those who acted with political motives or during and as part of some form of uprising. Even those crimes which are simply related to, as opposed to being in strict pursuit of, political goals are deemed within the category if there is a preponderant political motivation. These norms do not judge the validity of the political motivation or of the tactics. Rather, the mere "existence of the antagonism between individual and government may be sufficient to call the person a political offender. Under these norms then, President De Klerk should have included the release of several additional categories of prisoners: (1) those who have been convicted under the Internal Security Act[4] or its predecessor legislations: (2) those convicted of the common law crimes of treason, sedition, and related offenses; (3) those convicted of other common law crimes which are politically related; (4) under qualified circumstances, those convicted of offenses under the Explosives Act[6] and the Arms and

4 The Internal Security Act, No. 74 of 1982 is permanently in force (including and especially during periods when no State of Emergency has been declared) and confers wide powers of detention without trial, banning of persons, organisations, gatherings publications, etc. or another, since 1963, and is fully operational at the present time. All the so-called â\200\235independentâ\200\235 homelands have their own versions of the Internal Security Act, which are virtually indistinguishable from the parent. It has been in force, in one form

5 Terrorism Act, No. 83 of 1967; Internal Security Act, No. 44 of 1950; the Sabotage Act, No. 76 of 1962; the Unlawful Organizations Act, No. 34 of 1960 and the Criminal Law Amendment Act, No. 8 of 1953.

5 No. 26 of 1956.

THE RELEASE

OF

SOUTH AFRICAâ\200\231S POLITICAL PRISONERS

DEFINITIONS AND EXPECTATIONS

I.

Lg;;gducÂ§$on

On February 2, 1990, South African State President F.W. de Klerk announced a variety of initiatives designed to create a situation which "places everybody in a position to pursue politics freely."

Amongst others, he announced that, â\200\235People serving prison sentences merely because they were members of one of the [previously banned] organisations or because they com-.mitted another offence which was merely an offence because a prohibition on one of the organisations was in force, will be identified and released.

Prisoners who have been sentenced for other offences such as murder, terrorism or arson are not affected by this."

While President de Klerkâ\200\231s statement does not use the term â\200\235political prisoner," international media has interpreted it as a response to one of the preconditions for negotiations set by the â\200\230 African National Congress in the "Harare Declarationâ\200\2351 and endorsed by both the Organization of African Unity and the United

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Declaration of the Organization of African Unity Ad-hoc Committee on Southern Africa on the Question of South Africa: Harare, Zimbabwe, August 21, 1989.

Rebellion o: insurrection," and the El Salvadoran amnesty under "the crimes committed by any person for motive of, because of, by reason of or as a consequence of the armed conflict."

4.

Activities which in essence constitute acts of war or sabotage committed generally, but not necessarily, by trained combatants, often involving arms, explosives and ammunition.

Accused in this category are usually charged under the Internal Security Act for terrorism, subversion or sabotage and under the Arms and Ammunitions Act,72 or the Explosives Act.73 Depending on the circumstances, they may also be charged with murder, attempted murder, arson and malicious damage to property. As has been established earlier, their participation in acts of violence does not preclude these prisoners from being con˜ sidered political.

The acts for which they have been sentenced arose out of their attempts to overthrow the apartheid state. In the context of Namibia, the Independent Jurist had no difficulty concluding that certain acts were political offenses when committed by members of the Peoples Liberation Army, the military wing of SWAPO, or under their instructions, when the act was in furtherance of their political goals and when there was a

72 No. 75 of 1959.

73 No. 26 of 1956.

attempted murder of a police officer was political;64 and the murder of a farmer who had collaborated with security forces could also be considered political.65

Common law offenses in these situations may be considered politically-related. They arise out of the township political unrest generated by the hardships of or opposition to apartheid. In those cases where regrettably murders occurred, the victims, often Township Councillors, had become the focus for community rage against the implementation of apartheid through local surrogates.

The motive in killing these individuals was politi-
cal: antipathy towards apartheid and all those who support, represent, and benefit from that system.

When there has been a finding that the requisite relation-
ship exists between the offense and the political objective, both English and South African courts have taken an otherwise nonâ\200\224 judgmental approach.

Courts generally agree that the methods used in such uprisings should not be judged according to moral worth.

;n ;e Castioni, ggpgaf Schtraks, sggga; and Quinn v. Bobigson, ggpgg.

In particular, one member of the Castioni Court wrote:

"[OJne cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement"[Hawkins, J.,

64

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Andreas Vilho application.

Application of Angula Mwaala.

Proclamation about the specific offenses covered by the amnesty, in practice it was applied to returning members of the Peopleâ\200\231s Liberation Army of Namibia, the armed wing of SWAPO.

VI.

Sogth Afgican Po;;tical Prisoners

There are currently between 2,500 and 3,000 people incarcerated in South Africa who should be considered when determining eligibility for release as political prisoners. A case-by-case evaluation of each prisonerâ\200\231s status is, of course, beyond the limits of this paper. Some broad classifications can be discussed, however.

There are currently between 75 and 100 individuals who are being held as detainees under provisions in the Internal Security Act and the state of emergency regulations which allow for detention without charge or trial for reasons related to the security of the state.48 As the legal director of the International Committee of the Red Cross has said, "When detention is the result of an administrative decision, without any charge being preferred and without trial, there is no room for doubt

48 Sections 29, 28, 31 and 50 of the Internal Security Act and Section 3(1) of the State of Emergency Regulations.

basic principles of due process. The right of an accused to be-
informed of the charges, to have legal counsel and an expeditious
trial are all denied by statutory provisions which authorize long
term incommunicado detention without charge or trial. Sections
29 and 31 of the Internal Security Act authorize detention for
interrogation purposes and of potential state witnesses. Much of
the evidence presented in subsequent trials is based on state-
ments made in detention or evidence of alleged accomplices of the
accused who have themselves been held in incommunicado detention.
Section 28 authorizes the detention of persons when there is an
alleged suspicion that the person is likely to commit an act
endangering the maintenance of law and order.

