Nowhere to hide.
The case against PW Botha

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Abstract
In this article I have tried to demonstrate that PW Botha is allegedly responsible for the commission of grave violations of human rights under his government's policy of apartheid; apartheid is a crime against humanity which, as such, confers universal jurisdiction on the foreign municipal courts of every state in the world; Botha enjoys no immunity whatsoever for the commission of these international crimes; and despite Botha's failure to apply for amnesty at the TRC, and despite the current South African government's ability to do so, there is an unwillingness, or else an apathy, to prosecute him.

Introduction: PW Botha and the amnesty process
South Africa has joined the long list of states in modern history to have made use of amnesty in the course of political transition. Prior to South Africa's transition to a democracy (and with that the dismantling of the old apartheid regime) the international community operating through the United Nations concerned itself more with the systematic violation of human rights under apartheid than it did with any other conflict on the globe. The international community, previously so heavily involved in bringing about South Africa's transformation externally, withdrew completely from the process once South Africa assumed the transformation internally. Instead of criticising South Africa's approach of managing the transformation internally, the international community seemed to embrace the truth and reconciliation process and in

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2The internal transformation was largely facilitated by the truth and reconciliation process which occurred under the provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995. Section 3(1) of the Act states that the fundamental objective of the TRC is 'to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.
general supported it — possibly because the world accepted the amnesty deal as a political necessity (the price of peace and the earliest possible transfer of power).

The amnesty process undoubtably contributed substantially to the peaceful transition of a nation that was precariously poised on the brink of bloody revolution. The effect of amnesty was relatively comprehensive — protecting not only the perpetrator from both criminal and civil liability, but also any person or organisation which may have been behind the perpetrator, including the state itself. But applicants had to buy their amnesty, and the currency was essentially ‘truth’. The philosophical flavour of TRC justice was restorative and not punitive and the process was predicated upon an acknowledgement of wrong-doing — this much is clear from section 20(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995 which states that amnesty will be granted by the committee:

If the Committee, after considering an application for amnesty, is satisfied that

(a) the application complies with the requirements of this Act;
(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and
(c) the applicant has made a full disclosure of all relevant facts, it shall grant amnesty in respect of that act, omission or offence.

A notable omission from the list of applicants queuing for amnesty was former head of the apartheid state, PW Botha. Despite Botha’s rejection of reconciliation in South Africa generally, and his failure to recognise the TRC process in particular, the commission nevertheless delivered a five-volume report to (then) President Nelson Mandela in October 1998 in which it found that he had contributed to and facilitated a climate in which certain gross violations of human rights occurred. The TRC hearings exposed the magnitude of these violations perpetrated on a wide scale by the state (mostly the security forces) during Botha’s reign. These included the systematic killings and clearly orchestrated elimination of people who opposed apartheid. The human rights violations also included the undisputed and widespread use of torture, abduction, arson and sabotage. PW Botha established the State Security Council (SSC) which was mandated to deal with matters pertaining to the security of the apartheid regime. The security forces robustly engaged persons and organisations opposed to the government. They enjoyed a mandate that authorised them to ‘eliminate’ belligerents. At the TRC hearings, much turned on the meaning of the word ‘eliminate’. General Johan van der Merwe, a high

Section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

Pieter Willem Botha was head of the apartheid state for more than a decade (Prime Minister of South Africa from 1978–1984, and president from 1984–1989). Prior to that he was the notorious Minister of Defence (1966–1978) during the time of some of South Africa’s grimmest moments — like the 1976 Soweto Uprisings when the security forces broke up a peaceful child-protest by firing live ammunition into a crowd of young black school children, killing several, amongst them thirteen-year-old Hector Pieterson; and the death in 1977 of Steve Biko who was killed whilst in the custody of the security forces.
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ranking member of the SSC and one-time Commissioner of Police in the apartheid state, testified before the TRC that the word 'eliminate' meant 'kill'; in his words 'if you tell a soldier 'eliminate your enemy', depending on the circumstances he will understand that to mean 'killing.' The TRC found that:

Certain members of the State Security Council (The State President, Minister of Defense, Minister of Law and Order, and heads of security forces) did foresee that the use of words such as "eliminate", "take-out", "wipe out", and "eradicate" would result in the killing of political opponents. They are therefore responsible for the deliberate planning which caused gross violations of human rights.

During the Botha-era, South Africa witnessed some of its worst violence — on the one hand black freedom fighters engaged in the liberation struggle with passion, whilst on the other the government's security forces took all measures deemed necessary to sustain the apartheid system.

It is clear that under Botha the SSC contributed significantly to the prevailing culture of impunity by failing to recommend that action be taken against security force members involved in gross human rights violations. The TRC report in fact found Botha personally responsible for ordering the former Minister of Law and Order, Adriaan Vlok, and former Police Commissioner, Johan van der Merwe, to destroy a building in Johannesburg, Khotso House, occupied by anti-apartheid organisations that Botha considered a threat to the state. This was done despite the apparent risk of endangering the lives of people in and around the building. Botha's clear disregard for human life, without doubt, created and enhanced a culture of impunity which in turn facilitated the further violation of human rights by senior members of the security forces. The TRC report declared him accountable for such violations.

It is trite that in the South African domestic context, if amnesty was not sought from the TRC, or if it had been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. It is equally trite that under international criminal law states have a duty to the international community to prosecute the perpetrators of crimes against humanity. By implication, the South African state (under the African National Congress government) would apparently have both a domestic as

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6Id at 218 above.
7Id at 225.
8Id at 223-225.
9For a discussion on apartheid as crime, see below. Interestingly, s 35(3)(1) of the South African final Constitution states that 'every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. This subsection effectively gives constitutional expression to the common law principle of nullem crimen sine lege. But the section also seems to accept that South Africa could enact domestic laws that may retrospectively punish individuals, like PW Botha, for acts which constitute crimes under international law.
well as an international obligation to prosecute PW Botha if criminal jurisdiction over him could be established — all that could possibly stand in the way of such jurisdiction is the doctrine of sovereign immunity.

