' (1996) 42 *Annuaire Français de droit International* 372; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Dissenting Opinion of Judge ad hoc Kreca) 1996 <<https://www.icj-cij.org/files/case-related/91/091-19960711-JUD-01-07-EN.pdf>> para 120.

57 See *S v Tcoeb* (n 20) 15; see also *Gaingob v S* (n 20) paras 54–56.

the inductive approach when it comes to determining customary rules but also applies a deductive way of reasoning.⁵⁸ A deductive approach can be defined as:

[I]nference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle. Deduction is a process of going from the general to the specific.⁵⁹

In terms of the formation of customary international law, Alvarez-Jimenez argues that complete uniformity of state practice is not necessary.⁶⁰ Talmon emphasises that the deductive approach is not limited to identifying rules of customary international law, but that it can also be employed to confirm and strengthen results reached by the inductive approach. Roberts considers the deductive approach as a form of ‘modern custom’ that can produce new rules faster than the traditional inductive approach.⁶¹

By contrast, the inductive approach constitutes a process from the specific to the general. Therefore, it may be described as inferring a general rule from individual instances of state practice and *opinio juris*.⁶² As this section shows, courts do not always limit their legal reasoning to the inductive or deductive approach. In terms of the formation of customary international law, the approach of legal reasoning by the courts may be decisive.

In addition, under the positivist approach of custom, the concept of specially affected states might provide a lens through which the element of state practice might not require the elements of duration, consistency and general practice to the extent that it usually does.⁶³ Under this concept, a group of specially affected states can meet the requirement

58 See Alberto Alvarez-Jiménez, ‘Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000–2009’ (2011) 60 *Intl & Comp LQ* 681; Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 *European J of Intl Law* 417.

59 Talmon (n 58) 420.

60 Alvarez-Jimenez (n 58) 687.

61 Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American J of Intl L* 758–759.

62 Talmon (n 58) 420.

63 *North Sea Continental Shelf case (Germany v Denmark)* (Judgment) 1969 <<https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>> paras 73–74; ILC, ‘Identification of Customary International Law: Comments and Observations Received from Governments’ (14 February 2018) UN Doc A/CN.4/716, 56; Kevin Jon Heller, ‘Specially-Affected States and the Formation of Custom’ (2018) 112 *American J of Intl L* 191; Gennadij Mihajlovic Danilenko, *Law-making in the International Community* (Martinus Nijhoff Publishers 1993) 95; Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 87 *Intl Review of the Red Cross* 180.

of state practice if that group exercises a consistent practice within itself, and there is widespread and representative support.

Invalidation and Limitation of Amnesties on a Domestic Level: Jurisprudence and Legislation

As this section shows, amnesties can be reviewed and limited by respective domestic courts of the state that issued the amnesty. Due to the extensive use of amnesties in South America, the respective domestic jurisprudence is of particular interest here. Most decisions in this section derive from the IACHR judgment in the *Barrios Altos* case where the court concluded that Peruvian amnesty laws were contrary to the state's obligation to provide an effective remedy under the American Convention on Human Rights (hereinafter: American Convention).

The Supreme Court of Justice of Argentina held in the *Simon* case that amnesty laws by Argentina constituted a procedural obstacle to the investigation, prosecution and eventual punishment of human rights violations and therefore were unlawful.⁶⁴ The court based its argument on the duty to prosecute such acts by Argentina under its binding obligations under the American Convention and customary international law.⁶⁵ In the same vein, the Supreme Court of Justice of Chile argued against an application of Chilean amnesty laws from 1978 in the context of the crime of kidnapping as a crime against humanity when it held that:

[Amnesty laws] must be interpreted in a way that conforms with the protective covenants of fundamental rights of the individual and sanctions the serious violations committed against them during the period in which said legal body is in force.⁶⁶

While relying on the duty to investigate and prosecute violations of human rights under international law, the Constitutional Court of Peru concluded in the case of *Santiago Martin Rivas* that

[A]mnesty laws are null and void and lack, *ab initio*, legal effect. Therefore, the orders enacted as to guarantee impunity of the violation of human rights by [state agents] are also null and void.⁶⁷

In 2016, the Supreme Court of El-Salvador further concluded that its amnesty laws from 1993 had to be interpreted in the light of the state's binding international obligations,

64 *Case of Simon, Julio Hector et al. s/illegal deprivation of liberty* (Supreme Court of Justice of the Nation of Argentina) (Order) 14 June 2005, para 31.