In concluding that these detention powers were essential,
the South African Government-appointed â\200\235Rabieâ\200\235 Commission of
Inquiry Into Security Legislation stated:

> "[I]nformation obtained from persons in detention is most important, and to a large extent, the only weapon of the Police for anticipating and preventing terroristic and other subversive activities."3

The Internal Security Act grants additional procedural
advantages to the State. The scope of judicial inquiry and
review is narrowly circumscribed by statute. Security legisla-

33 IQÂ§_BÂ§Dort of the Commission of Inggiry Into Security Legislation, 1982, paragraphs 14.5 and 10.78.

those convicted of â\200\235relative" crimes (as the term is used above)
were released.
Both the Philippino and El Salvadoran amnesties
included those who had participated in armed struggle.
On March 2, 1986, by Proclamation No. 2,
the Philippino
Government reinstated the writ of habeas corpus which had been
previously suspended.
In June 1986, Resolution No. 3 clarified
the order and announced that this was a dismissal of pending
cases and granting of freedom to political prisoners.
The
government announced that a total of 563 prisoners had been
freed, including alleged leaders of the New Peopleâ\200\231s Army (NPA)
and the Communist Party (CPP).
The most notable was Commander
â\200\235Dante," founder and leader of the NPA.
Besides these armed insurgents and those convicted solely
for their political beliefs, questions arose regarding those who
had been convicted of common law crimes but who alleged that they
had acted with political motivation.
In August 1986, guidelines
for the release of political prisoners were issued by the Presi˜
dential Committee on Political Detainees/Prisoners of the
Ministry of Justice.
These guidelines stated that the following
were deemed political prisoners:
l.
(a)Those charged, detained, or imprisoned for the
â\200\235commission of any of the following crimes/offenses:
(1) Treason,
(2) Conspiracy or proposal to commit the crime of
treason,
(3) Misprision of treason

On October 28, 1987, the El Salvadoran Legislative Assembly passed an Amnesty Decree, Decree No. 805. The Decree granted amnesty to:

> all those persons, citizens or foreigners, Who have participated as immediate authors, intermediate authors or complices, in the commission of political crimes or common crimes connected to political crimes or common crimes when in their execution no fewer than twenty persons intervened, committed until October 22 of this year (Art. 1].

For additional detail, the Decree lists certain articles of the Penal Code, violations of whish are covered by the amnesty. Included are 1) organizing or ptomoting violence against the political, judicial, economic and social order;41 2) committing acts of terrorism using explosives and dangerous weapons;42 and 3) armed attacks on military installations.43 The Decree also includes amongst political crimes, â\200\235the crimes committed by any person for motive of, because of, by reason of or as a conse-quence of the armed confliet, without taking into consideration their militancy, membership or political ideology or belonging to one or the other of the sectors involved in that conflictâ\200\235 [Art. 2].

41 â\200\230 Codigo Penal, Article 376.

42 Lg,, Article 400.

43 Lg., Article 400(50).

The centrality of the political motive was stated clearly in

another influential United Kingdom case, gchtgaks v. Government

gÂ§_;Â§;ag; (1962) 3 ALL E.R. 529:

> We cannot enquire whether a fugitive criminal was
> engaged in a good or bad cause.
> gang who committed an offence in the course of an
> unsuccessful putsoh is as much within the act as a
> follower of a Garibaldi...
> motive and purpose of the accused in committing the
> offence must be relevant, and may be decisive [Lord
> Reid at 535].

[Ijt appears to me that the

A fugitive member of a

In summary, extradition law provides some of the most

important resources for defining political prisoner status.

This

is primarily through state judicial interpretations of the

political offense eXception.

Although there is no single

definition available regarding political offenses, there are some

broadly shared principles.

All definitions agree that political

offenses are not limited to those involving solely anti-govern-

ment opinions or non-violent expressions; acts which involve

common law or statutory crimes can also be deemed political.

In those situations, a number of factors must be evaluated.

First, the motive of the perpetrator must be assessed.

Kolczyn-

sgi and Schtraks, Â§QQÂ£Q.19

Second, the context in which the act

was committed may be considered.Â» Was the offense committed in

the context of a political incident or uprising?

In re Castioni,

19

See also In Re Josegh Patrick Dohertv: Government of

the Kingdom 0: Great Britain and Ireland, 599 F.Supp. 270 (1984).

gaggg; g; Egztg Eglgzxï¬\202ggi, sugga, per Lord Goddard at 550.

Third, the relationship between the offense and the political

goal may be considered, to evaluate "remoteness".

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v.

govegno; g: EegtggviLLQ Prison (1973) A.C. 931, Egg Lord Diplock

at 945.

With a few exceptions, courts have held that the determina-

tion should be done objectively without subjective judgment being

rendered on the worthiness 9f the motive or the tactics.

;Q_;g

CaÂ§Â§;on; and Â§thzags, ggggg; also Quinn v. Robinsog, Ã©ggga.

The

violent nature of the act does not rule it out as a political

act; indeed, the most important common law case involved the

shooting of a government official.

:n 3: Cast;oni, Â§Â§EÂ§Q.20

Also, an uprising, and any offenses arising out of it, can still

be deemed political even if the uprising lacks an organizational

structure.

QuÂ§gg v. Bobinson, Â§ggga.

South African courts

follow United Kingdom development in this regard.

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Some authorities rule out perpetrators of violent acts.
For example, the United Nations Human Rights Commission recently
stated that political prisoners are those detained â\200\235for seeking
peacefully to exercise their human rights and fundamental
freedoms, in particular the right to freedom of expression, of
assembly and of association."
It should be
noted that such a resolution does not by itself create binding
international law.

HRC Res. 1988/39.

[that the individual is a political prisoner].49

They should all

be released immediately.

With respect to individuals who have been charged, tried and

sentenced, their convictions have been based on their involvement

in four broad categories of alleged activities.

Those categories

are discussed below and evaluated on the basis of the definition

of political offense developed above.

1.

Public or semi-public politicizing and consciousness-raising activity where no specific acts of violence are alleged, including boycotts, stayaways, and participation in demonstrations, protests and campaigns.