The doctrine of sovereign immunity has long protected heads of state from legal liability in domestic courts, and in so doing has shielded some of the world’s worst human rights violators from the international community’s wrath. The doctrine has, in this way, allowed the perpetrators of heinous atrocities to continue violating the human rights of the people who dwell within their pariah states — like PW Botha and his accomplices in apartheid South Africa, or Ariel Sharon and his in Israel.10

But the doctrine of sovereign immunity (and indeed customary international law) is constantly evolving, and this article seeks to examine some of these developments and what they may mean for the notorious apartheid leader who snubbed the amnesty process and with that the spirit of unity and reconciliation in the new democracy — the very idea of which he so vigorously opposed throughout his reign. It seems ironic that the man who took the state into the realms of criminality has in fact chosen to incur a criminal record at the hands of its democratic successors.11

Sovereignty and immunity: early developments in international law
Since international law is about the way in which nations generally agree to behave towards one another, the notion of sovereign immunity is a rule of international law par excellence. But the origin and development of the rule needs to be understood in the context of international law’s early beginnings.

10There are striking similarities in the attitudes of the apartheid and Israeli leaders. Consider the following extract taken from a guest lecture given by Raphael Eitan, Chief of Staff of the Israeli Army, at the School of Law at Tel Aviv University in December, 1987: ‘I don’t understand this comparison between us and South Africa. What is similar here and there is that both they and we must prevent others from taking us over. Anyone who says that the blacks are oppressed in South Africa is a liar. The blacks there want to gain control of the white minority just like the Arabs here want to gain control over us. And we, too, like the white minority in South Africa, must act to prevent them from taking us over. I was in a gold mine there (in South Africa) and I saw what excellent conditions the black workers have. So there is (sic) separate elevators for whites and blacks, so what? That’s the way they like it.’ For quoted extract see URL http://www.zmag.org/iandsa.htm.

11In August 1998 Botha was found guilty of being in contempt of the Truth and Reconciliation Commission and fined R10 000 and given a twelve-month suspended prison term. He was eighty-two years old at the time and charged after he failed to attend a TRC hearing in Cape Town on 19 December 1997 after he had been subpoena’d to do so on three separate occasions. From its inception, Botha rallied against the TRC, rejecting it as a ‘circus of horrors presided over by a weeping clown' (a clear and derogatory reference to the TRC chairperson, Archbishop Desmond Tutu who, as a compassionate soul, was often so overcome by the horrific evidence presented at the TRC hearings that he was unable to hold back his tears). Botha’s response to the subpoena was characteristically arrogant when he declared that he has ‘nothing to apologise for’ and ‘will never ask for amnesty, not now, not tomorrow, not after tomorrow’. For contemporary news clippings of the events in point, see the website of the British Broadcasting Corporation (generally) and the story (specifically) posted at the URL: news.bbc.co.uk/hi/english/special_report/1998/10/98/truth_and_reconciliation/newsid_202000/202299.stm — 43k.
It is probably true to say that the early stages in the development of international law remind us of the path of development taken by municipal law. In olden times, communal courts established binding rules by declaring that a custom had become law. Early legal systems drew upon local established practice to determine the existence of rights or duties. These local declarations of custom grew into a more generalised and formalised legal system. Over time the customs-cum-law were absorbed into the municipal legal orders of states. Today, it seems to me, international law is still very much in its infancy, little more advanced than municipal law was at its earliest times. International law is still largely based on local declarations of what are perceived to be general customs (amongst nations). The development of customary international law tends to follow a 'positivist' approach to law — where law codifies how nations have already generally tended to act. International law has (disappointingly) avoided a more active prescription of how states ideally ought to act. Consequently, international law tribunals seem to regard their function as one of declaring an existing custom or rule of law rather than creating good law with just normative content.

The law on sovereign immunity provides us with an excellent example of a rule of international law that was, and remains, at a very uncreative and positivist stage. Essentially, it is simply historical practice that has been codified in international treaties such as the 1648 Peace of Westphalia (arguably the first Law of Nations) and the 1961 Vienna Convention on Diplomatic Relations. Sovereignty, in the context of jurisdiction, means that a state has jurisdiction over all persons within its territory and over all acts that take place within its territory. But there are certain circumstances in which a state will not be able to exercise jurisdiction on this basis — this occurs where another foreign sovereign, its property, or its agents are involved. The rationale for this exception is grounded in the doctrine par in parem non habet imperium which, translated, means that 'one cannot exercise authority over an equal'. International law is based on the notion that all states are equal and this perfect equality amongst states gave rise to the doctrine of state sovereignty and its corollary, sovereign immunity. Historically, a sovereign and his/her state were regarded as synonymous. Shaw says that:

The sovereign was a definable person, to whom allegiance was due. As an integral part of this mystic, the sovereign could not be made subject to the judicial processes of his country. Accordingly it was only fitting that he could not be sued in foreign courts.12

The ruler of a foreign state enjoyed complete immunity from the criminal jurisdiction of another state. One commentator has called the doctrine of sovereign immunity 'an anachronistic remnant of the sacred and omnipotent status of the earliest leaders in human society'.13 In early times the doctrine provided for absolute immunity. The most frequently cited precedent for the doctrine of absolute sovereignty — from which, roughly speaking, sovereign

12Malcolm Shaw International law (4ed 1997) at 492.
immunity is a logical extension — is the 1812 US case of *Schooner Exchange v McFadden*:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself... All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself.14

