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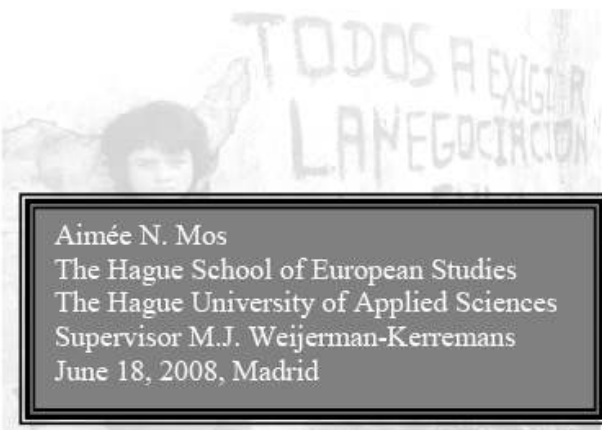


There comes a
time when
silence is betrayal.
The truth must be
told.
—MLK



TRUTH COMMISSIONS V. HUMAN RIGHTS VIOLATORS

The powers of a truth commission in relation to international justice



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Front page of the Report of the Argentinean Truth Commission; Perpetrator in jail; Girl with truth label; Archbishop Desmond Tutu; Note by Martin Luther King; Victim speaking at a hearing of the South African Truth and Reconciliation Commission; President Thabo Mbeki of the Republic of South Africa; Soldiers during the dictatorship of Pinochet; General Assembly of the United Nations; Guerrilla girl during El Salvador's civil war; Pro justice march during truth commission's investigation; Lady Justice.

Preface

Truth commissions are a relatively new form of justice that is increasing in popularity. Though there has been evolved a substantial basis of written information on truth commissions over the past decade, there are still areas of their work that are quite understudied. With this dissertation I aspire to contribute to the limited resources on the subject of the powers with which truth commissions can be equipped that can contribute to the trying of human rights violators.

I would like to express my gratitude towards my supervisor Mrs. Weijerman-Kerremans for always being there for me when I had any questions.

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1. Introduction

Truth commissions are investigative bodies equipped to examine the truth concerning committed human rights abuses. Their investigation can provide a sound basis and important guide for future criminal investigations and legal proceedings. To form a clear picture of which powers a truth commission can be assigned and how they can contribute to achieving international justice, the central question that formed the basis for this dissertation is as follows:

What powers do truth commissions have when it comes to trying human rights violators and how do these powers coincide with international justice?

In order to find an answer to the central question there are three sub questions that are of relevance:

- *Do truth commissions have any legally binding powers?*
- *In how far is the truth commission's advice taken seriously?*
- *Do the powers of truth commissions conflict or go hand in hand with international justice?*

The answers to these questions are thoroughly discussed throughout the paper. After the following Chapter that offers an impression of the main characteristics of truth commissions, Chapter three provides the selection of different powers that can be assigned to a truth commission, including the relevant conditions. In Chapter four on the relation between truth commissions and international justice the relevant sources of law that can be of influence on the work of truth commissions are thoroughly described. Subsequently, Chapter five provides detailed information on the importance of international recognition and acceptance of a truth commission and its recommendations.

Due to the length and complicatedness of Chapter three and four, these two Chapters include Chapter introductions and conclusions in order to make them more comprehensible.

Throughout the paper examples of former truth commissions are given in order to get a better understanding of their historical background and functioning. Especially the South African Truth and Reconciliation Commission is frequently mentioned as an example of a relevant case study since this commission is widely accepted as a model for truth commissions. Another regularly recurring factor in this dissertation is the power of amnesty. Amnesty power is the most controversial power a truth commission can possess and therefore receives special consideration throughout the entire paper.

A list of relevant definitions as well as the relevant legal Articles mentioned in this thesis can be found in the appendix.

2. An introduction to truth commissions

2.1 The right to truth

Truth commissions are a relatively new form of justice. They are best to be described as being investigative bodies that are equipped to combine transitional and restorative justice in order to deal with a past of serious human rights violations in a particular country. In contrary to judicial bodies the main goal of truth commissions is not the prosecution of assumed perpetrators, but repairing victims' harm and promoting reconciliation by revealing the truth (Roche, 2005, p.569). In doing so, truth commissions act on the emerging 'right to truth' that can be traced back to various international Conventions. The Draft Principles of the United Nations for instance describe "The Inalienable Right to the Truth" (supra note 2, at 10, principle 1):

Every society has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future. (Hayner, 1997, p.176)

Even though the prosecution of (assumed) human rights violators is not amongst truth commissions' tasks, when they are equipped with the right powers and their recommendations are taken seriously they can make a valuable contribution towards the actual trying of human rights violators by judicial bodies.

2.2 The formation of truth commissions

To date there have been some 32 truth commissions (see Appendix B). They were first used in Latin America to examine human rights abuses committed by military dictators (Roche, 2005, p.566).

Truth commissions can be created either by a country's President or Parliament, or otherwise by a non-governmental organisation or legislation agreed to in a negotiated peace settlement. Clear backing from the government is always essential for a commission in order for it to work with full authority, but it should still operate free of direct influence or control by the governmental regime. In order to prevent the possibility that the government could use the funding for the commissions' work as a point of leverage to influence them, the funding for the commission should at all times be committed and available at the start of the commission's work (Hayner, 1997, pp.178-9).

A crucial factor for the proceedings and effectiveness of the commission is the credibility of the persons that are appointed to a commission, since they are highly visible during the investigation and reporting process. The diversity of a commission is determined by components such as: occupation, political affiliation, and nationality. The general rule is that the higher the overall diversity of a commission is, the more credible its findings are likely to be found (*Strategic Choices*).

2.3 Truth commissions' characteristics

To clarify the characteristics of truth commissions the definition created by Hayner (1994) serves as the generally accepted standard. She has divided the definition into four primary elements that can be identified in practically every truth commission. Firstly she explains that a truth commission focuses on the past and secondly, that it attempts to paint the overall picture of certain human rights abuses or violations of international humanitarian law, over a certain period of time. Thirdly, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of the report of its findings. And fourth, this type of commission is always vested with some sort of authority that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report. (p. 604)

Besides these four elements there are generally speaking few similarities between truth commissions. Each and every one of them is created under different circumstances and in distinct countries with their own political, cultural and historical background. Consequently this means that the quality, range of powers and mandates of commissions vary as well (Roche, 2005, p.566). Concerning the differences in the range of powers, they can be assigned

various legal as well as moral powers. For instance, they can (or cannot) be empowered with amnesty power, subpoena power, and/or the power to name names. However, there is one more power that every well-functioning truth commission possesses: namely the ‘power to restorative justice’. This moral power embodies the truth commissions’ mission to find the truth on past human rights abuses that will hopefully lead to reconciliation.

Hayner (1994) verifies that there is no set of universal rules or recommendations to guarantee the success of a commission, but of course there are some minimal requirements in order for a commission to be able to function properly. The most important criteria for a truth commission to function correctly are that it should operate impartially, independent and in good faith and that it should have resources as well as free access to information. Moreover Hayner suggests that a commission should be implemented as soon after the resolution of a conflict allows, and it should also include in its mandate the power to make recommendations that can be expected to be given serious consideration. Furthermore, it is important that the report is published as soon as possible and that it is readily available to the public (p. 652). When a truth commission is effectively run it can mean the beginning of serious reforms, reparation to victims, reconciliation, and other forms of accountability (Hayner, 1997, p.175).

A truth commission attempts to form an accurate historical record on past human rights abuses. From this record lessons may be learned in order to prevent future violence and it often creates public dialogue between different societal groups. One of the valuable differences between a truth commission and a criminal court that is often depicted by scholars is that truth commissions can give the victims and society the power to forgive, and that participation in a truth commission for the perpetrators of serious crimes can have a redemptive quality in a way that a criminal court cannot (Pfanner, 2006, p.372). Though opinions always vary on which of the two offers the most preferable form of justice, fact is that a well functioning truth commission can often deliver a superior truth to victims than criminal trials can, especially when it comes to emotional truth (Aldana, 2006, pp.109/111).