Offenders in this category are usually charged under the

Internal Security Act50 with subversion51; furthering the aims of

a banned organizationsz; possession or distribution of banned

literature53; advocating the objects of communism54; violating

49

Statement by Claude Pilloud on the Protection of

Political Detainees to the American Society of International Lawâ\200\231s Panel on Humanitarian Problems and International Law, mimeo, at 1, Oct. 15, 1970.
Prisoners: The Law and Politics of Protection" 9 Vanderbilt Journal of Transnational Law, 295, at 320.

As quoted in Forsythe, â\200\235Political

(1976).

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No. 74 of 1982.

Sec. 54(2).

Sec. 56(1)(a).

Sec. 56(1)(b) and (c).

Sec. 55.

appear to be political in nature: opposition to apartheid and the structures created on the township level to implement apartheid. Second, the offense was committed in the context of a political uprising or protest against the government. Sometimes such events occurred during a melee when security forces violently disrupted a march or demonstration or funeral. Third, the relationship between the act and the political objective must be considered. The relationship between the two should not be remote. The act must be recognizably incident to the political motive and disturbance or uprising. It is not sufficient that the acts merely were committed during the disorder. Indiscriminate, wanton or reckless endangerment of civilians is not excused. Often, however, the political affilia˜ tionâ\200\230or governmental or military status of the targets or victims is considered. In the Namibian context, for example, Professor Norgaard concluded that an attack on a petrol pump, even though it was owned by a civilian, could be considered political because of the implications for the transport infrastructure of the country;62 the murder of a suspected informer may have been political;63 the

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53 Silas Mbonge application. Eino Mule and Haidula Andreas application. determination of their status, however, was postponed until after they are tried.

A final

"at 157].

In re Castioni is followed by South African courts.

Beyer. Â§EEEQ-

3.

Recruitment of people for military training and their transportation out of South Africa; and/or the harboring of such combatants.

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The charges against Nelson Mandela fell in this category.66

Offenders in this category are generally charged under the

Internal Security Act with terrorism57; subversion58; sabotageag;

harboring and assisting7o; and undergoing training7l.

They are

charged with supporting the armed struggle against the South

African Government but without carrying out military activities

themselves.

The motivation of people charged in this category is

unquestionably political.

Their actions take place in the

cohtext of an armed struggle to overthrow the government.

Both

the Philippine and El Salvadoran amnesties would have included

this category of prisoners:

the Philippine amnesty under â\200\235(a)(4)

Rebellion or insurrection," and the El Salvadoran amnesty under

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Nelson Mandela and eight other accused in the Rivonia

Trial were tried under the General Law Amendment Act and the Suppression of Communism Act for sabotage and conspiracy to overthrow the government by revolution and by assisting an armed

- invasion of South Africa by foreign troops.

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Sec. 54(1).

Sec. 54(2).

Sec. 54(3).

Sec. 54(4).

Sec. 54(7).

Nations General Assembly.

Specifically, by consensus, the United

Nations General Assembly stated that â\200\235it is essential...â\200\235 that

the South African Government "respond positively to this univer-

sally acclaimed demand..." and ig;g;_alia "Release all political

prisoners and detainees unconditionally and refrain from imposing

.any restrictions on them."2

President de Klerk’s announced prisoner release falls far

short of this international requirement.

His initiative is

limited to those political prisoners convicted of affiliation

with or furthering the aims of a banned organization.

The South

African Bureau of Prisons has estimated that only 77 individuals

will be released based on that standard.3

In contrast to the limited numbers affected by President de

Klerkâ\200\231s reforms, the Human Rights Commission in South Africa

estimates that there are currently approximately 350 prisoners

serving sentences for convictions under South Africaâ\200\231s security

legislation and common law charges such as treason.

There are

also approximately 2,500 to 3,000 prisoners convicted of unrest-

related offenses such as "public Violence," arson, and malicious

damage to property.

Further, the Commission adds that approxi-

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Deolaration 0n Apartheid And Its Destructive Conse-
quences In Southern Africa, Secs. 5 and 6(a), (A/Res/S-l6/l),
January 1990.

3

Those prisoners convicted on multiple charges, certain

of which do not fall within the parameters of the release, will
only have their sentences reduced.

mately 80 "death row" prisoners have been convicted of murder involving some form of political motivation.

In addition, there are a number of people who are being detained without charge or trial under regulations issued pursuant to the State of Emergency and various provisions of the Internal Security Act.

While President de Klerk’s initiatives set a limit on the length of detentions under the State of Emergency regulations, it did not release those or other detain-ees .

Given the narrow impact President De Klerkâ\200\231s speech has on the continued detention and imprisonment of political activists, it is important to weigh his initiatives against international legal norms and the expectations of the international community as expressed in the United Nations Declaration.

State practice relating to extradition treaties and amnesties provides the best source from which to formulate a widely accepted definition of political prisoners.

An examination of state practice, including that of the Republic of South Africa, leads to a broader definition ofâ\200\234 political prisoner status than the one on which President de Klerk appears to be acting. That definition would include all those jailed because their political beliefs, associations or deeds are considered a threat to state security, including all

III. Ihe Nam$bian Pgecedents

The definition of pblitical offense described above which was extracted from South African domestic law, and that of other countries, has been applied in Namibia to determine who in that country would be considered political prisoners eligible for release under the United Nations Settlement Plan.

Under the process mandated by United Nations Security Council Resolution 43521 leading to elections and independence in Namibia, the Administrator-General was obligated to release â\200\235all Namibian political prisoners or political detainees held by the South African authorities . . ."22 prior to commencement of the election campaign.

Disputes concerning the release or identification of eligible prisoners were to be resolved on advice of an independent jurist designated by the Secretary-General of the United Nations.

The decisions regarding political prisoner status in the Namibian context should be given particular weight in the present

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22

29 September 1978

Proposal for a Settlement of the Namibian Situation, 5/12636, 10 April 1978, Sec. 7(b), p. 3.
reference into Resolution 435 (1978).

Incorporated by

The â\200\231political incident’ test was further developed in the

United Kingdom in R. v. Gove no

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Br’xton ex

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0102 nski

(1955) I QTB. 540.

This case involved seven Polish sailors who

used force to seize control of a Polish ship in order to seek

asylum in the United Kingdom.

In this case, the sailors were not

part of a political movement, nor was there really an â\200\231incidentâ\200\231

as in In re Qastioni.