But capitalist market forces have resulted in the doctrine of absolute sovereign immunity undergoing substantial revision over the course of the latter half of the nineteenth century. Early symptoms of 'globalisation' effectively meant that local private companies could (and did) do business with foreign companies and some of these companies were state-owned. The result of this was a need to rethink the 'completeness' of sovereign immunity in favour of a more restricted approach. And so the doctrine evolved to the point where a state is now only immune from prosecution in the municipal court of another state in respect of acts *jure imperii* (government acts) and not for acts *jure gestionis* (commercial activities). The reason for restricting immunity in this way is that a state acting as a private individual (in the commercial sense) should not be placed in the advantageous position of receiving immunity. It should be liable in the same way and to the same extent as a private individual under similar circumstances.15 This was the position after the landmark decision in *Trendtex Trading Corporation v Central Bank of Nigeria*.16

The *Trendtex* case is hugely important for international lawyers since it was the first time that the United Kingdom applied restrictions to its sovereign immunity laws, but it is also interesting on the facts — least of all because it is about the purchase of 240 000 tons of cement. The issues arose out of a commercial transaction involving a private company and a state-owned institution.17 It is a fascinating case which set the stage for a fierce debate over the nature of sovereign immunity and its place in both international law and municipal law. Judgments were given by Lord Denning MR, Lord Stephenson LJ, and Lord Shaw LJ. In the final analysis, the case turned on the perceived relationship between municipal law in the United Kingdom and the

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15Kevin Hopkins 'The International Court of Justice and sovereign immunity: why the *Yerodia* case is an unfortunate ruling for the development of public international law' to appear in (2002) 27 *SAYIL* 256-263; and Rebecca Wallace *International law* (3ed 1997) at 121.

161977 QB 529 (CA).

17The Central Bank of Nigeria issued a letter of credit in favour of Trendtex Trading Corp., a Swiss company, for the purchase price of a massive amount of cement which Trendtex had sold to a British company that was due to construct army barracks in Nigeria. The British company had secured the building contract with the Nigerian government. After some very awkward moments the Central Bank of Nigeria repudiated its obligations by refusing to honour the letter of credit that it had granted to Trendtex. Trendtex thus brought a claim against the Central Bank of Nigeria in the English High Court. The bank, as an organ of the sovereign state of Nigeria, claimed sovereign immunity from prosecution in the UK court.
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international legal order. Lord Stephenson agreed with Lords Denning and Shaw that international law had changed to a doctrine of restricted immunity; however, he felt that since there was still precedent in UK municipal law for the doctrine of absolute immunity, he was bound to follow such precedent. The other two law Lords found it easy enough to get around the precedent on the basis that a previous ruling of international law was no longer binding on the court as international law knows no rule of stare decisis and thus courts are not obliged to follow their previous decisions. In terms of the majority view, it seemed that the world was moving — committing itself — to a restrictive immunity law which justly tackled the earlier problems which absolute immunity had presented to the market forces operating in the world of international commerce. It was decided that the legal parameters allowed decisions of UK courts to serve justice by transcending the crudity of absolute immunity. Thus for the majority precedent handed down from earlier days was to be treated as a guide rather than as a shackle. It seems to me that the only significant difference between the views of Lords Denning and Shaw and that of Lord Stephenson, was that Stephenson (as a minority voice) did not believe that the Court of Appeal had the authority to wrestle itself free of precedent.

The new rules on sovereign immunity that seemed to have emerged in the Commonwealth (as a consequence of Trendtex) were that a foreign government ought to receive the same treatment as any other (private) trader in a municipal court when such government enters the private domain. In other words, when governments bind themselves to commercial agreements they are not immune from being compelled to perform their obligations under such agreements. Sovereign immunity is no longer an absolute doctrine — a serious erosion of the right had occurred. First the UK (in 1978) and then South Africa (in 1981) adopted legislation that effectively bound their municipal courts to apply the restrictive approach to sovereign immunity. But the restricted approach to sovereign immunity applied in civil matters only and no head of state had ever been denied immunity from criminal prosecution in a municipal court.

The human rights influence exerted on the doctrine

The development of a very resourceful body of international human rights law has also had an important impact on the doctrine of sovereign immunity. The existence of human rights law essentially restricts the ability of heads of state (and their governments) from systematically violating the human rights of people in their sovereign territories because it prescribes a minimum standard

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18 It should be noted that the Commonwealth lagged behind some of the other 'Western' states who had in fact been practising the restrictive approach well before Trendtex. But for South African lawyers the developments that followed Trendtex are significant because of the tendency of our courts to slavishly follow the British courts on matters of international law. In that regard see Inter-Science Research Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 2 SA 111 (T). See also John Dugard 'The "purist" legal method, international law and sovereign immunity' in JJ Gauntlett (ed) JC Noster: 'n feesbundel (1979) at 36.


20 Foreign States Immunities Act 87 of 1981.
with which all states must comply. The conflict between human rights and immunity is well illustrated in the *Pinochet* case.\(^{21}\)

Like PW Botha, General Augusto Pinochet was the head of a sovereign state, and like Botha he ruled with scant regard for the human rights of many subject to his political influence. The Chilean dictator was said to be responsible for the torture and mass-disappearance of thousands of people following his successful 1973 (bloody) coup in which he overthrew the Popular Unity government of Salvador Allende. According to at least one news group:

> Hawker Hunter jets bombed the presidential palace, where Allende was killed ... the army, police and fascist gangs murdered at least 3 000 people on the day of the coup alone. Thousands more were herded into makeshift concentration camps where mass torture and executions took place. The killings continued throughout the seventeen years of Pinochet’s rule. From a population of only ten million, at least 50 000 political opponents were murdered.\(^{22}\)

On 10 December 1998 Judge Garzon of Spain issued a very comprehensive (285-page) indictment against Pinochet. The proceedings were initiated in Spain, where he was wanted to stand trial on charges of, *inter alia*, torture committed whilst he was head of state in Chile (1973–1990). Spain claimed to have authority to try him on the basis of universal jurisdiction.\(^{23}\) It would have been impossible for Spain to extradite Pinochet from Chile since he had been given amnesty in Chile as a part of the political transition deal that he brokered in the process of handing power over to a civilian government. The amnesty was, of course, only effective in Chile.