3. The powers of truth commissions

3.1 Chapter introduction

The powers granted to a truth commission affect the perception of how much their proceedings will contribute to achieving justice, whether it's restorative or retributive. A truth commission can be granted judicial powers by the authority by which it has been set up, in the form of the granting of amnesties and/or the issuing of subpoenas. Being invested with these powers a commission can benefit from having the legal authority to rule on amnesty in exchange for the truth, and to search and seize documents that are relevant for the investigation (Bronkhorst, 2006, p.9).

On the other hand, truth commissions do not have any legislative powers, nor do they have the power to prosecute. They are considered investigative bodies only and as being so they cannot impose any formal legal punishment on those who come before it (Freeman, 2006, p.194). Many truth commissions however share their archives with prosecuting authorities after they have recommended that prosecutions should take place, which illustrates the important contribution they can make to the future prosecution of human rights violators. Nevertheless, for the power to institute reforms or make policy changes they rely on the political will and interest of the government for its recommendations to be given force (Hayner, 1997, pp.175/296).

There is a moral power that can be assigned to a truth commission that can make an important contribution to the future trying of perpetrators as well. A commission can be empowered to make public or hand over to a judicial body a list of names of persons they have defined as human rights violators. Moreover, there is another moral power that deserves to be mentioned though it does nothing for the possible prosecution of assumed perpetrators. Nonetheless, by using its 'power of restorative justice' truth commissions are able to make a significant contribution to the recovery of the victims of human rights abuses.

3.2 Power of amnesty

3.2.1 Introduction to amnesty power

The creators of the website *Strategic Choices in the Design of Truth Commissions* opinion that transitions to democracy are rarely possible without at least some form of amnesty for human rights violations that the previous regime has perpetrated. Human rights organisations on the other hand are often sceptical about the granting of amnesties to perpetrators of human rights abuses since it results in impunity. Truth commissions that have the power to grant amnesties are therefore often accused of preventing prosecution and consequently, of preventing that justice is served. In the words of Brahm (2004): “there may appear to be a conflict between finding the truth and administering justice” (“The Operation of Truth Commissions” section, para.1). Some scholars believe that reconciliation is best achieved through amnesty and truth commissions whereas justice is best achieved through reparations and prosecution. Yet, according to Skaar (1999), these relationships have been hotly contested (p.1127). We should bear in mind though that justice does not necessarily require prosecution, and that nowadays restorative justice should perhaps also be considered as an alternative form of reaching justice. Unfortunately reality will have it that without the offer of amnesty few human rights violators are willing to voluntarily admit the crimes they have committed. Offering amnesty in exchange for information that will contribute to uncovering the truth is therefore at times the best option in terms of drawing a reliable historic picture of past atrocities that have taken place in order to achieve reconciliation. Even more, when going through a transitional period outgoing regimes are often still in a position to dictate the terms of their departure, and when that is the case they tend to insist on amnesty and impunity in return for their peaceful retreat from power (Skaar, 1999, p.1117). It also occurs that amnesties have already been negotiated or legalized before the old regime left office, though in the case of unconditional amnesties without any restrictions these do normally not receive international recognition (Sooka, 2006, p.316).

3.2.2 Conditions of amnesty power

The conditions under which a truth commission is permitted to grant amnesties are of utmost importance since they heavily contribute to the credibility of the commission. As with most aspects of truth commissions the type of amnesties they are allowed to grant and under which

specific conditions this may take place can also vary among the different commissions. Amnesties can be either declared prior to the establishment of a commission, or they can be passed after a commission has finished its work. However, declarations of limited, conditional amnesty after a commission has concluded its work are the most preferable since granting amnesties before the beginning of the operations of a commission limits the credibility of the commission's work (*Strategic Choices*). Conditions for proclaiming amnesty have included official and public acknowledgment regarding individual perpetrators, the guarantee that pardons could be petitioned by individual perpetrators, full disclosure by perpetrators and the guarantee that victims may seek reparation from the state (Bronkhorst, 2006, p.3). The concrete form of amnesty that will be given preference in the end also depends to a great deal on the extent of power of former perpetrators in the legislative and judicial process (*Strategic Choices*).

There are three different types of amnesty power that can be relevant for truth commissions:

- Blanket (general) amnesty: applies to all ranks and automatically for a certain period of time;
- Limited amnesty: is limited in time as well as it is limited to certain perpetrators;
- Conditional amnesty: is conditional upon application and/or testimony.

(*Strategic Choices*)

Blanket amnesty is usually thought to promote a culture of impunity, undermining the efforts to prevent future human rights violations (Hingorani, n.d., p.5). A combination of limited, conditional amnesty is therefore generally considered as the most acceptable form of amnesty because it only grants amnesties after a testimony has been given and even then it is subject to additional requirements that should be fulfilled in order to be actually granted the amnesty. For obvious reasons this type of amnesty is often rejected by armed and security forces (*Strategic Choices*).

3.2.3 Truth commissions with amnesty power

The most well-known truth commissions that have had the power to grant amnesties were the commissions of South Africa, Guatemala, El Salvador, Chile and Argentina. The commissions of El Salvador and Uruguay were followed by an overall amnesty. Chile and Haiti could not cancel the previously ruled amnesty, and the commission of Argentina was

overturned by amnesty later on (Bronkhorst, 2006, pp.53-54). It should be noted that in the cases of Uruguay, Brazil, Chile and El Salvador the outgoing regimes were in a position to dictate the terms of their departure and therefore insisted on amnesty laws (Skaar, 1999, p.1117).

Out of all the truth commissions that have seen the light up until today the South African Truth and Reconciliation Commission was granted the most power in being authorized to grant amnesty. This truth commission was connected to the South African Amnesty Committee, which was the judicial body of the commission that corroborated testimony, judged the political motivation of the crime, made decisions as to whether the complete truth had been revealed, and it could of course rule on amnesty (Brahm, 2004, para.16). However, the commission created some strict conditions on who could and could not be granted amnesty. The possibility of being granted amnesty did for instance not cover all cases of human rights violations nor common crimes, which meant that crimes as for example torture still remained prosecutable. The amnesty law in South Africa was therefore primarily based on individual, conditional amnesty, which in the case of South Africa meant that persons found guilty could get amnesty only if they would give a full confession for political crimes (Skaar, 1999, p.1124). Because of the strict conditions the commission had set the majority of the applicants for amnesty in reality were not granted so: of the 7100 applicants for amnesty in South Africa only 850 were successful (Roche, 2005, p.576).

3.3 Power of subpoena

3.3.1 Introduction to subpoena power

Next to the power to grant amnesty, subpoena power is the second most important and influential power that a truth commission can possess. It provides a commission with an important mean of leverage to obtain valuable information. Generally speaking a truth commission does not even have to use its subpoena power because the mere prospect of the consequences for not obeying to a subpoena is usually threatening enough for someone who is considering noncompliance, to cooperate (Freeman, 2006, p.190).

Just as amnesty power, subpoena power can only be assigned to a truth commission by the government or non-governmental organisation that initiated the commission in the first place

(Freeman, 2006, p.188). The issuing of subpoenas on the other hand can be done by the commission itself or by local judicial authorities. However, without the infliction of the judicial authorities the commission holds an important power for it can control the speed at which the subpoena is issued, as well as its content. Even more, since truth commissions are created in transitional democracies that at times still have a weak or corrupt judiciary system, a reliance on that judiciary could disrupt the commission's ability to make use of its subpoena power (Freeman, 2006, p.191).

A truth commission invested with this particular judicial power can issue a subpoena when a person does not volunteer testimony or when it requires certain evidence that it considers relevant and necessary for the investigation (Freeman, 2006, p.193). It is a legal device that is found in all major legal systems worldwide and subpoenas issued by truth commissions therefore serve the same purpose as those issued in court proceedings, namely to compel the disclosure of evidence "under penalty" (which is what subpoena stands for) for failure to comply (Freeman, 2006, pp.188/190).