Nevertheless, the Court ruled in favor of

the sailors, recognizing that they shared with their fellow

citizens a widespread hostility teward the current Polish

Government.

The Court also recognized that at that time, in

countries such as Poland, it was impossible to organize a more

cohesive opposition movement.

As a later American case notes, in

Kglcgznsgi, I’the only indispensable ingredient is that the act be

politically motivated and directed towards political ends.â\200\235l8

But see, gain v. Wiikes, 641 F.2d 504 (7th Cir., 1981), cert. denied 454 U.S. 894, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981); In re Doherty, 599 F.Supp. 270 (S.D.N.Y. 1984).
The Eain Court judged the legitimaCy of the political cause and motive, and whether the conflict involved well-organized groups or not [at 519, 521].
In Doherty, the accused had allegedly killed a British officer during an ambush in Northern Ireland.
membership in the Provisional I.R.A.
against extradition, stated that the â\200\231political incidentâ\200\231 test was merely the first step in analysis [at 274].
Court still considered, "the nature of the act, the context in which it is committed, [and] the status of the party committing the act...â\200\235 [at 275].
organizational structure and recognized that it was in political opposition to the British Government.

The Court felt that the P.I.R.A. had an

The Doherty

The accused claimed

The District Court, ruling

18

In re Gonzalez, 217 F.Supp. 717, 721 n9 (S.D.N.Y. 1963).

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Four aspects of the El Salvadoran amnesty should be noted.

First, it reiterates the political offense doctrine in extradi-.

tion law by including related or connected common law crimes.

Second, it grants amnesty to all those who committed common law

crimes in groups of twenty or more.44

Third, it specifies that

political offenses will be determined neutrally with no concern

giveh to the validity of the cause to which the prisoner

belongs.45

Finally, those convicted of participation in the

armed conflict are included.

On June 6, 1989 the Administrator General of Namibia issued

an amnesty decree46 as required under the terms of United Nations

Security Council Resolution 435.

_The amnesty applied to the

refugee community only and covered "any criminal offence com-

mitted by such person in the territory or elsewhere at any time

before the said date."47

While no further detail is given in the

44

The provision was primarily aimed at granting amnesty
to participants in government-backed death squads that normally
operated in large groups.
The provision in practice did not
extend to government opponents since they were almost always
charged with "pureâ\200\235 political crimes such as subversion.
extensiOn of amnesty by this provision to death squads was chal-
lenged in the courts.
When the challenge failed, American human
rights and refugee groups brought a petition to the Interâ\200\224
American Court.
in Las Hojas in 1983.

The petition relates in particular to a massacre

The

The case is still pending.

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One exception is stated:

those involved in the assas-

Sination of Archbishop Oscar Romero are excluded from the
amnesty. Art. 3(1).

46

Granting of Amnesty To Certain Persons, Proclamation

No. AG 13 (1989), Official Gazette, No. 5725 of 7 June 1989.

47

Section 2(1).

28

(4) Rebellion or insurrection,
(5) Conspiracy and proposal to commit rebellion,
(6) Disloyalty of public officers and employees,
(7) Inciting to rebellion or insurrection,
(8) Sedition,
(9) Conspiracy to commit sedition,
(10)Inciting to sedition,
(11)Acts tending to prevent the meeting of the

National Assembly

(12)Illegal assemblies, if meeting is one in which

the audience is incited to the commission of the crime of treason, rebellion or insurrection, sedition or assault upon a person in authority or his agent,

(13)Espionage,
(l4)Subversion,
(15)Unlawful rumor-mongering.

(b) Those charged, detained, or imprisoned, for any crime/offense other than those enumerated in Subsec. (a) above, committed in connection with, or by reason or in furtherance of the same.

(c) Those charged, detained, or imprisoned by reason of their political beliefs or resistance to the immediately preceding government/administration.

Note how Subsection (b) includes prisoners convicted of â\200\235rela-’

tiveâ\200\235 political offenses as well as â\200\235pureâ\200\235 ones in line with

extradition treaty doctrine discussed above.

The Presidential

Committee was empowered to review individual cases appealing for

political prisoner status and amnesty.

By the end of 1986, it

had reviewed 90 cases, of which 15 were recommended by the

Committee for release.40

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Amnesty International, Philippines:

Unlawful Killings

by Militagy and 2arami;ita;y Forces, AI Index ASA/35/02/88, p. 11.

trial is to eliminate or discredit a political opponent according to established rulesâ\200\235.28

At the same time, by charging a defendant under security legislation, the State acknowledges the political motivation of the accused.

The statutory definitions of offenses under the Internal Security Act, No. 74 of 1982 (terrerism, subversion, sabotage, and promoting communism) emphasize a finding of political intent on the part of the accused, for example, to â\200\235overthrow or endanger the State authorityâ\200\235,29 â\200\235promote any constitutional, political, industrial, social or economic arm or change",30 "to induce the Government...to do or abstain from doing any act...",31 to advocate, advise, defend or encourage the objects of communism,32 etc.

Additionally, the priority placed on the interests of state security in trials under security legislation has been used to justify the extraordinary procedural advantages created for the prosecution under the Internal Security Act which are not available in ordinary criminal trials, and which offend most

28 John Dugard, Human Rights and the South African Legal Order (1978) at 206.

29 Sec. 54(1)(a).

30 Sec. 54(1)(b).

31 Sec. 54(1)(c).

32 Sec. 55.

[T]here are many acts of a political

character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over [Hawkins, J., atâ\200\230157].

We know that in heat and in

This nonjudgmental attitude on the part of judges has been reiterated in United States cases.17

17

In Quinn, supra note 15, the Court stated that one

cannot judge the organizational structure of a group, since so many uprisings are inherently informal: possible to sympathize with, aid, assist, or support a group, [and] help further its objectives... without becoming a member of the organization. uprising" [at 809]. merits of the uprising or its tactics:

Still, one may be acting in furtherance of an

The Court added that one cannot judge the

"[IJt is entirely

We do not believe it appropriate to make qualitative judgements regarding a foreign government or a struggle designed to alter that government...

[I]t is not our

In deciding what tactics are acceptable, we seek to impose on other nations and cultures our own traditional notions of how internal political struggles should be conducted... place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their own countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. are seeking to change their governments that makes the political offence exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal [at 804-805].