65 *ibid* para 26.

66 *Case of Claudia Abdon Lecaros Carrasco* (Supreme Court of Justice of Chile) (Judgment) 18 May 2010 paras 1–3.

67 *Case of Santiago Martin Rivas* (Constitutional Court of Peru) (Judgment) 2 March 2007 paras 30, 60.

and therefore argued that the amnesty laws did not apply to grave violations of international law such as crimes against humanity or war crimes.⁶⁸

Regarding the *jus cogens* nature of some human rights norms and the international obligation to provide an effective remedy for respective violations, the Supreme Court of Justice of Colombia concluded that Colombian amnesties could not apply in cases of gross human rights violations.⁶⁹ With regard to a non-application of amnesty laws, the Supreme Court of Justice of Uruguay confirmed that its amnesty laws unlawfully affected the right to effective remedy under the American Convention on Human Rights.⁷⁰

Apart from the domestic jurisprudence in South America, there are also states that excluded the application of their amnesty laws regarding certain international crimes. This list consists of Suriname,⁷¹ Nicaragua,⁷² Guatemala,⁷³ Federation of Bosnia and Herzegovina,⁷⁴ Venezuela,⁷⁵ Côte d'Ivoire,⁷⁶ Colombia,⁷⁷ Croatia,⁷⁸ Philippines,⁷⁹ the

68 *Unconstitutionality of the Amnesty Law* (Supreme Court of El Salvador) (Judgment) 13 July 2016, Case no. 44-2013/145-2013 para 8 <<https://casebook.icrc.org/case-study/el-salvador-supreme-court-judgment-unconstitutionality-amnesty-law>> accessed 5 August 2019.

69 *Case of Segovia Massacre* (Supreme Court of Justice of Colombia) 13 May 2010 at 68–71.

70 *Case of de Nibia Sabalsagaray Curutchet* (Supreme Court of Justice of Uruguay) (Judgment) 19 October 2019 paras 11.

71 1992 Act granting amnesty in Suriname, Decree No 5544 which excludes crimes against humanity from the scope of the amnesty.

72 Nicaragua Amnesty laws (1993): excludes war crimes and crimes against humanity from the scope of the amnesties granted.

73 Article 8 of the Guatemala National Reconciliation Law, 18 December 1996: excludes genocide, torture, forced disappearances and crimes which are not subject to limitation or which, in conformity with internal law or international treaties ratified by Guatemala, do not allow release from penal responsibility are excluded from the scope of amnesty.

74 Federation of Bosnia and Herzegovina, Article 1 of Law on Amnesty (1999): excluding criminal acts against humanity and international law as stipulated in Section XVI from the amnesty law.

75 Venezuela, Article 1(a), (e), (m) and 4 of the Law of General Political Amnesty (2000): excluding war crimes, crimes against humanity and grave crimes against human rights.

76 Côte d'Ivoire, Article 4 of the Amnesty law (2003): excluding crimes against humanity from the scope of amnesty; Amnesty law from 2007: excluding crimes and offences against international law.

77 Colombia, Justice and Peace Law (2005); excluding combatants who committed certain serious crimes under international law; see also Article 29 of the Colombian Peace Agreement (2016), 24 November 2016: excluding crimes against humanity, genocide, war crimes and torture.

78 Article 1 and 3 of Croatia's General Amnesty law (1996): excluding genocide and war crimes.

79 Philippines, s 1 and 2 of Proclamation No 1377 (2007): excluding crimes against chastity, rape, torture, kidnapping for ransom, use and trafficking of illegal drugs, and other crimes for personal ends and violations of international law.