3.3.2 Conditions of subpoena power

The type of subpoenas that are common to truth commissions are subpoenas *ad testificandum* and subpoenas *duces tecum*. Subpoenas *ad testificandum* are subpoenas to testify. Subpoenas *duces tecum* are subpoenas compelling the production of documents and other projects that are material and relevant and in the custody or control of a certain person (Freeman, 2006, p.188). Whatever type of subpoena is being issued, according to Freeman any truth commission subpoena should cover both testimony and physical or documentary evidence. He also clarifies that a truth commission subpoena is consistent with the practice of international criminal tribunals in the way that it can have the power to issue subpoenas against natural as well as legal persons (Freeman, 2006, p.193). On the whole the same goes for the design and exercise of subpoena power, which is generally guided and governed by the relevant standards and practices of the concerned state (Freeman, 2006, p.188).

If a truth commission has subpoena power it should be indicated so in its mandate in order to be able to introduce sufficient safeguards to ensure that the power is properly used (Freeman, 2006, pp.188/191). The mandate should also make clear that it is a punishable offense for anyone to fail to comply with a subpoena without reasonable excuse, or to deliberately distort

or conceal relevant information or evidence (Freeman, 2006, pp.197-198). Possible penalties for noncompliance with a subpoena can include a fine, a short term in prison, or a reimbursement of the commission's reasonable costs (Freeman, 2006, p.202). In the case of noncompliance with a subpoena an effective mechanism of enforcement can prove to be a very important tool for the commission. Should a subpoenaed choose not to respond to the by the commission's issued subpoena, the commission should be able to start a subpoena enforcement proceeding. The upside of this is that this allows the commission to set out its full case against a noncompliant party and publicly reveal its full evidence, because it has to justify to the court the basis for having issued the subpoena in the first place (Freeman, 2006, p.197).

A truth commission subpoena should be directly relevant to the areas of investigation that are specified in the commission's mandate so that the commission's authority will not be undermined, nor will the privacy rights of the recipient be unfairly harmed. Freeman (2006) emphasises that the commission should always keep in mind the individual interests of the subpoenaed such as privacy rights and the privilege against self-incrimination, even though these considerations can pose restrictions on the commission's investigation (pp.190/194). Concerning these restrictive measures that have to be taken into account when issuing a subpoena, Freeman (2006) suggests that a subpoena should only be used as a last resort (p.198).

Another restriction can be that the approval is required of a quorum of commissioners when issuing a subpoena. The preferable situation when voting on the issuing of a subpoena is of course a consensus among the commissioners, but whenever this is not possible the decision can be based on a simple majority vote. The quorum requirement helps to ensure that subpoenas are not issued randomly and without reflection or debate, but it can also form a serious limitation to the functioning of the commission since commissioners are often based in different parts of the country and only meet infrequently. Therefore it can be very useful to grant the commission chair the power to independently issue a subpoena on an exceptional and emergency basis, as can be the case when for example the person that should be subpoenaed is about to flee the jurisdiction (Freeman, 2006, p.192).

3.3.3 Truth commissions with subpoena power

To date the following truth commissions have had the power of subpoena: Uganda, Chad, Sri Lanka, Haiti, South Africa, Nigeria, East Timor, Ghana, Sierra Leone, Liberia, and the Democratic Republic of Congo (Freeman, 2006, p.189).

As mentioned in the Chapter introduction, subpoena power can provide a truth commission with an important mean of leverage. The South African Truth and Reconciliation Commission for example only had to use its subpoena power on several occasions for this power served more as a threat than anything else. The commission had access to all government and security force information which had not been previously destroyed, and it was also granted access to documents of human rights organizations (*Strategic Choices*). Together with the public hearings the far-reaching subpoena powers that the Truth and Reconciliation Commission of South Africa possessed, individual human rights violators were forced into the spotlight (Freeman, 2006, p.190).

3.4 Moral powers

3.4.1 Introduction to moral powers

The power of ‘naming names’ is not a judicial power such as amnesty and subpoena power. It can perhaps best be described as a moral power that can serve as a powerful instrument to make assumed perpetrators publicly known and/or contribute to the trying of these human rights violators. It is however a power that attracts much controversy (Hayner, 1994, p.648).

Opinions on the correctness of naming names differ. Some scholars are of the opinion that naming the names of presumed perpetrators is an essential detail of a truth commission report. In contrast, researchers such as Rushton (2006) believe that it is inappropriate for a commission that does not officially follow due course to name perpetrators in public, because that way their guilt will be taken as a matter of fact (p.132). Reality will have it that it is in no way fair to assume the guilt of someone without a legal process and without offering the presumed perpetrator the option of an honest trial and defence. Article 11 sub.1 of the Universal Declaration of Human Rights of the United Nations (see Appendix D) provides that ‘everyone charged with a penal offence has the right to be presumed innocent until proved

guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'. The requirement by human rights to a fair trial is therefore not guaranteed when a truth commission publicly announces the names of perpetrators they find to be guilty, which consequently means a violation of due process (Hayner, 1995, p.648).

Bronkhorst (2006) adds to this by emphasising that criminal evidence should be assessed by an independent judicial body such as a domestic or international court: which is a criterion that a truth commission cannot fulfil (p.17). Even more, when the names of presumed human rights violators are made public reprisals can be undertaken against the assumed perpetrators, as was the case in for example Rwanda where two alleged perpetrators that were named in the truth commission report were killed. Of course this goes strongly against a truth commission's goal to seek reconciliation (Rushton, 2006, p.131). But as the commissioners of the El Salvador Truth Commission explained in the introduction of their final report: the whole truth cannot be told without naming names (Hayner, 1994, p.649).

Besides naming the names of presumed, individual perpetrators, there should be made a distinction by naming the state and particular units within it as responsible parties as well. In contrary to the naming of individual names, recognition of state responsibility in past abuses should be made public in order to offer the public at least some sort of recognition of the states wrongdoings (Rushton, 2006, p.132).

Last but not least there is another moral power that deserves to be mentioned though it does nothing for the possible prosecution of assumed perpetrators. Nonetheless, by using its 'power of restorative justice' truth commissions are able to make a significant contribution to the recovery of victims of human rights abuses.

3.4.2 Truth commissions with moral powers

Truth commissions that have been empowered with the power to name the names of assumed perpetrators include the commissions of Chad, South Africa, El Salvador, Argentina and Rwanda. In a truth commission's mandate can either be adopted that a commission does or does not have the power to name names, or there is no explicit notion made on the matter and it is left up to the commissioners.

Article 2 of the mandate of the Chilean commission explicitly provided that it ‘will not have the power to take a position on whether particular individuals are legally responsible for the events that it is considering’ (Tomuschat, 1999, p.156). On the other hand its mandate did however require the commission to send the names of the individuals implicated in possible crimes to the courts (Roht-Arriaza, 1998, p.279). Following, this led to further investigations and prosecutions with the truth tested in a more appropriate setting than that of a truth commission (Rushton, 2006, pp.131-132). Another commission that was explicitly restricted by its mandate not to name names was the commission of Guatemala. However, this commission was on the other hand empowered to determine institutional responsibilities (Tomuschat, 1999, p.156).

The Truth Commission of El Salvador attracted a great deal of attention when it made public the names of assumed human rights violators for the reason that the individuals that were held responsible for the atrocities that had taken place were for a large part high military and judicial officials. Though a truth commission is of course still not an official judicial body, the truth commission of El Salvador did took notice of the rule of due process and gave the individuals that would be named in the report at least the opportunity to defend themselves (Hayner, 1994, p.649).

In the case of the Argentinean truth commission the commission did not intend to publish the names of individual persons they had identified as human rights violators, but they had to submit the list to the President. This list of names was however leaked to the press and therefore still became publicly known (Tomuschat, 1999, p.156).