It is the fact that the insurgents

consideration.
The South African Government is the detaining
power in both situations.
The laws under which prisoners were
convicted in Namibia are largely the same as those under which
South African prisoners have been convicted.
A similar variety
of activities have formed the basis of offenses for which the
Namibian and South African prisoners were convicted.
And, the
acreement to release Namibian political prisoners was a critical
step in a negotiated settlement that ih several respects is being
seen as a model for South Africa.
If, on a case-by-case examinaâ\200\224
tion, the release of certain categories of prisoners in Namibia
was deemed necessary to create the political climate conducive to
free and fair elections, at the least, the release of those same
categories of prisoners would be necessary to create a climate
for a negotiated settlement in South Africa.
The status of 38 prisoners was considered in Namibia.
With
respect to 17 of them, the Administrator-General, representing
the South African Government, conceded without contest the
political nature of their offenses.
These were prisoners whose
charges fell primarily under security legislation, namely the
Terrorism Act.
They were members of the armed military wing of
SWAPO and the activities that led to the convictions were within
the course and scope of their duties as such.
The Administrator-
General also made concessions with respect to three additional
prisoners.

Professor Norgaardâ\200\231s decision to release five prisoners25 convicted of public violence offenses arising out of a school boycott in Walvis Bay is of particular note.

The Regional Magistrate found that the defendant had committed public violence in that they disrupted the writing of examinations at the Kuisebmond Secondary School, Walvis Bay, and either threw or associated themselves with the throwing of stones at the school or at police vehicles on 10 June 1988.

On 10 June 1988, a group of students of the Kuisebmond Secondary School decided to participate in the national school boycott.

They gathered in a group to mobilize fellow students to join with them.

The group proceeded to certain classrooms at the school and disrupted examinations; with some members of the group entering a classroom and tearing up examination papers.

After some time, the group was violently dispersed with whips by the police.

Stones were thrown by students at the school and at police vehicles, causing a total damage of approximately R2000.

The Administrator-General conceded that the disturbances had a political objective but submitted that the particular offenses could not be considered political since they were primarily directed against the scholars and teachers and not against a

25

Johanna Kambanda, Mingeli Erastus, Paulus Shimbanda, Rosalia Shipiki and Diinina Nakwafila.

been declared since 1985 in South Africa.

While neither the statute nor the regulations issued pursuant to it use the words "security of the state" or "internal securityâ\200\235, there can be little question that the sweeping powers authorized under the states of emergency have been employed as weapons against various forms of political dissent.

The Public Safety Act was passed in 1953 in order to put an end to a passive resistance campaign promoted by the African National Congress against discriminatory legislation.36 A state of emergency was first declared under it in 1960 in the wake of the police shooting of people demonstrating at Sharpeville against the requirement to carry passes.

The provisions for detention without charge or trial that have been promulgated under the states of emergency imposed since 1985 as well as the substantive prohibitions and other unfettered executive powers granted by those regulations mirror substantially those in the Internal Security Act.

Under Regulation 3(1):

> a member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of , such member, necessary for the maintenance of public order or the safety of the public or the person himself, or for the termination of the state of emergency and may, under a written order signed by any member of a force, detain, or cause to be detained, any such person in custody in a prison.

35 Dugard, suQra, at 110.

The regulations prohibit the making, poesession or dissemiâ\200\224
nation of subversive statements - defining ’subversiveâ\200\231 so widely
’as to cover virtually any criticism of the status quo: they give
power to outlaw and seize any publication deemed by the State
President to threaten the interests of the State; they prohibit
the publication of any information about police activities in
relation to any â\200\231unrestâ\200\231 incident: they grant an indemnity to
members of the security forces against criminal or civil liabiâ\200\224
lity arising out of unlawful acts (provided only that they can
not be proved to have been done in bad faith); and they purport
to oust the jurisdiction of the courts to adjudicate on the
lawfulness of the regulations or anything done in reliance on
them.37

And, perhaps most conclusive is the clear evidence that its
enforcement has targeted political activists.
For example,
during the second half of 1987 approximately 78 percent of the
recorded 2,346 detainees held under the State of Emergency
regulations were members of the United Democratic Front and its
’affiliates.38

37
Geoffrey Bindman, South Africa And the Rule of Law
(1988) at 90.

38
Race Relations Surve
1987 88 (South African Institute
of Race Relations) at 774.

act had political consequences or was situated in a political

context (objective criterion)â\200\2355Â°.

The factors to be considered

with regard to each case are:

a)

b)

The motivation of the prisoner, specifically
whether the offence was committed for a political
motive.

The context and circumstances in which the offence
was committed.
political uprising or a dispute of a political
nature, or within the context of protest against
the government.

Was it committed as part of a

c)

The relationship between the offence and the
political objective pursued by the perpetrator.

The child in the township who is convicted of public

violence for throwing stones at security force personnel meets

these standards.

The scholars who disrupted classes meet the

tests.61

The case of township residents who attacked officials

appointed under the Black Local Authorities Act or suspected

government informers requires more analysis.

It can be argued,

however, that they, too, fall within the scope of the definition

of political prisoners.

First, unless specific evidence to the

contrary can be presented in each case, their motivation would

60

See generally Van den Wijngaert, The Political Offence

Exoeption to Extradition, at 108-111.

61

See the decision of Professor C.A. Norgaard to release

as political prisoners five students convicted of public violence
arising out of a school boycott in Walvis Bay.

restrictions placed on individualsss; convening, advertising, and/or attending an illegal gatheringse; and/or incitement tov commit an offense57.

Another statutory charge used for this categcry of offenses is intimidation, under the Intimidation Act.58

In addition to statutory offenses, people engaging in activities that fall in this category are often charged with the common law crimes, such as treason, sedition and intimidation. A prominent trend among these trials has been to prosecute important community leaders on tenuous charges involving allegations of conspiracy with the ANC.

Often the activities forming the basis of the charges have included: forming residents and civic associations; launching rent and consumer boycotts against State-appointed Township Councils and local businesses; creating informal judicial structures known as "people’s ceurtsâ\200\235; and campaigning to get the South African Defence Force to withdraw from the townships.

