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The Prosecution of South African Apartheid Crimes Domestically and at the International Criminal Court

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I, Simo Sabelo Mthethwa declare that:

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ABSTRACT

The rule of law dictates that no one is above the law. The issue is whether this principle applies to apartheid crime perpetrators or not. Apartheid was declared a crime against humanity by the United Nations in the 1960s yet, to date, not even a single person has been prosecuted for the crime of apartheid in South Africa. The perpetrators of these inhumane and egregious crimes still walk the streets as if they did nothing wrong. Some have passed on without ever being held accountable for their roles in the apartheid crimes.

There appears to be a great reluctance to prosecute the said crimes. This reluctance can be seen both domestically and internationally. The National Prosecuting Authority and the International Criminal Court have not done their part. The continued non-prosecution of apartheid crimes amounts to condonation of these inhumane and egregious crime. This paper will consider the question whether the International Criminal Court has jurisdiction to deal with the South African apartheid crimes. It will also consider the jurisdiction and the role to be played by the National Prosecuting Authority in bringing perpetrators to book.

TABLE OF CONTENTS

1.1 Introduction 7
1.2 Background of the study 7
1.3 Rationale of the study 9
1.4 Research Questions 10
1.5 Research Methodology 10
1.6 Literature Review 10
1.7 Outline of the Dissertation 13
2.1 Introduction 14
2.2 Defining Apartheid 14
2.3 Apartheid as a Crime Against Humanity 15
2.3.1 Charter of the International Military Tribunal *15*
2.3.2 Control Council Law No. 10 ..... *15*
2.3.3 International Tribunal of the Former Yugoslavia *16*
2.3.4 International Tribunal for Rwanda *16*
2.3.6 The Apartheid Convention *16*
2.3.5 Draft Code of Crimes against the Peace and Security of Mankind *17*
2.3.7 The Rome Statute of the International Criminal Court *17*
2.4 Conclusion 18

CHAPTER THREE: PROSECUTION OF APARTHEID CRIMES IN THE INTERNATIONAL CRIMINAL COURT 20

3.1 Introduction 20
3.2 The Rome Statute of the International Criminal Court 20
3.3 Enforced Disappearances 22
3.4 Enforced Disappearances as a Continuing Crime 24
3.5 Continuing Crimes and the Jurisdiction of the ICC 26
3.6 Conclusion 27

CHAPTER FOUR: DOMESTIC PROSECUTION OF APARTHEID CRIMES 29

4.1 Introduction 29
4.2 Powers of the National Prosecuting Authority 29
4.3 Jurisdiction of the NPA and Domestic Courts to Prosecute Apartheid Crimes 31
4.4 The Impact of TRC to the Prosecution of Apartheid Crimes 34
4.5 The Impact of the Recently Re-Opened Inquests to Domestic Prosecution 37
4.5.1 Timol Inquest 37
4.5.2 Aggett Inquest 39
4.5.3 Calls to Re-Open Inquests of Other Political Deaths 40
4.6 Conclusion 40

CHAPTER 5: CONCLUSION 42

5.1 INTRODUCTION 42
5.2 RECOMMENDATIONS 43
5.2.1 Recommendation 1 (Prosecution by the ICC) *44*
5.2.2 Recommendation 2 (Domestic Prosecution) *45*
5.3 CONCLUSION 46
BIBLIOGRAPHY……47-50

CHAPTER ONE: BACKGROUND AND INTRODUCTION

1.1 Introduction

This paper explores the key challenges that impede the prosecution of South African apartheid crimes. The contention is that apartheid was declared a crime against humanity yet, to date, there appears to be a reluctance in prosecuting such crimes especially in South Africa. This reluctance is seen both in the International Criminal Court and domestically. It is on this basis that this study seeks to explore the impediments in this regard with a view of advancing recommendations to remedy this impasse and ensure successful prosecution of the said crimes.

In South Africa apartheid was legalized by the National Party.[1] In 1948 the National Party won the elections using the slogan "apartheid",[2] The government implemented and defended apartheid by any means necessary. Those who opposed it were suppressed, killed, detained without trial, some were made to disappear without a trace. Apartheid entailed oppression and domination by one racial group. In 1966 the United Nations declared Apartheid a Crime against Humanity and in 1973 adopted the Apartheid Convention[3] with an object do deal with the prosecution of the crime of apartheid. The crime of Apartheid was further included in the definition of Crimes Against Humanity[4] in the Rome Statute.[5] Scholars as well have written in support of the notion that Apartheid is a crime against humanity and that those responsible for such a heinous crime should be punished. However, the key challenge as aforementioned is that to date, despite such literature and legislative provisions (explored below), there has not been any prosecution of those crimes which means that families who suffered such injustices have not found closure.