3.5 Chapter conclusion

As stated in the introduction of this Chapter the powers that are granted to a truth commission affect the perception of how much their proceedings will contribute to achieving justice. Because a truth commission is not an official judicial body their powers are normally quite limited. However, when empowered with subpoena power, amnesty power, and/or the power to name names, a commission is still able to make an important contribution to the possible trying of human rights violators even though it will not be able to impose a formal legal punishment on them by itself.

The granting of amnesties by a truth commission is often perceived as a form of impunity that is contradictory to what a truth commission should try to achieve. This resistance towards amnesties is quite understandable, but as stated before, unfortunately reality will have it that without the possibility to be granted amnesty few human rights violators are willing to come forward to reveal the truth on past abuses they have committed (Aldana, 2006, p.110). Offering amnesty to the violators can therefore in a way be seen as a ‘necessary evil’ in order to get access to information that will contribute to uncovering the truth. Moreover, without some form of amnesty a truth commission can expect to encounter serious opposition from the armed forces (*Strategic Choices*).

We have to keep in mind that pardon and amnesty do not necessarily have to go together. As Cassin (2006) explains: “a crime can be legally amnestied without being morally forgiven” (p.239). Of course this does seem to go against what a truth commission stands for: trying to achieve some form of reconciliation in a way that a country can ‘move on’. In any case there should be some strict conditions adopted in the mandate of a truth commission on when and how they can use their amnesty power, if they are equipped with this particular authority. It should also be kept in mind that a truth commission amnesty does not necessarily by all means rule out all possibilities of prosecution, as will be explained in the following Chapter.

All in all, the powers that can be assigned to a truth commission can mean an important contribution to the future prosecution of human rights violators. The information a truth commission gathers to form an as detailed a picture as possible of past atrocities can be elaborated considerably thanks to the power to issue subpoenas as well as the power to grant amnesties. In their own way both legal devices demand a disclosure of information that can be of great value to possible prosecutions if they share their archives with prosecuting authorities and recommend that prosecutions should take place. The same goes for a truth commission’s moral powers. If a commission is empowered to present the names of assumed human rights violators in a discreet manner, they can make an important contribution to the eventual prosecutions of these perpetrators when they hand over the list of names to a judicial body.

4. Truth commission powers versus international justice

4.1 Chapter introduction

As human rights investigators truth commissions are expected by the international community to uphold core human rights standards and values (Freeman, 2006, p.88). Assuming that a truth commission is unbiased, reliable, and set up for the right reasons, judicial powers can give it more credibility and they certainly make an important contribution to the commission's investigation. There is no doubt that a truth commission can come to a greater truth when it is equipped with judicial powers. Making use of its subpoena power it can demand the handing-over of information that would otherwise not be available to the commission, and when it uses its amnesty power there is a far greater change that perpetrators agree to admit their crimes and come forward to tell the truth. The generally accepted international standard however is that perpetrators of serious crimes should not go unpunished (Seibert-Fohr, 2003, p.588).

On the other hand, there are several disadvantages to criminal prosecutions that can still mean that human rights violators will not be prosecuted. It is often difficult to find sufficiently cogent evidence to justify indictment and the resources of most countries that have just gone through a transitional period are normally limited. The consequence of this is that the generally weak judicial system is only capable of trying a handful of perpetrators and that the majority of the human rights violators escape trial (Goldstone, 1996, p.491). In South Africa for example criminal procedures and police investigations were slow and inefficient and if it was not for the Truth and Reconciliation Commission very few cases would have come before the courts (Goldstone, 1996, p.493).

4.2 International (human rights) law and amnesty

Justice is essential, but international law does not unconditionally demand punishment in all cases and amnesty can also be considered an option (Bronkhorst, 2006, pp.53-54). According to Tomuschat there does not exist a general obligation of states with regard to the international community to initiate legal action (Tomuschat, 1999, p.158). However, generally speaking amnesty does not have an extraterritorial effect and therefore not all

amnesties will be recognised abroad (Dugard, 2002, p.699). Pfanner affirms this by stating that persons granted amnesties are not to be immune from prosecution in other states or before international courts (Pfanner, 2006, p.372).

The law on amnesties is however a very complex issue. The decision whether a national amnesty should be accepted by the international community requires a delicate balancing of interests which, according to Seibert-Fohr (2003), differ from case to case (p.588). There are no clear rules on how to decide in which case an amnesty is acceptable or not, but it is known that international recognition might be given where amnesty has been granted as part of a truth and reconciliation process and each person granted amnesty has been obliged to make a full disclosure of politically motivated criminal acts (as was the case with the South African Truth and Reconciliation Commission). Moreover, the possibility of recognition of amnesties granted by a truth commission should only be considered when the commission has been established by a democratically elected government or international organisation and functions in accordance with due process of law requirements (Dugard, 2002, p.700).

It goes without saying that blanket, unconditional amnesty normally cannot count on international recognition (Dugard, 2002, p.699). Several international treaties and customary law make it clear that blanket amnesties granted to a whole class of perpetrators are illegal. If a truth commission or its government grants blanket amnesties the recipients can therefore still remain susceptible to prosecution by the International Criminal Court (Roche, 2005, p.576).

4.3 Relevant law

A truth commission is an instrument of transitional justice on which a large array of international Conventions and declarations can be of influence. Since the creation of the Rome Statute of the International Criminal Court there is a strong international Convention in regard to the obligation to prosecute gross human rights violators (Bronkhorst, 2006, p.6). Even more, when the crimes involve genocide, grave breaches under the Geneva Convention, and/or torture, states are usually obliged by international law to prosecute or extradite (Dugard, 2002, pp.697-699).

The primary source of international human rights law is the International Bill of Human Rights, with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights being the two most important components for a truth commission's work.

4.3.1 *Jus cogens*

Some crimes are generally considered to be so horrendous that international customary norms have evolved among nations to obligate all states to deal similarly with them. These norms are referred to by the legal term of *jus cogens* and they are not to be broken in any way. Violations that are considered crimes under *jus cogens* are violations that form a danger for the entire international community, such as for example genocide, aggression, crimes against humanity, war crimes, and torture (Bassiouni, 1996, p.72).

Jus cogens is considered the highest status in international law and it prevails over all other norms, which means that all states are obligated to prioritise the enforcement of these norms and to avoid taking any action that would limit their implementation (Weston, 2001, p.1028). National measures violating the general principle of *jus cogens* would therefore supposedly not be accorded international legal recognition and perpetrators acting upon or benefiting from those national measures may nevertheless be held criminally responsible, whether in a foreign state or in their own under a subsequent regime (Dugard, 2002, p.698). This goes regardless of the nationality of the perpetrator or victim, where the violations were committed, by whom, against whom, and whether the violations took place in peace or wartime (Weston, 2001, p.1029).

Knowing this, *jus cogens* does not seem to leave many options open for truth commission amnesties. In reality however, the general duty to prosecute crimes under the international law that *jus cogens* stands for is not supported by state practice (Dugard, 2002, p.698). Even though Article 53 of the Vienna Convention makes mention of *jus cogens*, the difficulty of condemning human rights violations under *jus cogens* lies in the fact that it is a general norm and not a written law to which every single member of the international community has officially expressed its consent.

4.3.2 The Rome Statute of the International Criminal Court

Since no agreement could be reached on how amnesties should be treated in the Rome Statute, no explicit provision on amnesties is adopted in the Statute of the International Criminal Court (Seibert-Fohr, 2003, pp.561-562). Even more, despite the rising popularity of truth commissions none one of the 128 Articles of the Statute makes any mention of truth commissions (Roche, 2005, p.567). However, this does not mean that the Statute cannot be of an important influence on the work of truth commissions.

The Statute Preamble declares that ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’ (Roche, 2005, p.566). However, no explicit provision is included (not in the Preamble nor in the operative part of the Statute) on the obligation of the states to either prosecute domestically or extradite the accused offender, and therefore one can conclude that it does not entirely rule out alternative forms of accountability. According to Seibert-Fohr (2003) this leaves the Court with a certain leeway not to interfere with truth commission processes (p.557). Likewise it is therefore possible to argue that there is sufficient flexibility in the system for truth commissions’ amnesties to be recognised, though under appropriate circumstances of course (Dugard, 2002, p.701).