These mass-based activities have been characterized as undermining and supplanting existing governmen˜ tal structures.

This alleged subversion of State rule has been deemed treasonous.

In most cases these same activities constitute violations of certain regulations issued under the state of emergency.

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57

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Sec. 56(l)(d)-(p).

Sec. 57;

Sec. 59.

No. 72 of 1982.

relationship between the target of an attack and the political goals.

Members of armed opposition have been included in amnesties in many other countries. Most notable for the present case is the Namibian example, where SWAPO combatants were granted amnesty to repatriate. Armed combatants were also included in theâ\200\230 Philippino and El Salvadoran amnesties. .The former included them under those who had participated in "Rebellion or insurrection.â\200\235 The latter included them under, "the crimes committed by any person for motive of, because of, by reason of or as a consequence of the armed conflict, without taking into consideration their militanoy, membership or political ideology or belonging to one or the other of the sectors involved in that conflict.â\200\235 Further, the South African Government has already conceded special status to prisoners_convicted because of armed opposition to the State. For the most part, they are held with other political prisoners in facilities, such as that on Robben Island, separated from nonâ\200\224political prisoners. For several years, representatives of the International Committee of the Red Cross have been allowed to visit prisoners serving sentences on Robben Island without distinction based on the violent or non-violent character of their offenses.74 The aims and objectives of the

74 In 1982 and 1983 the ICRC visited 415 and 375 political prisoners in South Africa.

Committee of The Red Cross,â\200\235 International Organization Vol. 39, J.D. Armstrong, â\200\235The International

criterion)."14

In E; pggge Rolff, 109 (26) s c 433, the South

African court held that:

It may be said broadly that a political offence is one committed in the course of some political disturbance and in furtherance of its objects [at 439].

The full bench of the Natal Provincial Division held in g;

v. Qevgx, 1971 1 S.A. 359(N) that the â\200\231political incidentâ\200\231 testls

adopted in United Kingdom cases should be applied in South Africa

14

Van den Wijngaert, The EglíticaL Oï¬\201fegce Exception to

ExtradiÂ§;on, p. 108-111; See also Schtraks v. Government of Isgag1, 1962 (3) ALL ER 529 at 534 (Per Lord Reid).

15

The â\200\231political incidentâ\200\231 was first espoused in the

On remand,

gaggs v. 91a; 179 F.Supp. 459 (S.D. Fla. 1959) (case

United States in In re Ezeta 62 F. 972 (N.D. Cal. 1894): a political offense was deemed in that case to be â\200\235any offense committed in the course of or furthering of civil war, insurrecâ\200\224 tion or political commotion" [at 978].
Subsequent cases include:
KaradÂ§91e v. Artugovic 247 F.2d 198 (9th Cir., 1957), vacated in 355 U.S. 393, 78 S.Ct. 381, 2 L.Ed. 2d 356 (1958).
extradition was denied because the evidence was insufficient to prove probable cause on at least one count of the complaint in extradition.
The vacated political offense analysis was reaf-
firmed and the crimes charged were deemed to be political in characteru
involving Cuban revolutionaries who killed a captive); In re G9nÂ§a1gg 217 F.Supp. 717 (S.D.N.Y. 1963) (Dominican national was not granted the political offense exception for alleged torture and killings because there was no evidence of an uprising or political disturbance); In re Mack1g 668 F.2d 122 (2nd Cir., 1981) (attempted murder of a British soldier and illegal posses-
sion of firearms): Be Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), appeal dismissed 786 F.2d 491 (2d Cir. 1986), (murder of British soldier); Re McMuLlen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979) (bombing of British Army barracks); and Quinn v. Robinson 783 F.2d 776 (9th Cir., 1986) (case involving an alleged member of the I.R.A., accused of complicity in a series of bombings and a murder.
by South African prisoners and detainees: while the acts were deemed political, they were not felt to be â\200\231incident toâ\200\231 an uprising since they occurred in England and not in Northern Ireland.).

Extradited on grounds unrelated to the issues presented

which fall within the definition˜and the factors which must be

assessed in making the determination.

Generally, the political offense exception includes: 1) the

â\200\235pureâ\200\235 political offense including offenses of opinion or

expression; and 2) "relative" political offenses which involve

some act, usually violent, motivated by political goals.9

"Pureâ\200\235 political offenses are most generally accepted as

falling within the extradition exception.

They include those

acts "aimed directly at the government and hav[ing] none of the

elements of ordinary crimes."10

Typical examples are treason,

sedition, and espionage.ll

Different countries use different

9

M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW 414 (vol.

The European Extradition Treaty of 1957 follows this:

Right from its first appearance in a treaty between

II, 1986).
France and Belgium in 1834, the exception included both â\200\235aucun
delit politique" and â\200\235aucun fait connexe a un semblable delitâ\200\235
[Art. 5].
"Extradition shall not be granted if the offence in respect of
which it is requested is regarded by the requested Party as a
political offence or as an offence connected with a political
offence."
â\200\235relative" political offenses category into â\200\235delits complexesâ\200\235
(acts directed at both public and private rights) and â\200\235delits
connexesâ\200\235 (acts connected to public issues).
SHEARER, EXTRADITION IN INTERNATIONAL LAW Chapter 7 (1971).

Art. 3(1).

Some European theorists subdivide the

See generally I.A.

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Qgi2h_x._gggigÂ§gg, 783 F.2d 776, 793-794 (9th Cir. 1986).

L_.

Â§gg_g;Â§g, Evans, Reï¬\201lections upon the Political

Oï¬\201ï¬\201ense ig Internationgi Eractice, 57 AM.J.INTâ\200\231L L. 1,11 (1963).

There should be little doubt that those detained or serving sentence for conviction of an offense under the Internal Security Act or state of emergency regulations issued pursuant to the Public Safety Act should be considered political prisoners.

V.

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Laws

Apart from domestic legal interpretations of bilateral extradition treaties, useful evidence of a widely accepted definition of political prisoner status exists in various amnesties granted recently by governments to political prisoners. Although this paper is not the place for a comprehensive study of such amnesties, it is helpful to look at three recent amnesties as evidence of state practice.