Whilst in the United Kingdom (undergoing medical treatment) in 1998, Pinochet was arrested on the strength of Spanish Judge Garzon’s indictment. Spanish authorities sought his extradition in order for him to stand trial in Spain. It seemed possible for Spain to ‘get him out’ of the UK because: first, Spain had an extradition treaty with the UK; and second, the amnesty granted to him by Chile was only a valid bar to prosecution in Chile and could thus not protect him in the UK. But one question remained: was Pinochet immune from prosecution in a Spanish municipal court on the basis of sovereign immunity? This was an extremely important question because if Pinochet was not entitled to immunity in relation to the alleged tortures, then it would have been the first time ever that a head of state or former head of state, had been held competent to stand trial in a municipal court. This would mean a further erosion of the doctrine of sovereign immunity — and bad news for other dictator heads of state.

\(^{21}\)See the trilogy of Pinochet cases: *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (1998) 4 All ER 897 (HL); *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (no 2)* (1999) 1 All ER 577 (HL); and *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (no 3)* (1999) 2 All ER 97 (HL).


\(^{23}\)Spanish municipal courts are competent to exercise universal jurisdiction because such authority is conferred upon them in domestic criminal statutes, see JD van der Vyver ‘Universal jurisdiction in international criminal law’ (1999) 24 *SAYIL* 107 at 120.
It is well-known that the House of Lords handed down two judgments. In the first, the court (by a narrow three to two majority) held that Pinochet did not enjoy sovereign immunity in respect of the tortures for which he was charged because torture fell outside a head of state's official scope of functions. In other words, a head of state (or former head of state) only enjoys immunity for those acts committed during the course and scope of his/her official duties as head of state. The torturing of civilians, it seems, is not to be treated as an official function of a head of state. According to Dugard this is because 'torture is an international crime with the status of *jus cogens*'. It does in fact seem difficult to imagine that the commission of an international crime could ever be regarded as forming part of a civil servant's official duties.

In the second judgment handed down by the House of Lords, the court once again confirmed that Pinochet was not entitled to immunity (this time by a majority of six to one). But, significantly, the court reduced the number of crimes for which he was competent to be extradited (in terms of the principle of speciality, he could only, of course, be tried in a Spanish municipal court for the tortures in respect of which he had been extradited). The reason that the court slashed the number of extraditable crimes was based on the double criminality principle in extradition law, which, according to Dugard, means that 'the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and the requested state'. Although General Pinochet allegedly tortured political opponents on a systematic basis throughout his seventeen-year reign, the double criminality principle limited his extradition to the extent that he was only competent to be tried for those tortures committed during the period for which torture constituted a municipal crime in both Spain and the United Kingdom. Since the UK only incorporated the provisions of the Torture Convention into its municipal law

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24 After the decision in the first *Bow Street* case (1998) n 21 above, it transpired that one of the judges who delivered the majority decision, Lord Hoffman (a South African ex-patriot), had failed to disclose his close links with Amnesty International. As a result of the 'Hoffman affair' the first judgment was set aside and the matter was once again set down for a second hearing — *Bow Street (no 3)* n 21 above.


26 For a contrary view see Van der Vyver n 23 above at 121 where the author cites *Marcos and Marcos v Fed Dept of Police Switzerland Federal Tribunal* 2 November 1989 (1990) 102 ILR 198 at 203 for authority that 'criminal conduct is not necessarily excluded from the range of official functions of a head of state'. Van der Vyver made this statement, supported by the *Marcos* authority, in the context of a discussion on the *Pinochet* case. It seems to me that a very important distinction needs to be drawn, however, between conduct that is criminal because it violates a municipal law and conduct that constitutes an international crime.

27 Dugard n 25 above at 159.
in 1988, he could only be extradited to answer for the tortures that occurred in the twilight years of his dictatorship (1988-1990).

A recent ICJ ruling on the scope of sovereign immunity

Like the laws that permitted General Pinochet's arrest in London for crimes committed largely in Chile, Belgium also has municipal legislation which effectively confers universal jurisdiction on its domestic courts to investigate, prosecute, and convict individuals that have committed crimes against humanity even if neither the victims nor perpetrators are Belgian nationals, and even if the crimes were not committed on Belgian territory. Article 7 of the Belgian law provides that:

The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed.

On 11 April 2000, Belgian Judge Van der Meersch issued an international arrest warrant for the detention of the Democratic Republic of Congo's Minister of Foreign Affairs, one Abdulaye Yerodia Ndombasi. According to the

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28 The United Kingdom adopts a dualist approach to incorporation — that is to say that the provisions of a treaty that it has ratified (like the Torture Convention) only become a part of British domestic law when they have been specifically incorporated into municipal law by legislation. Prior to incorporation, judges in the UK may not apply international law in their municipal courts and, it seems, such treaty provisions do not form part of the British domestic legal order. Thus, prior to 1988 there was no crime of 'torture' in the UK.