Article 80 of the Statute provides that the Statute neither affects domestic penalties nor such domestic laws that do not provide for penalties prescribed in the Rome Statute. This means that under the Statute states are neither obliged to prosecute nor to impose a certain penalty, though it should be kept in mind that this provision concerns particular crimes other than those provided for in the Statute (that is to say, serious human rights violations). However, generally speaking the reason of investigation of a truth commission are serious human rights violations: violations that form exactly the crimes for which the Court has jurisdiction (as by Article 5 of the Statute). These crimes involve: genocide, crimes against humanity, war crimes, and crimes of aggression. Nevertheless, the official steps the Court should take determine whether or not a current or former truth commission case is admissible to the Court, and when there are truth commissions’ amnesties involved it should determine if the

amnesty granted by a truth commission qualifies as one of the situations described under Article 17 of the Statute (see Appendix C).

As indicated in Article 17 para.1, a case is inadmissible if it is being or has been investigated or prosecuted by a state unless the state is or was unwilling to carry out the investigation or prosecution (Seibert-Fohr, 2003, pp.564/567). Apparently this does not rule out non-criminal investigations and even more, it refers to investigation or prosecution and it is not specified that the decision not to prosecute needs to be based on the factual outcome of the investigation. Article 17 therefore provides the leeway Seibert-Fohr (2003) refers to for the Court not to prosecute offenders when an individualized amnesty has been granted by a national truth commission in the interest of re-establishing peace and security (pp.568/588).

Since the treaty entered into force in 2002 the Rome Statute was not relevant for the dozens of truth commissions that have already taken place in the past decades, but it is however an important treaty that will be relevant for truth commissions that have taken place in the recent past as well as truth commissions' investigations yet to come.

The Statute leaves open the possibility for the International Criminal Court to cooperate with a national truth commission. Cooperation between the two could enhance the effectiveness and legitimacy of both institutions since the International Criminal Court would have a principled basis on which to allocate its prosecutorial resources, while perpetrators would have a stronger motivation to apply for amnesty from a truth commission. If this were the case, the International Criminal Court might for example choose to delay its investigations until a truth commission has completed its work, where after it starts selecting individuals for prosecution from among those who did not obtain an amnesty from the commission (Roche, 2005, p.566).

4.3.3 The Geneva Conventions

The 1949 Geneva Conventions state that contracting states are obliged to prosecute or extradite those guilty of grave breaches under the Convention, and/or torture (Dugard, 2002,

p.696). More specifically, the Fourth Geneva Convention (which is the one most relevant to truth commission cases) states in Article 146 that ‘the parties...shall bring persons alleged to have committed serious breaches before its own courts, or hand them over to another High Contracting Party’. These serious breaches refer to wilful killing, torture or inhuman treatment. That ‘no party to the Geneva Conventions can absolve itself, or another party, of liability for grave breaches of the Geneva Conventions’ can also be found in Convention I, Art. 51; Convention II, Art. 52; Convention III, Art. 131; and Convention IV, Art. 148 (Society of Professional Journalists). The Geneva Conventions are therefore quite clear on the state obligation to prosecute or extradite human rights violators.

On the other hand though, the Second Protocol Additional to the Geneva Conventions and relative to non-international armed conflicts provides in Article 6.5:

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. (International Committee of the Red Cross, n.d.)

This Article demonstrates that concerning non-international conflicts the Geneva Conventions can promote the granting of amnesty, most probably in order to promote the reestablishment of stability and security. Concerning the Geneva Conventions it is important to keep in mind the circumstances under which violations have been committed.

4.3.4. The Genocide Convention

According to Freeman the Convention on the Prevention and Punishment of the Crime of Genocide is one of the most relevant Conventions for truth commissions’ work (Freeman, p.90). Article 4 of the Convention is explicit in its support for a duty to prosecute in providing that persons committing genocide ‘shall be punished’. It bans acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. It declares

genocide a crime under international law whether committed during war or peacetime, and binds all parties that signed the Convention to take measures to prevent and punish any acts of genocide committed within their jurisdiction (Weston, 2001, p.1028). Article 6 adds that those responsible for gross human rights violations should be brought before a domestic or international ‘competent tribunal’. Therefore, under the Genocide Convention no direct acceptance can be found in favour of truth commissions. As a result an amnesty granted by a truth commission to an individual who is suspected of having committed the crime of genocide would most probably not be considered as valid.

4.3.5 Other relevant sources under international law

As stated earlier in this Chapter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights form two basic and therefore relevant sources of international human rights law for truth commissions. The Universal Declaration of Human Rights of the United Nations is considered to be a common standard for the entire international community. It aims to promote respect for rights and freedoms and to secure the universal and effective recognition and observance of these by national and international measures, not only among the people of the member states themselves but also among the persons of territories under their jurisdiction (*Universal Declaration*). Both Article 5 of this declaration and Article 7 of the International Covenant on Civil and Political Rights state that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. This particular Covenant as well as the European Convention on Fundamental Rights embodies a wide range of rights that can influence the work of truth commissions, such as the right to petition and the right to remedy for victims of violations (Bronkhorst, 2006, p.6).

Article 7 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment adds to this by requiring states to make torture illegal and try or extradite offenders. The same is provided by the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind and the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights (Dugard, 2002, p.696).

Concerning the option to accept truth commissions as an alternative form of justice the set of principles for the protection and promotion of human rights through action to combat impunity, also known as the Joinet Principles, provide that ‘alternative institutions should not supplant the justice system’ (Bronkhorst, 2006, p.6). The First Principle states:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished.

Certainly truth commissions do investigate violations and, in their own way, take appropriate measures, but of course these are not the measures the Joinet Principles are aiming for. Truth commissions can make recommendations to prosecute perpetrators, but they are not in the position to ensure that assumed perpetrators are in fact tried and where relevant prosecuted and punished. The second part of the First Principle is however more in favour of the work of truth commissions since it states that the victims should be provided with effective remedies and that the inalienable right to know the truth about violations should be ensured. It does also mention that it should be ensured that the victims receive reparation for the injuries suffered and that other steps necessary to the prevention of a recurrence of violations should be taken (*Updated Set*).

4.4 Chapter conclusion

International law places a responsibility on governments to prosecute, in particular regarding the most serious crimes such as genocide, extrajudicial executions, disappearances and torture (Bronkhorst, 2006, p.54). However, arguments of scholars differ on whether or not truth commissions and the amnesties they are at times able to offer should be internationally accepted as an alternative form of reaching justice. Theoretically impunity should not be offered to human rights violators. Unfortunately, in practice the prosecution of these perpetrators in a transitional state often turns out to be an unfeasible undertaking. The financial means of the country are limited, the judicial system is weak or even corrupt, the perpetrators in question are often high positioned individuals with means, power and contacts,

and often they come in such a large number that prosecuting each and every one of them would be an impossible task.

Since the main motive of a truth commission to grant amnesties (if the commission possesses this particular power) should be to facilitate the reconciliation process by uncovering the truth and it is therefore in the interest of re-establishing peace and not for shielding persons from criminal responsibility, it is quite save to say that generally speaking, a case that has already been handled or is being handled by a truth commission should not be subjected to international prosecution, as for example by the International Criminal Court. The Court would have to conclude that the ultimate goal of the Rome Statute to provide for the most 'attainable peace and justice' has already been served (Seibert-Fohr, 2003, p.572).

Regarding the possibility of a cooperation between the International Criminal Court and truth commissions, the Statute of the International Criminal Court leaves this option open. Cooperation between the two could enhance the effectiveness and legitimacy of both institutions since the International Criminal Court would have a principled basis on which to allocate its prosecutorial resources, while perpetrators would have a stronger motivation to apply for amnesty from a truth commission. If this were the case, the International Criminal Court might for example choose to delay its investigations until a truth commission has completed its work, where after it starts selecting individuals for prosecution from among those who did not obtain an amnesty from the commission (Roche, 2005, p.566).