Democratic Republic of the Congo,⁸⁰ Central African Republic,⁸¹ Liberia,⁸² Tunisia,⁸³ and Poland.⁸⁴ In addition, some constitutions and national legislation prohibit the application of amnesties concerning international crimes.⁸⁵

All states that have been presented in this section have limited or invalidated their amnesty laws either by legislation or by jurisprudence. The legislation and jurisprudence is not only evidence of state practice by the states that granted those amnesties. It is also evidence of the *opinio juris* that domestic amnesty laws cannot override binding international law requiring an effective remedy for gross human rights violations or the investigation and prosecution of international crimes and gross human rights violations. In terms of the identification of custom, one might even argue that the evidence presented in this section qualifies as practice under the concept of specially affected states. As the next section further illustrates, such practice corresponds with international jurisprudence.

The Dichotomy between Amnesties and Obligations under International Law: From a Deductive to a Mixed Approach (1998–2012)

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) demonstrates a firm rejection of amnesties. In 1998, the ICTY concluded in the *Furundzija* case that, based on the *jus cogens* nature of the prohibition of torture, blanket amnesties cannot bar prosecutions for the crime of torture.⁸⁶ According to the ICTY, an international tribunal or any state could, therefore, prosecute an individual for torture. The ICTY stated that:

What is even more important is that perpetrators of torture acting upon or benefitting from those national measures [amnesties] may nevertheless be held criminally

80 Democratic Republic of the Congo, Article 3 of the Law of Amnesty (2009): excluding genocide, war crimes and crimes against humanity.

81 Article 2 of the Central African Republic's Amnesty law (2008): excluding genocide, war crimes and crimes against humanity.

82 Article VII of Liberia's Act to Establish the Truth and Reconciliation Commission (2005): excluding war crimes and crimes against humanity.

83 Tunisia, Legislative Decree No. 2011-1: excluding international crimes

84 Poland, Article 4(1)(3) of the Act on the Institute of National Remembrance (1998): excluding crimes against humanity.

85 See Article 28(1) of the Ethiopian Constitution; Article 80 of the Constitution of Ecuador; Article 29 of the Constitution of Venezuela; Article 199 of the Democratic Republic of the Congo's Constitution of the Transition, 2003; Article 171 of Burundi's Penal Code (2009); Article 86 of the Peruvian Code of Military and Police Justice (2006); Article 8 of Uruguayan Law on Cooperation with the ICC (2006).

86 *Prosecutor v Furundzija* (Judgment) ICTY, Case No IT-95-17/1-T (10 December 1998) (hereinafter *Furundzija* case) para 155.

responsible for torture, whether in a foreign State or in their own State under a subsequent regime.⁸⁷

The ICTY further concluded in the same case:

While the *erga omnes* nature [of torture as a crime] appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.⁸⁸

The court considered some crimes as so severe that they obtained the status of *jus cogens* crimes which sets out a basis for the principle of universal jurisdiction.⁸⁹ The court, therefore, inferred its conclusions from hierarchical principles of international law in order to address the specific question of applicability of amnesties in relation to the core crimes and gross human rights violations. On this basis, the court pointed out that amnesties were inapplicable before the ICTY and that this might also be the case before domestic courts. A reason for this firm reliance on deductive reasoning could be the fact that the ICTY was one of the first courts that addressed the issue of amnesties from such a perspective. Therefore, the temporal aspect and the lack of other jurisprudence could be one of the reasons for the deductive approach in this case.

In 2004, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) followed the way paved by the ICTY when it concluded that there could be no amnesties for crimes that fall under the principle of universal jurisdiction.⁹⁰ In the *Kallon* case, the Appeals Chamber decided whether the amnesty under the Lomé Agreement was applicable in respect of crimes against humanity or war crimes. The Appeals Chamber held that:

Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring

87 *ibid.*

88 *ibid* para 153; see also Mahmoud Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 *Virginia J Intl L*

89 *Furundzija* case, para 156.