29 One of my final year LLB students, Gila Isaacson, raised a fascinating question at a seminar in our advanced course on international law at the University of the Witwatersrand. She (correctly) pointed out that the double criminality rule does not necessarily mean that the offence must have the same name in both states but rather that the alleged conduct must be criminal in both places. This is interesting because the violation of a human being's bodily integrity has always been criminal in the UK — after 1988 the accused could be charged with torture, but prior to that he could quite competently have been charged with assault. According to my colleague, Peter Jordi, when members of the police are criminally prosecuted in South Africa for torturing, the charge is always 'assault' (sometimes 'with intent to do grievous bodily harm'). Isaacson's point, I think, raises some very awkward questions about the commitment of the UK authorities to actually secure the conviction of General Pinochet. Further scepticism seems justified when one remembers that the British government was openly supportive of General Pinochet's regime in Chile; and that Pinochet was never, in the final analysis, extradited — in January 2000, Home Secretary of the British government, Jack Straw, announced that the former dictator was too ill to face a Spanish criminal court (the British government instead sent him back to Chile from where he can once again not be extradited). But the counter-argument to Isaacson is that the Spanish municipal court still needs to have jurisdiction over Pinochet if it is to try him — and since his crimes were committed outside of Spain, universal jurisdiction seems to be the only competent basis. Torture, as an international crime, confers universal jurisdiction but assault (which is not an international crime) does not.

The Arrest Warrant of 11 April case: Democratic Republic of Congo v Belgium (ICJ). At the time of writing, the case was as yet unreported although the judgment has been posted on the official web site of the International Court of Justice and can be viewed at http://www.icj-cij.org.

31 Law of 16 June 'concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 Additional Thereto', as amended by the law of 19 February 1999 'concerning the Punishment of Serious Violations of International Humanitarian Law' (hereafter referred to as 'the Belgian law').
warrant, Yerodia was accused of having committed both crimes against humanity as well as breaches of the 1949 Geneva Conventions — apparently whilst serving in a non-ministerial post in August 1998. Yerodia’s inflammatory speeches are said to have incited the massacre of Tutsi residents in Kinshasa.

On 17 October 2000 the DRC instituted proceedings against Belgium before the ICJ. The DRC requested that the court declare Belgium’s warrant for the arrest of Yerodia invalid because it violates the principle of sovereign equality amongst states. The crisp question before the ICJ was: Did the issue and circulation of an arrest warrant by a Belgian judge against a person who was at the time the DRC Foreign Minister, violate his immunity from criminal process and make the arrest warrant unlawful under international law? Thus, the case was about whether the doctrine of sovereign immunity affected the lawfulness of the Belgian arrest warrant.

Belgium claimed that under international law there is no immunity in respect of serious crimes, such as those against humanity, nor is there any immunity for acts done by individuals in a private capacity (because, they argued, the commission of a crime against humanity can never be part of one’s official functions as a minister of a sovereign state). The DRC counter-argued that a sitting foreign minister’s immunity is subject to no such exception. The ICJ agreed with the DRC that, under customary international law, sitting foreign ministers, when abroad, enjoy full immunity from criminal jurisdiction. The ICJ in fact went further to state that foreign ministers enjoy protection from any act of authority by another state which would hinder them in the performance of their official state duties. At paragraph 54 of the judgment, the court had the following to say:

The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties.

Thus, according to the ICJ, it does not seem to matter whether a foreign minister is, at the time of arrest, present in the territory of the arresting state on an official or a private visit. It also does not seem to matter whether the arrest relates to acts allegedly committed before the foreign minister took office or while he was in office. Even more surprising is the apparent implication that it appears immaterial whether or not the arrest relates to acts performed in an official capacity or a private capacity. The court alluded to no exception that an incumbent foreign minister enjoys absolute immunity from criminal process — apparently because if no such immunity is afforded then the state (whom the accused represents) would be hindered in its international relations with other states.

In the final analysis, the ICJ held that the issuing of the arrest warrant for Yerodia violated customary international law because incumbent ministers are

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32For a critical note on this case see Hopkins n 15 above.
completely immune from criminal jurisdiction. The arrest warrant infringed upon this immunity because it hampered Yerodia in his foreign travels by exposing him to arrest while abroad. And if the Foreign Minister is hampered then so is the state that he represents — therein lies the violation of state sovereignty.

Dugard, writing shortly after the *Pinochet* case, said that:

> It may confidently be predicted that it is only a question of time before courts start to hold that sovereign immunity does not extend to acts constituting a crime under international law.\(^{33}\)

One can only begin to imagine how disappointed Dugard must have been after the ICJ handed down its decision in the *Yerodia* case, given this (above-quoted) statement which effectively anticipates that international criminal law is developing to the point where office-bearers guilty of gross violations of human rights are soon to lose their veil of protection afforded by the doctrine of sovereign immunity. Those hopes seem to have been struck a serious blow which is, to say the least, regrettable.

**PW Botha: questions of jurisdiction and immunity**

Viewed side-by-side, the *Pinochet* and *Yerodia* cases paint a very interesting picture for international lawyers. At first blush they seem to be saying something contradictory to international lawyers — in *Pinochet* the delinquent was held competent to face criminal prosecution, whereas in *Yerodia* the delinquent was declared completely immune from criminal prosecution. But to my mind the differing outcomes need not confuse the matter — two contradictory propositions do not always have to be reconciled by deducing that one must necessarily be false because sometimes contradictions can be used to form a thesis from which a brand new idea might emerge. In the context of this article, it seems to me that a careful analysis of the cases reveals the emergence of a consistent body of 'sovereign immunity jurisprudence' despite the fact that the outcomes differ. A closer inspection of the apparent dichotomy actually suggests that both cases reinforce a consistent trend in sovereign immunity thinking — and *Yerodia* does not, as one may initially think, represent a giant step backwards.