However, should it occur that the International Criminal Court is in its right to prosecute a case previously handled by a truth commission, the state party in question is obliged to provide assistance for the international prosecution even it runs counter to the earlier promise not to prosecute (Seibert-Fohr, 2003, p.586).

There are more examples like the legal instruments mentioned in this Chapter that can be of relevance for the work and powers of a truth commission, but the selection made in this Chapter depicts the ones most important and universally applicable. Nevertheless it should be mentioned that for the different truth commissions there are regional and national laws that might very well influence their work and powers as well.

An area of concern when it comes to the dealing with human rights violators is that the declarations and Conventions mentioned earlier are only binding on those states that have formally expressed their consent. Even more, the simple signing of a Convention is not enough in order to make it binding; the Convention needs to be ratified by a country in order to make it legally binding to that particular state. Therefore the implementation of these Conventions depends on the commitment of each country (United Nations, 2007). Moreover, declarations are in a legal sense unfortunately not much more than a statement of a noble endeavor.

5. International recognition and acceptance

5.1 International recognition

It works in a truth commission's favour when the international community is positive towards the commission and its research from the beginning on. That way it is more likely for the commission to get easy access to international information resources and the international community is more likely to accept the path the commission chooses to take during its investigation and consequently, the decisions it makes.

It can be expected that international non-profit organisations that strive to defend human rights across the globe are normally not all too comfortable with a truth commission decision to grant amnesty to a human rights violator. As one of the world's most respectable human rights organisations, Amnesty International's position on amnesties for example is that 'impunity negates the values of truth and justice and leads to the occurrence of further violations' (Bronkhorst, 2006, pp.53-54). To this position they do however add that 'amnesty is only acceptable after the due process of law has been properly completed', which does demonstrate that there exists at least some sort of acceptance towards amnesties in the case that they might be the best option to deal with past abuses (Bronkhorst, 2006, p.3). Generally speaking however international non-profit organisations do not oppose to the work of truth commissions. They do however strongly feel that the decision to form a truth commission should not rule out prosecutions.

The South African Truth and Reconciliation Commission is a good example of how a truth commission can appeal to the international community to recognise the decisions made by the commission during their investigation (especially concerning the granted amnesties), and thereby requesting them not to initiate prosecution. In a way this is of course a request to accept that the state has dealt with the matter in the best possible way, fit for that particular country and situation. The request made by the Commission was as follows:

The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become

liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the process of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies. (Dugard, 2002, p.699)

The request made by the South African truth commission obviously has been given acknowledgment by the international community and it received the sympathy of numerous international human rights organisations and commentators for its model of amnesty in return for truthful confession (Katshung, 2008, “The question of adequate truth commissions in order to comply with international standards” section, para.4). Nowadays the South African truth commission is widely accepted and considered as a model for other countries attempting a similar transition (Roche, 2005, p.267). Even the United Nations welcomed the solution and as Reddy points out (as cited in Katsung, 2008) the United Nations Secretary-General’s report on *The rule of law and transitional justice in conflict and post-conflict societies* praised truth commissions as a potentially valuable complementary tool in the quest for justice and reconciliation. The same report also values them for ‘restoring public trust in national institutions of governance’.

An example of a truth commission that could not count on the support of the international community is the Congolese Truth and Reconciliation Commission because of its lack of democratic legitimacy. In the case of this particular truth commission there was a clear lack of citizen involvement and there was no endorsement of its work as a mechanism of transitional justice (Katshung, 2008, “The question of adequate truth commissions in order to comply with international standards” section, para.7). A commission that was criticised by international human rights organisations was the Chilean Truth Commission. Though opinions on the overall success of the commission differ, the mandate excluded abuses that did not result in death or disappearance, such as for example torture (Hayner, 1994, p.621). Another truth commission that was criticised by the international human rights community was the one of Haiti, because they felt the commission did not went far enough in establishing institutional responsibility for the investigated abuses (“Tool Category”, n.d., “Past practice

Outside of the Greater Horn”, para.7). However, the overall opinion of the international human rights community on well-functioning truth commissions is that they are very much in favour of their existence if this contributes to ending civil conflict (Brahm, 2004, “The Future of Truth Commissions” section, para.1).

5.2 International acceptance of recommendations

Truth commissions can contribute to the future by making specific recommendations for reform. In the past, commission reports have included recommendations covering military and police reform, the strengthening of democratic institutions, measures to promote national reconciliation, reparation to victims of the violence, and reform to the judicial system (Hayner, 1997, p.609). The power to make such recommendations gives commissions the possibility of making important changes to society. However, unfortunately policy changes are hardly ever achieved by truth commissions (Rushton, 2006, p.137). Since truth commissions are normally considered investigative bodies only and do not have the power neither to prosecute perpetrators nor to make any of these legal reforms on their own, it is of great importance that the recommendations they make at the end of the investigation process are taken seriously.

According to Tomuschat human rights standards do not impose any specific solutions concerning if a truth commission should or should not recommend criminal prosecution (Tomuschat, 1999, p.157). After finalizing its investigation a truth commission can however choose to adopt in its report the recommendation to start criminal prosecutions against presumed human rights violators. The problem lies in the fact that normally the advice of truth commissions is not legally binding. There should of course always be good faith that the findings of the commission are given credence and that its recommendations are taken into serious consideration, but if the government is not pleased with the advice given, it is legally free to disregard them (Hayner, 1997, p.180). Truth commissions of which the recommendations were binding on the government were the ones of Guatemala and El Salvador because they operated on the basis of peace accords which were binding on the government (Hingorani, n.d., p.3). The commission of El Salvador was even authorized to recommend binding legal, political, and/or administrative measures that followed from the investigations (*Strategic Choices*). But even when the recommendations of a truth commission do not legally have to be followed-up on, they can provide pressure points

around which the civilian society or the international community can lobby for change in the future (Hayner, 1997, p.609).

The recommendations a truth commission makes normally involve reforms that should prevent the recurrence of gross human rights abuses and therefore generally require some kind of follow-up (Tomuschat, 1999, p.157). The advice to establish some sort of permanent human rights commission such as an ombudsman is therefore quite common (Bronkhorst, 2006, p.9). An example of a government that followed the recommendation of a commission to implement a *National Corporation for Reparation and Reconciliation* was the Chilean government after the publication of the Rettig Report (Hayner, 1994, p.622).

Besides the possible recommendations to start prosecutions against assumed human rights violators and the establishment of a permanent human rights commission, truth commissions often recommend reparations in favour of the victims (Tomuschat, 1999, p.157). This is however a recommendation that is hardly ever being honoured, though not necessarily because of a lack of willingness on the part of the new government. Rushton (2006) points out that the reasons for not implementing suggested reparations are divers, but that they are primarily due to a lack of state resources and states having other priorities (p.136). This however is quite understandable since the country has just gone through a period of serious conflict that exhausted its economic resources (Tomuschat, 1999, p.157).

6. Conclusion and recommendations

Nowadays the question of whether to prosecute human rights violators in states that are going through a period of transition from a repressive past to a democratic future is an important issue for the international human rights community. An unstabilised country that is recuperating from the human rights abuses committed is often not in the position to successfully set up trials and prosecute the responsible perpetrators. The justice system is often still weak or at times even corrupt, and resources are scarce. In this type of situation a truth commission can perhaps provide for a more appropriate alternative to let justice be served.

Truth commissions are investigative bodies equipped to examine the truth concerning committed human rights abuses. Their investigation can provide a sound basis and important guide for future criminal investigations and legal proceedings. To form a clear image on which powers a truth commission can be assigned and how they can contribute to achieving international justice, the central question that formed the basis for this thesis is as follows:

What powers do truth commissions have when it comes to trying human rights violators and how do these powers coincide with international justice?