The amnesties considered below are those which occurred in the Philippines in 1986, ih El Salvador in 1987 and in Namibia in 1989.

Other amnesties have of course occurred. As in Uruguay in 1986, these have sometimes focussed on forgiving security officers for their past alleged human rights violations.39 Thus, they are less useful in working towards a definition of political prisoner status.

The Philippine and El Salvadoran amnesties both reflect the broad concept of political prisoner elaborated in the context of extradition treaties discussed above.

In both cases,

39

gee, gÃ©gÃ©, Ley de Caducidad de la pretension punitiva del Estago (Law No. 15,848, 1986).

tion expressly excludes judicial review of administrative actions authorized by/its provisions, such as detention without trial. Security police, not the courts, make the final decision as to who should be removed from society when there is a claim that state security is at-issue. In these circumstances, therefore, the question of individual freedoms is reserved for the police and the executive but denied to the courts. Further, when charges are brought, the courtâ\200\231s discretion to grant bail can be precluded by the attorneyâ\200\224general34 only in such political trials. Under security legislation, the international standard of presumptive innocence is turned on its head. With certain offenses (terrorism, subversion), once the State has proved the commission of certain acts likely to have furthered ene of a series of widely-phrased aims, the onus is on the accused to prove beyond reasonable doubt that s/he lacked the requisite political intention, thereby shifting the burden of proof. The Public Safety Act, No. 3 of 1953, empowers the State President te declare a state of emergency when he considers it to be in the interests of â\200\235the safety of the public, or the maintenance of public orderâ\200\235 to do so.35 It is under the authority of this statute that five successive States of Emergency have

34 Section 30 of the Internal Security Act, No. 74 of 1982.

35 Section 2(1).

state institution.26
The targets attacked were in his view too
far removed from the South African authority in Namibia.
Professor Norgaard concluded that the students were eligible
for release.
His advice regarding the Walvis Bay students has
not as yet been made public.
However, it can be speculated that
he reasoned that although the studentsâ\200\231 actions may have only
indirectly targeted the government, they were sufficiently
calculated to create pressure for change in South Africa’s
policies toward Namibia.
IV.
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All prisoners held under the administrative detention
provisions of security legislation or convicted of offenses under
such legislation ipgg gaggg are political prisoners.27
South
Africaâ\200\231s security legislation was enacted for indisputably
political purposes: to control opposition to government policies
and practices and thereby "provide for the security of the
State."
John Dugard writes with reference to trials under
security legislation that the "main purpose of the political

25
A jurisdictional issue was also raised relating to the
status of Walvis Bay.
27
In State v. Budlender (1973) 1 SA 264 c at 268 the
court regarded a contravention of the Riotous Assembly Act, No.

17 of 1956 to be a "political offence."

18

After hearing arguments and receiving submissions on_the status of the other prisoners contested by the Administrator General, the Independent Jurist appointed by the Secretary-General, Professor C.A. Norgaard,23 advised that 10 additional prisoners be released under the political prisoner provisions of the Settlement Plan. The release included prisoners convicted of common law charges. For example, Mr. Angula Mwaala, whose release was advised by Professor Norgaard, was sentenced for murder, robbery and contravening Section 2(c) of the Terrorism Act. He was a member of SWAPOâ\200\231s armed wing who was accomplice to a murder related to his activities as an insurgent. Norgaard considered the murder in that case to be a political offense because of a connection between the deceased and the Security Forces. Acts of sabotage (bombings of buildings and facilities) were also considered political even when the attack was on private property if politically motivated and if a connection could be made between the target and the political aim pursued.24

23 Professor Norgaard is a national of Denmark and is President of the European Commission on Human Rights.

24 See for example the applications of Silas Mbonge, Paulus Andreas, Afunda Nghuyolwa and Leonard Sheehama.

[at 363].

The Court expressly referred to two leading English

cases, ;g_;g_Â§Â§Â§Â§iggi (1891) I Q.B. 149 and R. v. Govegno; of

ggiztgn e; pagge Kolczynsg; & Othegs (1955) I Q.B. 540.

:3 ge Castion; involved the shooting of a government

official during an uprising in the Swiss canton of Ticino.

The.

opinions of the Court formulated the â\200\231political incidentâ\200\231 test

which still generally governs in both the United Kingdom and the

United Statesl5: "[F]ugitive criminals are not to be surrendered

for extraditicn crimes, if those crimes were incidental to and

formed a part of political disturbancesâ\200\235 (Hawkins, J., at 159].

The case also set a precedent for a ncnjudgmental approach

to defining pclitical offenses:

15

Recent developments have altered the law in the United

Because of

The United Kingdom also recently passed a new

Kingdom and its relationship to the United States.
British dissatisfaction with the applicability of the political
offense exception in cases involving the I.R.A., particularly
when American courts used the "political incidents testâ\200\235, Britain
negotiated with the U.S. a new treaty which narrows the defini-
tion of political offense, making practically any act of violence
extraditable.
extradition law which also narrows the scope of exceptions.
These recent developments do not, however, affect the doctrine
applicable in South African law.
Act, No. 67 (1962) is modeled on the earlier British statutes and
British case law which interpreted them.
U.S.-U.K. Supplementary Extradition Treaty affects only relations
between those two states.
Extradition Treaty between the Government of the United Kinqdom
of Great Bgitain and Northern Ireland and the Government of the
United States of America, signed at London on June 8, 1972,
Washington, June 25, 1985.
tion between the U.S. and the U.K. of June 8, 1972, entered into
force, January 21, 1977, 28 U.S.T. 227, T.I.A.S. No. 8468.

It supplements the Treaty on Extradi-

The South African Extradition

Of course, the new

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THE RELEASE

OF

SOUTH AFRICA'S POLITICAL PRISONERS:

DEFINITIONS AND EXPECTATIONS

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March 3, 1990

Ammunitions Act;7 (5) those conviCted of violating State of Emergency regulationss; and (6) administrative detainees held under the detention provisions of the Internal Security Act or the State of Emergency regulations.

Under South Africaâ\200\231s fiction of homeland independence, the Transkei, Ciskei, Venda and Bophuthatswana each have legislation similar, and at time identical, to that discussed in this paper, which has been used to incarcerate opponents of apartheid. Prisoners held under those laws must also be released.