First, there are striking factual differences between the two cases which help to explain their apparently opposite outcome. General Pinochet lost his immunity and was also incidentally, at that time, no longer in office; whilst Yerodia only retained his immunity because he was an incumbent minister. The significance of this first observation for PW Botha is thus the connection between 'being in office' and 'enjoying sovereign immunity'. He (Botha) as a former head of state, would not, it seems, be shielded from the criminal jurisdiction of a foreign municipal court simply because his criminal conduct

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\(^{33}\)Dugard n 25 above at 204.
harks back to a time when he was the sovereign head of state. He is no longer the sovereign and thus no longer immune.\textsuperscript{34}

Second, General Pinochet was competent to stand trial for all of the international crimes that he ever committed — including those while he held office. He was ultimately due to face the criminal court on a very limited number of charges, but this had less to do with the doctrine of sovereign immunity than it did with the operation of the double criminality rule in extradition law. Yerodia, on the other hand, enjoyed complete immunity from any criminal prosecution, but not because he committed the crimes whilst in office, but rather because to prosecute him as an incumbent minister would have violated the sovereignty of the state that he represents. The significance of this second observation for PW Botha thus seems to be two-fold: notwithstanding that much of Botha's criminal liability stems from the implementation of what was effectively 'official' government policy at the time of criminal commission is of no consequence to his individual liability; and even though apartheid is a crime against humanity, the extent of the charges that Botha will be competent to answer in a foreign municipal court will probably be determined by how that state was legally positioned against apartheid during the material times in question.\textsuperscript{35}

The second point requires further discussion. Given that not all states in the international community reacted to apartheid in the same way and at the same time, such variables will affect the prospects of a successful prosecution of the former apartheid leader. The \textit{Pinochet} case teaches us that PW Botha can only be extradited from a state in which his conduct constituted a crime, and not

\textsuperscript{34}Whilst this rule is generally regarded as a welcomed erosion of sovereign immunity's completeness, it may in fact have negative repercussions in the broader scheme of things — it will probably encourage the worst violators of human rights to cling to power for as long as possible because for such despot the relinquishing of power exposes them to criminal prosecution. This could, in turn, force dictators to resort to even worse human rights violations just to 'stay in office' — one thinks here of Zimbabwe's incumbent head of state, Robert Mugabe, whose antics (ranging from state endorsed murder and forced human removals to vote rigging and election manipulation) are best understood as a desperate attempt to cling to power. It is also interesting to note, for example, that Belgium did not only issue an arrest warrant for the DRC's incumbent Minister of Foreign Affairs, Yerodia, but also for Israel's incumbent Prime Minister, Ariel Sharon. Belgium had to withdraw the Sharon warrant in light of the ICC's ruling in the \textit{Yerodia} case. But in light of the erosion of the sovereign immunity doctrine, they are free to re-issue it when Sharon vacates office.

\textsuperscript{35}The clearest indication of a state's position with respect to the 'lawfulness' of apartheid is probably best determined by its response to the Apartheid Convention which transformed apartheid into an international crime. The Convention was adopted under United Nations GA Resolution 3068 of 30 November 1973 (the Apartheid Convention). The Convention criminalises not only the implementation of apartheid but also its principal features. Article V of the Apartheid Convention stipulates that perpetrators may be prosecuted by any state party which may acquire jurisdiction or by an international tribunal with jurisdiction and article VI requires state parties to adopt legislation and other measures to bring perpetrators to justice through trials and punishment regardless of the perpetrators' residency status or nationality. See Chris Roederer & Kevin Hopkins 'What is appropriate justice where the perpetrator's liability falls outside of the Truth and Reconciliation Commission's Mandate?' (2002) 23.2 \textit{Obiter} 27.
just any crime — it must be an international crime that confers universal jurisdiction. Although this is a threshold requirement for extradition, it is simply not feasible (or meaningful) to consider this question without knowing which states Botha may decide to visit — lest one consider the position of every state. At the moment he is living in the quiet coastal town of George in South Africa — for this reason it would seem completely relevant to assess whether or not he can in fact be extradited from South Africa. The crisp question is thus whether his conduct, at the time of commission, was criminal in South Africa notwithstanding that apartheid was, at that time, official government policy.

Broadly, the apartheid policy of PW Botha's South African government violated international human rights law in as much as it impacted adversely upon the rights of black South Africans by denying them their *jus cogens* right to self determination; discriminating against them on the grounds of race and colour; and through the widespread infringement of a wide range of basic civil liberties including the right to property, the right to life, the right to be free from cruel, inhumane, and degrading treatment, to be free from arbitrary arrest and detention, and the rights to freedom of movement, opinion, expression, peaceful assembly and association. Although most (if not all) of these rules have crystallised into binding customary international law, the task of an international lawyer seeking to hold individuals in the apartheid government criminally liable, would need to go beyond establishing custom — such conduct would in fact have had to have been criminal (even in South Africa).

Apartheid as crime

South Africa's contribution to the development of international criminal law during the apartheid era was enormous — albeit unintentional. New rules developed in response to apartheid, and an enormous body of customary international law emerged from the literature that stood in clear opposition to racist state-policy. But it was not only international criminal law that developed as a result of the world's outrage at apartheid; an extremely resourceful body of human rights doctrine was also born from this period.

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36 Note 29 above.


38 The mere fact that their conduct (in furtherance) of apartheid was criminal under the international legal regime will only be of assistance in establishing universal jurisdiction so that other municipal courts have authority to try them; but for the purposes of satisfying 'double criminality' in extradition law, one needs to go further and establish that even in South Africa their conduct ought to be regarded as criminal.