90 *Prosecutor v Morris Kallon and Brima Buzzy Kamara* (Decision) SCSL-2004-15-AR72(E) (13 March 2004) (hereinafter *Kallon* case) para 67.

into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.⁹¹

The Chamber further deduced from international case law which crimes are subject to universal jurisdiction.⁹² The Appeals Chamber concluded that crimes against humanity and war crimes are international crimes which can be prosecuted under the principle of universal jurisdiction. The Chamber inferred from the binding nature of *jus cogens* and *erga omnes* that amnesties are contrary to those principles and, therefore, violate international law and cannot apply.⁹³

The African Commission on Human and Peoples' Rights (ACHPR) has consistently declared its critique for the use of amnesties.⁹⁴ In 2006, the ACHPR pointed out the incompatibility of amnesty laws and the fight against impunity in the *Zimbabwe Human Rights NGO Forum* case where it held that:

Clemency, it is believed, encourages *de jure* as well as *de facto* impunity and leaves the victims without just compensation and effective remedy. *De jure* impunity generally arises where legislation provides indemnity from legal process in respect of acts to be committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, as in the present case, by way of clemency (amnesty or pardon). *De facto* impunity occurs where those committing the acts in question are in practice insulated from the normal operation of the legal system. That seems to be the situation with the present case.⁹⁵

The ACHPR referred to jurisprudence by other regional courts and UN bodies to confirm the existence of a duty to prosecute gross human rights violations.⁹⁶ On this basis, the ACHPR concluded that amnesties are not in accordance with such a duty.

The ACHPR confirmed the inapplicability of amnesties in the *Mouvement Ivoirien des Droits Humains (MIDH) v Cote d'Ivoire* case when it held that an amnesty promotes impunity and constitutes a bar from seeking an effective remedy. It concluded that:

[T]his commission reiterated its position on amnesty laws by holding that by ... prohibiting prosecution and setting free perpetrators of 'politically motivated crimes',

91 *ibid*

92 *ibid* paras 68–70.

93 *ibid* para 71.

94 See ACHPR Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (2003) <http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf> accessed 30 July 2019 at 5

95 *Zimbabwe Human Rights NGO Forum* (Decision) ACHPR, Communication No 294/02 (15 May 2006) paras 196, 200.

96 *ibid* para 206.

the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation. This act of the State constituted a violation of the victims' right to judicial protection and to have their cause heard ... The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.⁹⁷

The ACHPR further emphasised that a domestic amnesty did not exempt a state from its international obligations when it concluded that:

It [ACHPR] is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries ... cannot shield that country from fulfilling its international obligations under the Charter.⁹⁸

The ACHPR inferred the inapplicability of amnesty laws from the requirement to provide an effective remedy under the African Charter on Human and People's Rights, ie the victim's right to judicial protection. The ACHPR also referred to jurisprudence of other courts as evidence for a customary rule to prosecute gross human rights violations.

Due to the history of South-American states with amnesties, the IACHR has a very extensive jurisprudence on this topic. In 2001, the IACHR pointed out that a Peruvian amnesty law was contrary to the American Convention while referring to the right of an effective remedy and judicial protection.⁹⁹ In the *Gomes Lund* case, the IACHR had to decide whether an amnesty for gross human rights violations was in accordance with the American Convention. With reference to domestic and international jurisprudence, the IACHR concluded that Brazil, by applying amnesty laws in cases of gross human rights violations, had violated its international obligations under the American Convention, ie to prosecute and punish those responsible.¹⁰⁰

97 *Mouvement Ivoirien des Droits Humains (MIDH) v Cote d'Ivoire* (Decision) ACHPR, Communication No 246/02 (29 July 2009) paras 96–98.

98 *Case of Malawi African Association and Others v Mauritania* (Decision) ACHPR, Communication No 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (11 May 2000) paras 82–83.