The most remarkable outcome that resulted from this particular study is that truth commissions can play a more important role when it comes to trying human rights violators than was previously expected. They might not be judicial bodies nor have any legislative or prosecution powers, but the powers they can be assigned can most definitely influence what will happen to assumed perpetrators of human rights abuses. There should be kept in mind though that the powers that are assigned to the majority of truth commissions are often quite limited. However, when empowered with subpoena power, amnesty power, and/or the power to name names, a commission is without doubt most definitely in the position to make an important contribution to the possible trying of human rights violators.

Whatever powers may be assigned to a truth commission, for all of them there should be some strict conditions adopted in the commission's mandate on when and how they can use their powers. If a truth commission is equipped with judicial powers these should be

accompanied by procedural safeguards. This is of utmost importance not only for the commission to be accepted as legitimate by the international community, but also in order to in a way safeguard the rights of the assumed perpetrators.

The information a truth commission gathers to form an as detailed a picture as possible of past atrocities can be elaborated considerably thanks to the power to issue subpoenas as well as the power to grant amnesties. In their own way both legal devices demand a disclosure of information that can be of great value to possible prosecutions if they share their archives with prosecuting authorities and recommend that prosecutions should take place.

On the other hand, the granting of amnesties by a truth commission is often perceived as a form of impunity that is contradictory to what a truth commission should try to achieve. This resistance towards amnesties is quite understandable, but as stated before, unfortunately reality will have it that without the possibility to be granted amnesty few human rights violators are willing to come forward to reveal the truth on past abuses they have committed. International law concerned there does not exist a general obligation of states with regard to the international community to initiate legal action and there are no clear rules on how to decide in which case an amnesty is acceptable or not. Nevertheless, generally speaking amnesty does not have an extraterritorial effect and persons that are granted amnesty are therefore not necessarily immune from prosecution in other states or before international courts.

Especially if a truth commission is equipped with the power of amnesty, some strict conditions should be adopted in its mandate on when and exactly how it can use this power. The most important condition is that there should be made a full disclosure by the person that applies for the amnesty.

As stated before, a truth commission that has subpoena power usually does not even have to use it because the mere prospect of the consequences for not obeying to a subpoena is generally threatening enough for someone who is considering noncompliance, to cooperate. Nevertheless there should still be some restrictions established in case the commission does see the need to issue one. When a truth commission is equipped with subpoena power the most important condition should be that the interests of the individuals that are being subpoenaed are respected at all times. To be able to safeguard their privacy rights a subpoena

should be directly relevant to the areas of investigation that are specified in the commission's mandate. To ensure the legitimacy of the subpoenas that are issued by the commission they should be voted upon and adopted by the commissioners by means of simple majority voting in order to guarantee that subpoenas are only issued when appropriate. In addition the commission chair should be granted the power to independently issue a subpoena on an exceptional and emergency basis. Furthermore, it should be adopted in the mandate that it is an offense to fail to comply with a subpoena without a reasonable excuse, to deliberately distort or conceal relevant evidence, or to commit perjury. Therefore a truth commission should be able to start a subpoena enforcement proceeding in the case of noncompliance with a subpoena.

The decision to name the names of assumed perpetrators is also a very delicate issue. The public presentation of the names of presumed human rights violators by a truth commission can entail a violation of due process and it can provoke reprisals. Still, if a commission is empowered to compose a list of names of assumed human rights violators throughout their investigation, they can make an important contribution to the eventual prosecutions of these perpetrators when they hand the list over to a judicial body. Therefore, a truth commission should be given the power to do so, but under the condition that the list of names of presumed perpetrators is not made public. The list of names should be composed carefully and after the finalising of the investigation it should be handed over to either the government or a national or international judicial body that can decide on prosecution. The institution to which the list is given should depend on how stable and trustworthy the before mentioned institutions are after the transitional period they have just gone through. This way the guilty do not have to go unpunished, but their privacy is still guaranteed and the universal right of 'innocent until proven guilty' as adopted under Article 11 of the Universal Declaration of Human Rights of the United Nations will still be effectively safeguarded. Besides naming the names of assumed individual perpetrators, there should be made a distinction by naming the state and particular units within it as responsible parties for the past human rights abuses as well. In contrary to the naming of individual names recognition of state responsibility in past abuses should be made public in order to offer the community some sort of recognition of the states wrongdoings.

Considering the powers that can be assigned to a truth commission one may conclude that when equipped with one or more of these powers a commission certainly can make a valuable

contribution to the trying of human rights violators, if subject to the earlier mentioned and preferred conditions. All in all though, most people will agree that truth commissions should not be seen as a substitute for legal prosecution. It is highly recommendable that there will be established some form of coexistence of truth commissions and prosecutions in the future, as for example a cooperation between truth commissions and the International Criminal Court. At first sight this may perhaps appear to be a conflicting combination, but in reality a solid cooperation between truth commissions and the International Criminal Court could mean a breakthrough in international justice. The restorative and truth-seeking nature of a truth commission combined with the prosecution character of the International Criminal Court could create a balanced construction that may enhance the legitimacy and effectiveness of both institutions. Working together with the International Criminal Court could enable a truth commission to hold out a more credible threat of prosecution to those who refuse to confess and to make amends for their crimes, while the Court's own legitimacy may be enhanced by its demonstrating a willingness to support states' efforts to address human rights abuses (Roche, 2005, p.579).

The International Criminal Court should be able to take up cases of assumed perpetrators that failed to comply with the amnesty conditions offered by a truth commission. Still, the difficulty when it comes to the desire to prosecute that is often present in countries going through a transitional period will of course still be there: the grand number of human rights violators that should be trialled. Options to overcome this obstacle certainly form an interesting subject for future research, especially considering the rising popularity of truth commissions.

Another way for a truth commission to contribute to the prosecutions of human rights violators is by adopting in its report the recommendation to start criminal prosecutions against the assumed perpetrators. However, with the exception of some, normally the recommendations made by a truth commission are not legally binding and therefore not obligatory to implement. Nevertheless, the recommendations made by a truth commission should most definitely be made legally binding and therefore obligatory to implementation. Besides the possibility to recommend trials and thereby prosecuting human rights violators, this way the recommendations for policy changes that are almost always recommended by the commissions will also be taken seriously and will have to be followed up on by the governments.

The recommendations suggested in this dissertation can be used as a general guideline on how the powers that can be assigned to a truth commission can be best put to use. It should be kept in mind though that every truth commission is unique and no generalisation can nor should be made. Each truth commission requires a delicate balancing of which powers are suitable for it to be empowered with, depending on for example the country in which the truth commission is initiated, the situation of the judicial system, and the past abuses it has to investigate.

However, whatever the case may be and in whichever situation a truth commission may find itself: human rights violators should not be able to get off without punishment for their crimes.

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Appendix A: List of definitions

Ad hoc

In Latin shorthand it means "for this purpose only." Thus, an ad hoc committee is formed for a specific purpose, usually appointed to solve a particular problem. An ad hoc attorney is one hired to handle one problem only often is a specialist in a particular area or considered especially able to argue a key point.

<http://legal-dictionary.thefreedictionary.com/ad+hoc>

Amnesty

A general pardon granted by a government, especially for political offenses; a period during which offenders are exempt from punishment; a warrant granting release from punishment for an offense; the formal act of liberating someone; grant a pardon to (a group of people).

<http://www.thefreedictionary.com/amnesty>

Binding

Executed with proper legal authority.

<http://www.thefreedictionary.com/binding>

Blanket

Applying to or covering all conditions or instances; applying to or covering all members of a class: blanket sanctions against human-rights violators.

<http://www.thefreedictionary.com/blanket>

Conditional

Imposing, depending on, or containing a condition.

<http://www.thefreedictionary.com/conditional>

Convention

An agreement between states, sides, or military forces, especially an international agreement dealing with a specific subject, such as the treatment of prisoners of war.