39 For example: The prohibition on interference in the domestic affairs of states prescribed in article 2(7) of the United Nations Charter was substantially weakened by the succession of resolutions condemning apartheid; certain forms of racial discrimination were elevated to the status of an international crime — see the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973; and humanitarian law was rewritten to confer prisoner-of-war status on combatants belonging to national liberation movements.
South Africa's discriminatory racial policy was raised in the very first session of the General Assembly, and since then it occupied a central position on the agenda of the General Assembly for more than forty years. Provost attributes this to the fact that South Africa, unlike other human rights violators at the time, was not part of a large voting block in the United Nations, and that for this reason it was unable to protect its own interests. This, she believes, made it possible for South Africa to serve as a test case for the development of the United Nations' policy on human rights.40

India was the first state to challenge South Africa before the General Assembly on apartheid generally, but in particular on her treatment of people of Indian origin. South Africa's racial policy continued to enjoy debate in the General Assembly and in 1952 a resolution was passed which effectively created the Commission on the Racial Situation in the Union of South Africa.41 The commission was mandated to investigate and report upon South Africa's racial policies. Three reports were submitted to the General Assembly by the commission — all three criticised the discriminatory practices of the apartheid government. The General Assembly adopted the reports in resolutions to the effect that apartheid constituted a threat to peaceful relations between nations.42

At first, the large Western powers supported South Africa's challenges to the competence of the United Nations to intervene in her domestic affairs. South Africa protested that apartheid was a domestic issue and that for this reason it fell outside the jurisdiction of the United Nations on account of the non-intervention principle contained in article 2(7) of the Charter. But this international support disappeared after the Sharpeville massacre in 1960 when many of the world powers were morally outraged and began to view South Africa's brutal implementation of apartheid as a threat to international peace and stability. As a result of the Sharpeville incident, and indeed South Africa's persistent refusal to consider seriously the repeated concerns of the General Assembly, the question of stronger action was referred to the Security Council in terms of article 11(2) of the Charter. The Security Council was quick to deplore South Africa's racial policies and practices but no binding enforcement action was taken against South Africa because this line of action was vetoed by the three Western powers that are permanent members of the Security Council.43

Despite mounting pressure from the international community, the apartheid government continued to disregard the pronouncements of the United Nations. The call for sanctions increased and in 1962 General Assembly Resolution 1761 (XVII) was adopted. It expressly condemned racial discrimination in South Africa and called for member states to break all diplomatic ties with South Africa; forbid their ships from entering her ports; boycott all South

40Provost n 1 above at 213.
41GA Resolution 616A and B of 1952.
42GA Resolutions 721, 820 and 917.
43See Hopkins n 1 above; and Dugard n 25 above at 394-411.
African goods and cease exporting to her; and refuse landing rights to South African aircraft. Although resolutions of the General Assembly, such as this one, are not binding on states, it nevertheless indicated that the international community had voiced their strong dissent to apartheid.

This same resolution (1761 of 1962) also created the Special Committee on Apartheid, charged with the task of reviewing South Africa’s policies. In 1967 the Special Committee was charged with the task of promoting an international campaign against apartheid. The committee received substantial support in the General Assembly but less so in the Security Council where the veto power enjoyed by the Western permanent members, France, Britain and the United States continued to render effective opposition to apartheid largely redundant. In the circumstances, the committee sought to overcome the ‘veto problem’ by targeting world public opinion directly. This action was directed chiefly at those states that had maintained political, economic or cultural relations with South Africa. This course of action proved to be fairly effective and resulted in the mobilisation of anti-apartheid NGO’s, large-scale sports and cultural boycotts, and increased pressure on multinationals to disinvest from South Africa. In addition to this, the General Assembly generated a vast number of resolutions condemning apartheid. This consistent denouncing of the South African government’s apartheid policy has led some commentators to suggest that a customary rule of international law was created by the cumulative General Assembly resolutions.

Over time, and probably as a result of the ever-increasing number of General Assembly resolutions against it, South Africa changed her tactic somewhat by no longer claiming that article 2(7) was a bar to United Nations’ competence, but rather that the apartheid philosophy of ‘separate development’ was in fact in line with international human rights law. The apartheid government contended that the creation of the Bantustan-homelands was in furtherance of the international law norm promoting the right of all people to self-determination, as enshrined in the Charter of the United Nations. This justification was never taken seriously by the international community because there was clearly no true commitment on South Africa’s part to honour the values that underlie the philosophy behind self-determination. This was because black people in South Africa had been stripped of their South African nationality and forced, against their will, to become citizens of fictitious homelands designed to ‘get them out of white-South Africa’. In reality the homelands had become the dumping ground for black South Africans who

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44This raises an interesting question: Why were the three Western powers blocking action against South Africa in the Security Council? The answer seems to be political necessity rather than moral support for racism — to isolate South Africa would have been contrary to Western interests for two main reasons. First, during the cold war South Africa played a vital role in resisting communism and it (South Africa) used the threat of communism in Africa to gain the support of the West; and secondly, although not a member of NATO, South Africa played an important part in the Western defense system, due to its strategic position. For more on this see Provost n 1 at 216; and also Hopkins n 1 above at 250–254.

45Dugard n 25 above at 396–397.
had not, by any stretch of the imagination, been permitted to 'freely determine their political status' as is required by Resolution 1514 (XV) — the Declaration on the Granting of Independence to Colonial Countries and Peoples — or article 1(1) of the International Covenant on Civil and Political Rights.\(^4^6\)

Yet despite the apparent ineffectiveness of the Security Council, the General Assembly continued to increase its anti-apartheid sentiment. It did this in two ways. First, the General Assembly effectively expelled South Africa from its meetings in 1974.\(^4^7\) Secondly, it used its mandate under article 13(1)(a) of the Charter to encourage the progressive development of international law. It did this by submitting a draft Convention on the Suppression and Punishment of the Crime of Apartheid to the members of the United Nations for ratification. The convention came into force on 18 July 1976, after ratification by twenty states.\(^4^8\) The convention declares that 'apartheid is a crime against humanity' and criminalises the principal features of apartheid, ranging from the murder, torture, and arbitrary arrests of members of one particular race group. Parties to the Convention undertake to enact municipal legislation to prosecute persons responsible for the commission of this international crime. Some commentators have argued that the Convention is merely symbolic because as a crime against humanity, apartheid confers universal jurisdiction on all states.\(^4^9\)