99 *Case of Barrios Altos v Peru* (Judgment) Inter-American Court of Human Rights, Series C No 83 (14 March 2001) para 43.

100 The IACHR pointed out states whose supreme courts had invalidated their domestic amnesty laws, namely Argentina, Chile, Peru, Uruguay and Columbia, see *Case of Gomes Lund v Brazil* (Judgment) Inter-American Court of Human Rights, Series C No 219 (24 November 2010) paras 163–168, 172, 180; For a non-application of amnesties in relation to crimes against humanity and gross human rights violations see also *Almonacid Arellano v Chile* (Preliminary Objections) Inter-American Court of Human Rights, Series C No 154 (26 September 2006) paras 110–111.

In the *Massacres of El Mozote* case, the court had to decide whether an amnesty granted in relation to an armed conflict was in accordance with the American Convention on Human Rights and concluded:

[This] Court has already described and developed at length how this Court, the Inter-American Commission on Human Rights, the organs of the United Nations, other regional organisations for the protection of human rights, and other courts of international criminal law have ruled on the incompatibility of amnesty law in relation to grave human rights violations with international law and the international obligations of States. This is because amnesties or similar mechanisms have been one of the obstacles cited by States in order to comply with their obligation to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations.¹⁰¹

The IACHR further concluded that:

[T]he inadmissibility of ‘amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations such as torture ... because they violate non-derogable rights recognized by international human rights law.’¹⁰²

While referring to its previous decisions, bodies of the UN and international criminal courts, the IACHR further concluded that amnesty laws constitute a ‘serious violation of the State’s international obligation to investigate and punish grave human rights violations ... by preventing the survivors and the victims’ next of kin in this case from being heard by a judge.’¹⁰³ The court held in this context:

On the other hand, the Law of general Amnesty for the Consolidation of Peace has resulted in the installation and perpetuation of a situation of impunity owing the absence of investigation (sic), pursuit, capture, prosecution and punishment of those responsible for the facts [...]. Given their evident incompatibility with the American Convention, the provisions of the Law of General Amnesty for the Consolidation of Peace that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects.¹⁰⁴

The analysis of the IACHR jurisprudence reveals that amnesty laws are not applicable in relation to a state’s duty to prosecute and punish perpetrators of gross human rights

101 *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Judgment) Inter-American Court of Human Rights, Series C No 252 (25 October 2012) para 283.

102 *ibid.*

103 *ibid* para 295.

104 *ibid* para 296.

violations. As presented in the previous section, decisions like the *Barrios Altos* case had a crucial effect on the domestic jurisprudence within the states that granted amnesties.

The jurisprudence by the European Court for Human Rights (ECtHR) follows this line of rejection. In the *Abdulsamat Yaman* case, the ECtHR pointed out that:

[I]t is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.¹⁰⁵

On this basis, the ECtHR concluded in the *Margus* case that:

Granting amnesty in respect of ‘international crimes’ – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.¹⁰⁶

While the ECtHR considers the practice by UN bodies, the ICTY and the IACHR as evidence of a rule, it draws its reasoning primarily from the customary rules of international humanitarian law, human rights and the obligation to prosecute crimes such as war crimes or crimes against humanity. However, the ECtHR did not go as far as to conclude that such an inapplicability of amnesties has become customary international law by 2012.

This section illustrates a development in legal reasoning by the international jurisprudence against the application of amnesties. The ICTY and SCSL predominantly rely on a deductive approach to argue that amnesties are not in accordance with international law, namely principles of jus cogens, erga omnes and universal jurisdiction. If one accepted the deductive method as one that can result in a rule of customary international law, one could argue in favour of a rule that prohibits the application of amnesties in the context of war crimes, crimes against humanity or other gross human rights violations such as torture. Under the principles of jus cogens or erga omnes, any state would be under a duty to prosecute such acts. The regional courts apply more of a mixed approach that includes deductive and inductive reasoning. Considering the previous section, the jurisprudence of the IACHR is reflected by the domestic

105 *Abdulsamet Yaman v Turkey* App no 32446/96 (ECtHR, 2 November 2004) para 55; see also *Okkali v Turkey* App no 52067/99 (ECtHR, 17 October 2006) para 76.