It can be said that South Africa, particularly NPA and (other pertinent law enforcement agencies), have failed to prosecute the apartheid crimes which are the crimes against humanity. Our country has therefore not fully embrace the ethos of the Constitution in that the affected people are not enjoying the fruits of democracy. It is imperative that SA deals with such crimes in order to achieve substantive equality and ensure that justice is served to the affected individual thereby working towards an equal society.

1.2 Background of the study

Over the last five decades, there has not been much progress in as far as the prosecution of apartheid crimes is concerned despite numerous instruments in favor of its prosecution and

[1] The National Party is the political organization which implemented apartheid in 1948 in South Africa.
[2] Which literally means "apartness"
[3] The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in 1973 and came into force in 1976.
[4] Article 7(1)(j) of the Rome Statutes of the International Criminal Court
[5] Rome Statute of the ICC, done in Rome on 17 July 1998, in force on 01 July 2002.

writers advocating for same. The adoption of the Apartheid Convention[6] was a beacon of hope for those who were victims of the crime of apartheid. This Convention was adopted mainly to deal with the South African cases. Before the adoption of the Rome Statute of the ICC, the United Nations did not have a Convention to deal with, prosecute or punish International Crimes. It would establish a Tribunal with focused terms of reference to deal with International Crimes as they crop up. One can make an example of the Charter of the International Military Tribunal[7] and the International Tribunal for Rwanda. These two Tribunals were established by Conventions to deal with reported crimes in specific countries. Those accused of wrongdoings were swiftly prosecuted and punished under the said Charters/Conventions. The idea was that the Apartheid Convention will follow the same route, that is, bring perpetrators to book. However, that was not the case. Instead it never got off the ground. Some scholars have argued that the main cause of such was that most European countries were actually benefactors of apartheid South Africa, and complicit in the atrocities suffered by majority of South African.

In 1994 South Africa became a democratic country and the first black President was installed. The country entered a new era of democracy and apartheid was abolished. To many victims of the apartheid crimes, this was a chance to get justice. Many were hoping to see perpetrators of apartheid being brought to justice by the new democratic government. However, this was not the case. The first thing that the new democratic government did, to deal with apartheid crimes, was to establish TRC.[8] TRC was a platform for both the oppressor and the oppressed to seat around the table and reconcile. On the table was immunity from prosecution for "political crimes" in exchange for the truth. Meaning that those that came out with the truth would be granted amnesty or immunity from prosecution, but those that concealed the truth would suffer the might of the law. The NPA has records of the TRC and the names of those that were not granted amnesty. However, twenty-seven years later not even a single person has been prosecuted for the crimes of apartheid that amounted to crime against humanity.

In terms of the Constitution of the Republic of South Africa,[9] the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the State, and carry out any necessary functions incidental to instituting criminal proceedings.[10] It will be argued that the powers alluded to in the said Section also include powers to prosecute Apartheid crimes regardless of how far back they were committed. This makes the NPA and the domestic prosecution route more feasible and beneficial to the victims. The NPA has recently as 2021 decided to finally prosecute the so-called Cosas 4[11] and Cradock 4[12] cases. The High Court has also recommended prosecution of the apartheid police officials who were responsible for the

[6] The 1973 Convention on the Suppression and Punishment of the Crime of Apartheid
[7] Used in the Nuremberg Trials.
[8] The Truth and Reconciliation Committee.
[9] The Constitution of the Republic of South Africa Act 108 of 1996
[10] Section 179(2) of Act 108 of 1996
[11] Two apartheid Activists who were tortured to death by the Apartheid police in Cradock Farm in 1982
[12] Four apartheid Activists murdered by Security Forces in 1985

death of apartheid Activists Ahmed Essop Timol[13] and Dr. Niel Hudson Aggett.[14] This paper will also discuss the above-mentioned Inquests, the decisions to prosecute and other outstanding cases of a similar nature with a view of exploring how they might unfold in court in terms of procedures and strength or weaknesses of the said cases.