<http://www.thefreedictionary.com/convention>

Declaration

An explicit, formal announcement, either oral or written; the act or process of declaring; a firm, emphatic statement

<http://www.thefreedictionary.com/declaration>

Due process

An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual; the administration of justice according to established rules and principles; based on the principle that a person cannot be deprived of life or liberty or property without appropriate legal procedures and safeguards

<http://www.thefreedictionary.com/due+process>

Human rights

The basic rights and freedoms to which all humans are entitled, often held to include the right to life and liberty, freedom of thought and expression, and equality before the law.

<http://www.thefreedictionary.com/human+rights>

Impunity

Not being punished for a crime or misdemeanour committed.

<http://legal-dictionary.thefreedictionary.com/impunity>

Judicial power

Constitutional authority vested in courts and judges to hear and decide justiciable cases, and to interpret, and enforce or void, statutes when disputes arise over their scope or constitutionality.

<http://www.businessdictionary.com/definition/judicial-power.html>

Jus cogens

That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. Norms of a humanitarian nature are included, such as prohibitions against Genocide, Slavery, and racial discrimination.

West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group,
<http://legal-dictionary.thefreedictionary.com/Jus+cogens>

Justice

The quality of being just; fairness; the principle of moral rightness; the upholding of what is just, especially fair treatment and due reward in accordance with honour, standards, or law; the administration and procedure of law; conformity to truth, fact, or sound reason.

<http://www.thefreedictionary.com/justice>

Legal power

The right and power to interpret and apply the law; "courts having jurisdiction in this district

<http://www.thefreedictionary.com/legal+power>

Legislative power

The authority under the constitution to make laws and to alter or repeal them.

A Law Dictionary, Adapted to the Constitution and Laws of the United States. By
 John Bouvier. Published 1856.

<http://legal-dictionary.thefreedictionary.com/Legislative+power>

Ne bis in idem

This phrase signifies that no one shall be twice tried for the same offence; that is, that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not again be tried.

<http://legal-dictionary.thefreedictionary.com/Ne+bis+in+idem>

Perpetrator

Someone who perpetrates wrongdoing; a person who transgresses moral or civil law.

<http://www.thefreedictionary.com/perpetrator>

Power

Possession of controlling influence.

<http://www.thefreedictionary.com/power>

Procrastination

The act of procrastinating; putting off or delaying or deferring an action to a later time; the act of delaying; inactivity resulting in something being put off until a later time; slowness as a consequence of not getting around to it.

<http://www.thefreedictionary.com/Procrastination>

Restorative

Of or relating to restoration; tending or having the power to restore; something that restores; a medicine or other agent that helps to restore health, strength, or consciousness.

<http://www.thefreedictionary.com/restorative>

Restorative justice

A response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities.

<http://www.restorativejustice.org/intro/tutorial/definition>

Retributive

Of, involving, or characterized by retribution;

<http://www.thefreedictionary.com/Retributive>

Transitional justice

Transitional justice refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights.

<http://www.ictj.org/en/tj/>

Unwillingness

Is described as an unjustified delay or a lack of independence which is inconsistent with an intent to bring a person to justice (Seibert-Fohr, 2003, p.569).

Appendix B: List of truth commissions

- Argentina (National Commission on the Disappearance of Persons, 1983)
- Bolivia (National Commission of Inquiry into Disappearances, 1982)
- Burundi (International Commission of Inquiry, 1995)
- Chad (Commission of Inquiry on the Crimes and Misappropriations Committed by the ex-President Habré, his Accomplices and/or Accessories, 1991)
- Chile (National Commission for Truth and Reconciliation, 1990; National Commission on Political Imprisonment and Torture, 2003),
- Côte d'Ivoire (Mediation Committee for National Reconciliation, 2000)
- Democratic Republic of Congo (Truth and Reconciliation Commission, 2003)
- Ecuador (Truth and Justice Commission, 1996; Truth Commission, 2007)
- East Timor (Commission for Reception, Truth and Reconciliation, 2002)
- El Salvador (Commission of Truth, 1992)
- Ethiopia (Office of the Special Prosecutor, 1993)
- Germany (Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany, 1992)
- Ghana (National Reconciliation Commission, 2002)
- Guatemala (Commission for the Historical Clarification of Human Rights Violations and Acts of Violence which Caused Suffering to the Guatemalan People, 1997)
- Haiti (National Commission for Truth and Justice, 1995)
- Indonesia (Truth and Reconciliation Commission, 2004)
- Liberia (Truth and Reconciliation Commission, 2005)
- Morocco (Equity and Reconciliation Commission, 2004)
- Nepal (Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period, 1990)
- Nigeria (Human Rights Violations Investigation Commission, 1999)
- Panama (Truth Commission, 2001)
- Paraguay (Truth and Justice Commission, 2003)
- Peru (Truth and Reconciliation Commission, 2000)
- Philippines (Presidential Committee on Human Rights, 1986)

- Rwanda (International Commission of Investigation on Human Rights Violations , 1990)
- Serbia and Montenegro (former Federal Republic of Yugoslavia) (Truth and Reconciliation Commission, 2001)
- Sierra Leone (Truth and Reconciliation Commission, 2002)
- South Africa (Truth and Reconciliation Commission, 1995)
- South Korea (Presidential Truth Commission on Suspicious Deaths, 2000)
- Sri Lanka (Presidential Commission of Inquiry into Involuntary Removal and Disappearances of Persons in Western, Southern and Sabaragamuwa Provinces, Presidential Commission of Inquiry into Involuntary Removal and Disappearances of Persons in the Central, North Western, North Central and Uva Provinces and Presidential Commission of Inquiry into Involuntary Removal and Disappearances of Persons in the Northern & Eastern Provinces, 1994)
- Uganda (Commission of Inquiry into the Disappearance of people in Uganda, 1974 and Commission of inquiry into Violations of Human Rights, 1986)
- Uruguay (Investigative Commission on the Situation of Disappeared People and its Causes, 1985 and Peace Commission, 2000)
- Zimbabwe (Commission of Inquiry, 1985)

(Sources: United States Institute of Peace, Amnesty International, Pangea.org and Truth commission: a schematic overview by Hayner)

**Appendix C: Rome Statute of the International Criminal Court
(Article 6, 7, 17, 53)**

Rome Statute of the International Criminal Court*

* Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;

(j) The crime of apartheid;

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that

a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

**Appendix D: Universal Declaration of Human Rights
(Article 5, 11)**



Universal Declaration of Human Rights

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

**Appendix E: Second Protocol Additional to the Geneva Conventions
(Article 6)**

**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the
Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.**

Art 6. Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.

In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen

years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavor 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.

<http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>

**Appendix F: Convention on the Prevention and Punishment of the Crime of Genocide
(Article 4, 6)**



Convention on the Prevention and Punishment of the Crime of Genocide

**Approved and proposed for signature and ratification or accession by
General Assembly resolution 260 A (III) of 9 December 1948**

Entry into force 12 January 1951, in accordance with article XIII

Article 4

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 6

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Appendix G: Updated Set of principles for the protection and promotion of human rights through action to combat impunity (First Principle)



Updated Set of principles for the protection and promotion of human rights through action to combat impunity.

**United Nations
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8 February 2005
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**COMMISSION ON HUMAN RIGHTS
Sixty-first session
Item 17 of the provisional agenda**

PROMOTION AND PROTECTION OF HUMAN RIGHTS

Impunity

**Report of the independent expert to update the Set of principles to combat impunity,
Diane Orentlicher***

I. COMBATING IMPUNITY: GENERAL OBLIGATIONS

PRINCIPLE 1. GENERAL OBLIGATIONS OF STATES TO TAKE EFFECTIVE ACTION TO COMBAT IMPUNITY

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

Appendix H: Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Article 7)



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**Adopted and opened for signature, ratification and accession by
General Assembly resolution 39/46 of 10 December 1984**

Entry into force 26 June 1987, in accordance with article 27 (1)

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

**Appendix I: Vienna Convention on the Law of Treaties
(Article 53)**



Vienna Convention on the Law of Treaties 1969
Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.
United Nations, *Treaty Series*, vol. 1155, p. 331

Article 53

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole

as a norm from which no derogation is permitted and which can be modified only by a subsequent norm

of general international law having the same character.