106 *Margus v Croatia* App no 4455/10 (ECtHR, 13 November 2012) para 74.

invalidation of amnesties in terms of prosecuting gross human rights violations, war crimes or crimes against humanity. The example of the IACHR further illustrates how the jurisprudence by regional courts can bind the domestic courts which might also apply for the respective region of the ACHPR and ECtHR. Therefore, the jurisprudence in this section is not only evidence of state practice but also of *opinio juris* when it comes to the non-application of amnesties in terms of gross human rights violations, war crimes or crimes against humanity.

The Formation of a New Rule: Sufficient Evidence of State Practice and Opinio Juris? (2014–2019)

In 2014, the ECCC undertook a detailed analysis of the applicability of amnesties in relation to the most serious crimes and gross human rights violations for the time between 1975 and 1979. With regard to breaches of the Geneva Conventions, genocide and torture, the Trial Chamber concluded that conventional law such as the Geneva Conventions, Genocide Convention and Torture Convention and relevant international jurisprudence prohibit the application of amnesties.¹⁰⁷ The Trial Chamber deduced such a prohibition from the binding nature of those conventions and supported this assertion with case law as evidence of practice.

By contrast, the Trial Chamber's analysis of the applicability of an amnesty in relation to crimes against humanity adopted the jurisprudence of the IACHR, ECtHR, ACHPR, SCSL and ICTY that was presented in the previous paragraphs as evidence of state practice and *opinio juris*.¹⁰⁸ In addition, the ECCC identified domestic amnesties that excluded their application to certain serious crimes.¹⁰⁹ On this basis, the ECCC argued that 'an emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators.'¹¹⁰ While the Trial Chamber, in the end, did not go as far as to say that such a prohibition has emerged under customary international law, it concluded that:

[T]his practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms.¹¹¹

107 *Co-Prosecutors v IENG Sary* (Decision on Ieng Sary's Rule 89 Preliminary Objections) ECCC, Case No 002/19-09-2007/ECCC/TC (3 November 2011) (hereinafter *Ieng Sary* case) paras 38–39, 53.

108 *ibid* paras 40–48.

109 The Trial Chamber lists Suriname, Nicaragua, Guatemala, Federation of Bosnia and Herzegovina, Venezuela, Côte d'Ivoire, Columbia, the Philippines, the Democratic Republic of the Congo, Tunisia and Poland: *Ieng Sary* case (n 107) para 51.

110 *Ieng Sary* case (n 107) para 53.

111 *ibid*.

The ECCC Trial Chamber, therefore, confirmed that amnesty laws are inapplicable in relation to war crimes, genocide, torture and crimes against humanity in the *Ieng Sary* case.¹¹²

In April 2019, the Pre-Trial Chamber I of the ICC underlined the view that most serious crimes such as crimes against humanity did not fall under the scope of amnesties when it concluded in the *Saif al-Islam Gaddafi* case that:

The Chamber believes that there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law.¹¹³

In this case, Pre-Trial Chamber I had to decide whether a Libyan law that granted the accused amnesty would find any application in respect of the charges for crimes against humanity. Pre-Trial Chamber I adopted jurisprudence by the ICTY, ECCC, IACHR, ACHPR and ECtHR as evidence of a rule and concluded that:

It follows that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. Besides, they deny victims the right to truth, access to justice, and to request reparations where appropriate.¹¹⁴

Pre-Trial Chamber I's decision suggests that the ICC will not accept an amnesty that prevents the prosecution of international crimes under its jurisdiction. While the Chamber used previous jurisprudence by international and regional courts as evidence of state practice and *opinio juris*, it observes that there is a 'universal tendency' that amnesties do not apply to 'grave and systematic human rights violations'.¹¹⁵