II.

De ’ i â\200\231on Acco din to Ext ad’tion Treat’es

Since the mid-nineteenth century, there has been a political offense exception to most bilateral extradition treaties. The exception was first introduced by France into its treaties in the decades following the Revolution. According to the exception, individuals are held non-extraditable if they are charged with a political offense. State interpretations of the exception vary. Nevertheless, state practice under extradition treaties demonstrates a significant degree of consensus on the type of offenses

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8

No. 75 of 1969.

The Public Safety Act, No. 3 of 1953 enables declaration of a State of Emergency granting even wider and more unbridled powers, capable of use on a mass scale. of Emergency have been declared in 1960 and 1985 and National States of Emergency declared in 1986, 1987, 1988 and 1989 extending uninterruptedly from 12 June 1986 up to and including the present time.

Partial States

â\200\230

tests for the second category, that is, "relativeâ\200\235political

offenses.12

South Africa has adopted the political offense exception to

extraditions.13

In interpreting this, South African courts have

followed certain legal developments in fellow common law coun-

tries such as the United Kingdom and the United States.

Those United Kingdom precedents followed by South African

courts recognize not only offenses which are â\200\235purelyâ\200\235 political

but also offenses which may, on their face, appear to be ordinary

common law crimes but "which are assimilated to political

offences because the perpetrator pursued a political purpose

(subjective criterion) or because-the act had political consec

quences or was situated in a political context gobjective

12

The French standard of what constitutes a political

offense remained for many years the most traditional: the offense
would be deemed an exception to extradition if the alleged act
directly injured the rights of the state.
courts have loosened this standard to include consideration of
motive and context.
Palais 113 (Ct.App. Paris, Fr. 1953).

This began with In re Rodriggez, 2 Gaz.

Recently, French

In recognition of the problems in evaluating â\200\235relativeâ\200\235
political offenses with the traditional test, the Swiss
amended it for their own use.
the political and criminal elements of the offense.
the former outweighs the latter or if the latter are
proportionate to the former, the offense is deemed
political.
â\200\235predominance" test.

This is known as the â\200\235proportionalityâ\200\235 or

ge Kavic 19 Intâ\200\231l L. Rep. 371.

Swiss courts now weigh

If

13

Extradition Act, No. 67 (1962).

See a150, LAWSA (Ed

Joubert) Vol. 10, p. 151; LANSDOWNE & CAMPBELL, SOUTH AFRICAN
CRIMINAL LAW AND PROCEDURE, Vol. 5, p. 32, e

se

ICRC, to create a measure of humanitarian protection to political prisoners and detainees as well as prisoners of war, are well’ known.

It is submitted, therefore, that by allbwing the ICRC to visit prisoners in this category the South African Government has recognized the political nature of the offenses for which they have been convicted.

Finally, while state practice to date has been insufficient te conclude that Additional Protocol I to the Geneva Conventions of 194975 constitutes customary international law binding on South Africa, its clearly stated provisions and the tgavaux EgggagatgigeÂ§75 are evidence of interhational expectations that captured combatants who engaged in armed struggle against apartheid should be accorded a special status as prisoners.

No. 4 (1985) at 636.
PoLitics (1977) at 62 and 66.

See also David P. Forsythe, Humanitarian

75

Protocol Addition to the Geneva Conventions of 12

August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), opened for signature Dec. 12, 1977, 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

75

Under Article 1(4), Protocol I applies specifically to

peoples "fighting against colonial domination and alien occupation and against racist regimes..."
member of the United States delegation to the diplomatic conferences which drafted the Protbcol confirmed that the references to "colonial domination" and â\200\235racist regimesâ\200\235 were directed essentially at Southern Africa-- to South Africa, Namibia, (then) Rhodesia and to the Portuguese colonies.
Law or Hgmanitagian Po1itics? The 1974 Diplomatic Conference on Humanitagian Law, 16 HARV. INTâ\200\231L L. J. 1, 12 (1975).

A leading authority and

Baxter, Humanitarian

40

There can be little doubt that prisoners convicted bf offenses in this category constitute political prisoners. Considering extradition law doctrine, for example, many of the charges fall within the "pure" political offense category. Indeed, treason and subversion have been considered by many commentators as the primary examples of "pureâ\200\235 political offense559.

The political motive is clear and the actions are either aimed directly at the South African Government or are clearly designed to affect it. Also, as discussed above, by charging individuals under security legislation, as many are in this category, South Africa should be deemed to have conceded the political nature of the offense.

2.

Largely spontaneous attacks on property or individuals which were perceived as symbols of oppression (e.g., state-run inferior schools or other official buildings, township officials appointed under the Black Local Authorities Act, small shopkeepers with a reputation for gross exploitation of African township dwellers, members of the security forces, suspected informers, etc.).

Commonly, those arrested for activities of this type have been charged with common law offenses: public violence, arson, malicious damage to property, attempted murder and murder. This is perhaps the most difficult category about which to make generalizations. The range of activities falling into this

59

See supra, note 11.

â\200\230category is very broad.
In some cases, the prisoners may have
been charged with public violence for participation in a school
boycott which disrupted classes.
In other cases, the accused may
appear to have been arrested randomly during township-wide police
sweeps following security force actions against demonstrators or
mourners at funerals.
At times the accused in this category may
have been arrested in the context of a general political uprising
in a township.
Deaths may have occurred, and large numbers of
persons merely present during a melee may have been arrested and
charged with murder.
In a number of such cases, convictions have
been based on a tenuous expansion of the theory of "common
purpose" which attributes criminal responsibility to many in the
crowd who may have had no causal connection to the death.
Death
sentences have been imposed pursuant to convictions based on that
theory.
A careful case-byâ\200\224case assessment is most important in
determining the status of prisoners in this category.
As
established above, South African law recognizes that offenses
which, on their face, appear to be of a non-political nature, may
be considered political offenses in certain circumstances.
Violence will not ipgg gaggg preclude the offense from being
considered political;
To quote Van den Wijngaert again, â\200\235related
political offencesâ\200\235, may be defined as â\200\235in _Â§ common crimes which
are assimilated to political offences because the perpetrator
pursued a political purpose (subjective criterion) or because the