On the other hand, the Rome Statutes of the International Criminal Court came into effect in July 2002 and the statute does not apply retrospectively, that is, to most South African Apartheid crimes. However, the ICC can deal with and prosecute international crimes, including apartheid, committed before 2002 if those crimes are "continuing crimes" like "enforced disappearances". Enforced disappearances was one of the features and strategies used by the apartheid government. Anti-apartheid activists were abducted in numbers for various purposes. There are some who were abducted and up until today their whereabouts and fate remains unknown. Article 17(1) of the U.N Declaration on the Protection of All Persons from Enforced Disappearance,[15] "act constituting enforced disappearance shall be considered a continuing offence as long as the perpetrator continues to conceal the fate or whereabouts of persons who disappeared and their fates remains unclear". This paper will, therefore, also critically analyze the shortcomings of the ICC and its limited jurisdiction in relation to the South African apartheid crimes.

Prosecution of apartheid crimes and perpetrators thereof would bring closure for many families of those that died in the fight against the apartheid regime. It will also provide healing for the country as a whole. This study will address the significant role that can be played by the law enforcement agencies in eradicating the challenges identified as well as dominant systems towards effective prosecution of apartheid crimes and provide recommendations thereto. The South African Constitution is a transformative instrument – it heralded democracy and embodies values such as equality, dignity and freedom in society. These values are important to dismantle barriers towards effective prosecution of the crimes against humanity committed during apartheid.

1.3 Rationale of the study

The reluctance to prosecute or continued non-prosecution of apartheid crimes is a violation of the Constitution and the Rome Statute of the ICC. Whereas the prosecution of these crimes and perpetrators thereof would be a step in the right direction as it will ensure that South Africans in general and in particular families of victims of apartheid crimes get closure. This study will investigate the lack of interest by law enforcement agencies towards the prosecution of apartheid crimes in South Africa and provide recommendation to ensure not just prosecution, but effective prosecution of these heinous crimes. There is a gap in this area in that while research has focused more on the topic in general, it appears that little has been said on whether

[13] The Re-Opened Inquest into The Death of Ahmed Essop Timol, I.Q 01/2017, Gauteng Division, Judgment by Mothle J.
[14] The Re-Opened Inquest into the Death of Niel Aggett, Case No: 445/2019, Gauteng Division, judgment by Makume J.
[15] Adopted by General Assembly Res. 47/133 of 18 December 1992

the I.C.C can prosecute any of South African apartheid crimes which this study seeks to examine. This study will also examine the reluctance of the NPA and also provide recommendations to ensure that they prosecute these crimes.

1.4 Research Questions

i. Can South African law enforcement agencies still investigate and prosecute apartheid crimes, or is it a little too late?

ii. Does the International Criminal Court have jurisdiction to prosecute South African apartheid crimes even though apartheid was abolished before the Rome Statute of the ICC came into effect?

iii. What are the challenges hindering prosecution of apartheid crimes and what are the possible solutions?

1.5 Research Methodology

This will be a desktop based research. It will give a critical analysis and review of both primary and secondary sources dealing with crimes against humanity in general and the crime of apartheid specifically. This study will be based on qualitative method of research as I will be consulting primary sources such as the Rome Statute of the International Criminal Court, the South African Constitution, International Conventions, relevant case law and legislation. The study will also look at available literature such as journal articles, textbooks and other publications to answer the abovementioned questions.

1.6 Literature Review

In this part of the proposal we shall deal briefly with some literature in favor of the prosecution of such crimes and their perpetrators as we argue for prosecution. This paper will argue that the ICC has limited jurisdiction in as far as South African cases are concerned. The ICC can only prosecute crimes of "enforced disappearance" which are "continuing crimes" by nature. It will, however, argue that domestic prosecution will be a more viable and convenient route since it has not limit.

Slye,[16] prepared a submission to the TRC[17] arguing that Apartheid was a Crime Against Humanity. He argues that apartheid consists of widespread and systematic persecution on racial grounds, as well as other inhuman acts, and demonstrate that apartheid meets the definition of a crime against humanity. In this submission or papers he chronologically narrates historical events that

[16] Ronald C. Slye, Seattle University of Law Professor and consultant in International Law to the South African Truth and Reconciliation Commission.

[17] Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission, 20 Michigan Journal of International Law, 267 (1996)

developed the concept of a crime against humanity before the Rome Statute came into existence. Of great importance and relevance to this paper is the definition of apartheid[18] as per the Apartheid Convention.[19] Slye argues that most countries agreed that apartheid was a crime against humanity, but notes that they refused to endorse it for other issue, *inter alia*, extended jurisdiction. This, however, changed in 1984 as all member States voted for the resolution save for the U.S.