Conclusion: Binding Treaty Obligations, the Power to Review Amnesties and the Formation of a New Customary Rule

Three submissions derive from the sub-sections above. First, the comparative analysis of international jurisprudence demonstrates a consistent rejection of amnesties as a bar to prosecutions of gross human rights violations in a state that is under a binding treaty obligation to provide an effective remedy for such violations, ie the ICCPR or the African Charter on Human and Peoples' Rights. Regarding the prosecution of the most serious international crimes, such an inapplicability may also derive from conventions

112 See also *Co-Prosecutor v IENG Sary* (Decision on Ieng Sary's appeal against the Closing Order) ECCC, Case No 002/19-09-2007-ECCC/OCIJ (11 April 2011) para 201.

113 *Prosecutor v Saif Al-Islam Gaddafi* (Decision) ICC-01/11-01/11 (5 April 2019) para 61.

114 *ibid* para 77.

115 *ibid* para 61.

such as the Geneva Conventions or the Torture Convention, which impose a duty to prosecute on the state party.¹¹⁶

Second, the analysis of international jurisprudence reveals that a power to review and assess amnesty laws is not only limited to international courts or courts in third states, but instead includes courts in the state that granted the amnesty.¹¹⁷ On this basis, amnesty laws can be set aside or limited in their scope by the respective domestic courts. Under Article 79 of the Namibian Constitution, the Supreme Court of Namibia, therefore, has the jurisdiction and power to conduct such a review if a matter should make its way through the lower courts and the High Court.

Third, this section revealed the development of the international jurisprudence which started with a predominantly deductive way of reasoning by the ICTY to courts that applied an inductive approach in determining the customary nature of the inapplicability of amnesties. Assuming that customary international law can emerge by inferring from existing peremptory norms, one could follow the ICTY jurisprudence and argue that there are crimes which form part of jus cogens and the principle of universal jurisdiction. By virtue, amnesties constitute a violation of those principles. Since jus cogens norms are binding upon any state, such an amnesty would be prohibited from applying to the most serious crimes such as war crimes or crimes against humanity.¹¹⁸

Under the positivist view of custom, the international jurisprudence is more cautious in its identification of custom which is reflected by its terminology of ‘emerging consensus’ or ‘universal tendency’. Even if one cannot confirm such a customary rule yet, it appears that the formation process is at the edge of becoming custom.

However, in this context, one may apply the concept of specially affected states. Under this concept, the formation of custom is shaped by those states who qualify as specially affected.¹¹⁹ In this context, states that granted amnesties certainly may qualify as specially affected. As the practice by states that granted amnesties showed, such laws have been invalidated or limited in their scope in several states.¹²⁰ At the same time, this is confirmed by the international jurisprudence of the ICTY, SCSL, IACHR, ACHPR, ECtHR, ECCC and ICC, and therefore constitutes the relevant *opinio juris* for this rule. Therefore, one might argue, that through the lens of the concept of specially affected states, a new rule of custom has emerged. That new rule excludes the application of amnesties in relation to rules of jus cogens, ie gross human rights violations such as

116 See *Ieng Sary* case, paras 38–39, 53; *Furundzija* case, para 155; *Kallon* case, para 67.

117 See *Furundzija* case, para 155; *Ieng Sary* case, para 53.

118 See *Kallon* case, para 67; see also *Ieng Sary* case, paras 38–39, 53.

119 See (n 63).

120 See section on ‘Invalidation and Limitation of Amnesties on a Domestic Level: Jurisprudence and Legislation’ above.

torture or the most serious international crimes such as genocide, war crimes or crimes against humanity.

The Application of International Law in Namibia: A Blanket Amnesty that cannot Apply

This section analysed Namibia's international obligations under treaty and customary international law. Moreover, I illustrated the inapplicability of amnesties concerning the most serious international crimes and gross human rights violations under two regimes of international law, namely treaty law and customary international law. In this context, this section analysed domestic and international jurisprudence in order to argue that the Namibian blanket amnesties can be challenged. Four submissions derive from this examination.