But even Security Council sentiment changed in 1977 with the death of Steve Biko in police custody — the apartheid government had finally lost the support (and veto) of France, Britain and the United States. The veto power-barrier to the application of Chapter VII had finally been crossed and in November of that same year (1977) the Security Council passed a binding resolution mandating an arms embargo against South Africa.\(^5^0\) This was the only time that Chapter VII was ever invoked against South Africa. Security Council action under Chapter VI nevertheless continued throughout the 1980s — there were resolutions calling for the release of political prisoners,\(^5^1\) the

\(^{4^6}\) Dugard n 25 above at 450–453 advances some very interesting grounds to support the non-recognition of the Bantustan States. The resolutions of the Security Council and the General Assembly did in fact make it clear that the creation of the Bantustan-homelands violated a number of international law norms as well the Universal Declaration of Human Rights which expressly prohibits denationalisation on the grounds of race.

\(^{4^7}\) Article 6 of the Charter provides that a member may be expelled for persistent violation of the Charter's principles, but the General Assembly may not expel without a prior recommendation from the Security Council. Although this prior recommendation was not made, the General Assembly was still able to achieve its aim indirectly by repeatedly refusing to recognise the credentials of South African representatives. This was because the Credentials Committee of the General Assembly held that South Africa's apartheid government, the National Party, did not represent the South African State.

\(^{4^8}\) As at January 2002 there were 101 parties to the Convention.

\(^{4^9}\) Dugard n 25 above at 144; Hercules Booysen 'Convention on the Crime of Apartheid' (1976) 2 SAIL at 56; and Roederer & Hopkins n 35 above.

\(^{5^0}\) SC Resolution 418 of 1977.

\(^{5^1}\) SC Resolutions 473 (1980) and 560 (1985).
granting of clemency to political prisoners facing execution, the lifting of the state of emergency, and an end to attacks on neighbouring territories. The end of the Cold War resulted in a further loss of sympathy for South Africa because the threat of communism was no longer imminent, and South Africa's strategic location was no longer a reason to afford her protection from international isolation. Crippling sanctions against South Africa were more widely implemented, and eventually the international stranglehold of repeated cumulative action forced change upon South Africa. State President FW de Klerk made the decision to dismantle apartheid in February 1990.

That apartheid is a crime against humanity seems clear from the above discussion. But it is still true that apartheid was official government policy in South Africa and that its principal features formed part of South African municipal law. The question is thus: Can government policy that constitutes a crime against humanity ever be regarded as lawful? The most predictable response (that someone like PW Botha may want to offer) is that apartheid, as official policy, ought not to be declared criminal on the basis of *nulla crimen nulla poena sine lege*. But it seems to me that this kind of excuse should fail the former apartheid leaders for much the same reasons that it failed the Nazi leaders at the Nuremburg trials. The Principles of the Nuremburg Charter and Judgment (which were formulated by the International Law Commission and thereafter adopted by the General Assembly) state the following:

> Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does relieve the person who committed the act from responsibility under international law.

It seems clear from the Nuremburg Charter that international law criminalises certain behaviour irrespective of 'internal law' which, in the case of South Africa effectively condoned PW Botha's apartheid policy. Further, according to Paust, Bassiouni and Scharf *et al.,* 'propriety under domestic law' is not a valid defence in international criminal law. In addition, it seems that

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55Note 44 above.
56Apartheid is also specifically referred to as a crime against humanity in Article 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes Against Humanity 754 UNTS at 75. It is also listed as a crime against humanity in Article 7(1)(j) of the Rome Statute which gave birth to the International Criminal Court.
57The Principles of the Nuremburg Charter and Judgment were adopted by GA Res 177 (II)(a) 5 UN GAOR, document A/1316.
customary international law in fact places an obligation on all states to either themselves prosecute or else surrender to another state for prosecution, perpetrators of international crimes. But what states may not do is harbour those who are guilty of committing crimes against humanity. From as early as the late-1960s and early-1970s the United Nations has processed a series of resolutions that stand of evidence of customary international law's expectation that states embrace universal jurisdiction and prosecute those who dwell within their sovereign territory. Customary international law knows no rule that empowers a state to grant asylum to a perpetrator of crimes against the international community.

Conclusion
So where then, the crucial question asks, can PW Botha (as a gross violator of human rights) hide in order to avoid prosecution. The answer seems best dealt with in three parts. First, if he leaves South African territory and travels to any state anywhere in the world, then such state will have jurisdiction to prosecute him in their own municipal courts on the basis of universal jurisdiction. Second, if he leaves South Africa and goes to a state that does not want to prosecute him, he can nevertheless be extradited from that state to a third state to stand trial in that third state, but the extent of competent charges will be determined by the respective stances that both states adopted against apartheid during the material times in question. Third, if he decides not to leave South Africa (probably his safest bet) but another state wants him extradited from here to stand trial there, then South Africa is obliged to surrender him to that state.

The message is clear: human rights violators who are no longer heads of state have very little place to hide. One only hopes that more states will become as proactive as Belgium has been in her endeavours to arrest, investigate, prosecute and punish pariahs — that is, after all, the duty that all states owe to the rest of the international community.

59 For details of these resolutions and also for a general discussion on the duty of states to 'prosecute or surrender' see Jordan Paust 'Universality and the Responsibility to Enforce International Criminal Law: No US Sanctuary for Alleged Nazi War Criminals' (1989) 11 Houston Journal of International Law 337 at 337–340.

60 Paust, Bassiouni, Scharf et al n 58 above at 134.