Alan Nissel,[20] in his publication[21] writes about the limited nature of the ICC's jurisdiction and makes a strong argument for the ICC to deal with continuing crimes like enforced disappearances even though they were committed before the effective date of the Rome Statute. He avers that continuing nature of a crime has a significant impact on the jurisdiction of the ICC. Further, that in the case of enforced disappearances, if someone incorrectly analyzes the crime as an ordinary crime, then abductions that began prior to the entry into force of the Rome Statute are precluded from the ICC's jurisdiction. He then states that if, however, if a conduct is viewed after the initial abduction as not having ended, the continuing crime can fall within the ICC's jurisdiction, so long as the abductee is unaccounted for after the entry into force of the Rome Statute. The Rome Statute of the ICC came into operation in July 2002. Apartheid was abolished in 1994. One of the strategies of the Apartheid government was enforced disappearances. Some political activists who were abducted before 2002 are to date still without a trace and their fate remain unknown. This paper would argue that the ICC would still enjoy jurisdiction for those cases where abductees' fate or whereabouts remain unknown to date.

Sarkin[22] argues that an enforced disappearance is recognized as an international crime and a wrongful act by international customary law, treaties and jurisprudence: due to its continuous and multi-offensive nature as well as to the multiplicity of victims. Enforced disappearance requires a *sui generis* regime and constitutes *per se* a violation of various human rights. Further, that the NPA has not done enough to bring perpetrators to book and suggests that such is motivated by, amongst other reasons, political interference even from within the ANC itself. It is argued, however, that this is a crime that requires the international community to act decisively against.

Gevers[23] has raised a concern that there has never been a single prosecution of the crime against humanity of apartheid committed in South Africa despite the fact that apartheid was declared a crime against humanity by the United Nations General Assembly in 1966[24]. He argues that as much as the apartheid is generally accepted as a crime against humanity there has been an

[18] Article I(1) of the Apartheid Convention
[19] International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in 1973
[20] Alan Nissel, Doctoral Candidate at University of Helsinki
[21] Continuing Crimes in the Rome Statute, 25 Michigan Journal of International Law, Issue 3, 2004
[22] Dealing with Enforced Disappearances in South Africa (with a focus on the Nokuthula Simelane case) and Around the World: The Need to Ensure Progress on the Right to Truth, Justice and Reparations in Practice
[23] Christopher Gevers, Lecturer, School of Law, University of Kwa-Zulu Natal
[24] Prosecuting the Crime Against Humanity of Apartheid: Never, Again, (2018) African Yearbook on International Humanitarian Law 25

ongoing commitment not to prosecute it and its perpetrators. He submits that 'the crime of apartheid that were too 'young' to be acceptably included in the 1968 New York Convention were too old to be included in the 1998 Rome Statute'…'it would seem it is never right to prosecute certain crimes or put differently, the time is always right to never prosecute such crimes'. He, further, criticizes the International Criminal lawyers of their non-condemnation of the amnesty granted by the TRC to perpetrators of apartheid crimes.

As part of the way forward, Raligilia[25] suggests that the State should promote a culture of accountability irrespective of the era and the politically charged indictments in respect of which apartheid crimes were committed. Further that the NPA has a constitutional mandate to prosecute without fear, favour or prejudice.[26] She then submits that the current reluctance to prosecute these crimes gives an impression that there is fear or favour in relation to prosecuting he perpetrators. He also notes that there might be challenges in effective prosecution because some witnesses may be untraceable or no longer available, but then suggests that 'there are circumstances where hearsay evidence may be admissible, in the interest of justice'.

While the literature explored lack of appetite or interest to prosecute apartheid crimes, it appears that there has not been much focus on the enforcement with particular reference to relevant institutions which this study seeks to explore. It will be argued that, even though there is a plethora of literature on this subject, not much has been said about the feasibility of the prosecution of South African apartheid crimes in the ICC. It is suggested that the ICC enjoys jurisdiction on South African apartheid crimes of enforced disappearances, which was one of the strategies of the apartheid regime, because of their continuing nature. The available literature has not suggested how South Africa as the member State or individuals may seek justice from the ICC for the apartheid atrocities and this is what this paper will expound on.