First, Namibia has the right to prosecute crimes such as crimes against humanity and war crimes which derive from customary international law and treaty law. With reference to the examination by the ECCC and the Geneva Conventions signed by South Africa, one may argue that war crimes and crimes against humanity were punishable offences in the 1970s and 1980s. It should be noted that torture constitutes a separate offence under crimes against humanity if all other remaining elements of the crime are fulfilled.

Second, Namibia's obligations under the ICCPR, Torture Convention, Rome Statute or Geneva Conventions show that there is a duty to prosecute some of the most serious international crimes and provide a way of an effective remedy in case of serious human rights violations. As discussed, this duty might even apply to situations that occurred before the ratification date. International jurisprudence demonstrated how international treaty obligations can be interpreted in practice. Therefore, one might argue that the application of the blanket amnesties constitutes a breach of Namibia's treaty obligations in this context.

Third, international jurisprudence suggests that the inapplicability of amnesties for core crimes or gross human rights violations may derive from principles such as *jus cogens* or universal jurisdiction. The analysis illustrates that most recent examinations of state practice and *opinio juris* by international courts did not confirm the customary nature of such an inapplicability. However, based on the concept of specially affected states one may argue that the practice and *opinio juris* by specially affected states is consistent enough to form a new rule of custom. In the context of domestic and international jurisprudence that I examined, one may argue that such a rule prohibits the application of amnesties for genocide, war crimes, crimes against humanity or gross human rights violations such as torture.

Fourth, if one should disagree with the assertion that a new rule of custom has emerged, the comparative analysis of domestic and international jurisprudence firmly suggests that amnesties are inapplicable to the most serious international crimes or gross human rights violations, especially when it comes to providing victims with an effective remedy. As discussed, such a comparative analysis of foreign and international jurisprudence as an interpretive tool is one way how international standards find their application in Namibia's legal system.

In the end, the message of this comparative analysis is clear. If a state is under a treaty obligation to prosecute the most serious international crimes or under an obligation to provide an effective remedy, blanket amnesties cannot pose a bar to such proceedings. Moreover, blanket amnesties also cannot block prosecutions in case that a state should decide to exercise its right to prosecute crimes such as torture, crimes against humanity or war crimes.

Conclusion

As stated earlier, the Namibian blanket amnesties were not, in themselves, a violation of international law. Nonetheless, considering the analysis in this article, I submit that their application is unlawful now.

I submit that international law is directly applicable as part of Namibian law under Article 144 of the Namibian constitution. Because there are treaty obligations under which Namibia has to investigate or prosecute crimes such as torture, crimes against humanity or war crimes, the Namibian blanket amnesties should not prevent prosecutions in such a case. That does not only derive from interpretations of Namibia's treaty obligations but also customary international law as well as domestic and international case law. In the light of providing victims with an effective remedy, blanket amnesties are unacceptable especially considering that Namibia never established a truth-finding body such as the TRC in South Africa.

Therefore, I submit that the Namibian blanket amnesties are not in accordance with current Namibian law, which includes international law and its standards. Through the lens of international law, it appears to be unlikely that a Namibian court would confirm the suspension of an investigation or prosecution in respect of the crimes discussed in this article based on the blanket amnesties from 1989 and 1990. As the examination of international law in this field showed, Namibian courts have the power to review its amnesty laws. Moreover, Namibia has the right to prosecute crimes such as war crimes or crimes against humanity.

What does this mean for future prosecutions? So far, there has not been a serious attempt to challenge the blanket amnesty in the courts of Namibia. In this context, the

independent prosecutorial authority in Namibia has not shown an appetite to investigate or prosecute crimes such as torture, war crimes or crimes against humanity that fall under the blanket amnesties. However, as the law binds the courts of Namibia, the same applies to the prosecuting authority under Article 88 of the Namibian constitution. It remains to be seen whether the Namibian prosecution will show the strength to challenge the blanket amnesties in order to contribute to the truth and justice process in the country.

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