It is submitted that the NPA has a Constitutional obligation to prosecute apartheid crimes without fear, favour or prejudice. However, it has not lived up to its constitutional obligation. This paper will further explore the role that can be played by the NPA in bringing perpetrators to account. This study is done at a time where the High Court[27] have recently ordered that some of the Security forces officers be prosecuted for the deaths of Timol[28] and Aggett.[29] The NPA has also recently decided to prosecute the Cradock 4 and Cosas 2. This paper will explore how these cases might unfold in court and how they might further affect other similar apartheid cases.

[25] Konanani Happy Raligilia, Senior Lecturer, University of South Africa
[26] Beyond Foot-Dragging: A reflection of the Reluctance of South Africa's National Prosecuting Authority to Prosecute Apartheid Crimes in Post-Transitional Justice, Obiter 2020, 63
[27] High Court of RSA, Gauteng Division, Pretoria and Johannesburg respectively
[28] The Re-Opened Inquest into The Death of Ahmed Essop Timol, I.Q 01/2017, Gauteng Division, Judgment by Mothle J
[29] The Re-Opened Inquest into the Death of Niel Aggett, Case No: 445/2019, Gauteng Division, judgment by Makume J.

1.7 Outline of the Dissertation

- **Chapter 1: Introduction/Background**

In this chapter I will introduce the topic and give an overview of the research paper. It will also introduce some concepts upon which this research is based and thus draw the attention of the reader. The background will outline a detailed explanation of the research problem and the rational thereof. It will include the research questions and how will the said questions be answered.

- **Chapter 2: Apartheid as a Crime Against Humanity**

In this chapter the paper will deal with the definition of crimes against humanity and explore in details how the crime of apartheid finds its way into this category of international crimes. It will look at the literature and conventions in favour of defining apartheid as a crime against humanity.

- **Chapter 3: Prosecution of Apartheid Crimes in the International Criminal Court**

In this chapter we will explore and analyse the role of the ICC in the prosecution of the South African apartheid crimes. It will review International Conventions or Charters together with literature and ultimately explore whether the ICC has jurisdiction to deal with the crimes in question.

- **Chapter 4: Domestic Prosecution of Apartheid Crimes**

This chapter will deal with the domestic avenue of prosecuting apartheid crimes. It will explore challenges hindering prosecution of these crimes and seek to provide recommendations to such. This chapter will also look at the impact of the TRC to non-prosecution of apartheid crimes. It will also deal with the implications of the recently decided inquest into the murders of Timol and Aggert and how they find pave the way for future prosecutions.

- **Chapter 5: Conclusion**

This chapter will provide concluding remarks and recommendations to the problems identified.

CHAPTER TWO: APARTHEID AS A CRIME AGAINST HUMANITY

2.1 Introduction

This chapter deals with the definition of the crime of apartheid. The chapter will also help the reader to understand how the crime of apartheid fits within the realm of the crime against humanity. This chapter will touch briefly into the history of this crime and also dissect how apartheid came to be declared as a crime against humanity. The concept "apartheid" was introduced in South Africa by the National Party[30] in 1948. The National Party campaigned for the National elections using the slogan "apartheid" which translates to "apartness". The main objective of apartheid was to keep the South African population divided on racial lines. Under apartheid, black and whites were not allowed to even reside in the same neighbourhood. The then government enacted laws and polies to ensure that the white minority had the upper hand whilst keeping other races inferior and sub servants to the whites. Those who opposed such a regime were brutally murdered, exiled, tortured, persecuted, detained without trial and even made to disappear. Apartheid was declared a crime against humanity by the United Nations as far back as 1966, however, it is shocking that years later no one has been prosecuted for this crime against humanity. The lack of willingness to prosecute the crime of apartheid is strikingly shocking looking at the various conventions, literature and declaration confirming apartheid as a crime against humanity.

2.2 Defining Apartheid

It is important that one starts by defining the crime of apartheid. The crime of apartheid can be simply described as a system of legislation that upheld segregationist policies against non-white citizens in South African.[31] The Apartheid Convention[32] defines apartheid as the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practiced in Southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.[33] The article, thereafter, goes on to give a list of conducts which fall within the scope of the crime of apartheid. Such list includes, *inter alia*, measures that divide the population along racial lines, prohibition of interracial marriages. It also includes murder, torture arbitrary arrests and inhumane treatment of members of racial groups opposing apartheid. It also includes and prohibits legislative measures that discriminate in the political, social, economic and cultural fields.

[30] A former Political Party in South Africa

[31] History.com Editors: https://www.history.com/topics/africa/apartheid

[32] The International Convention on the Suppression and Punishment of Apartheid, G.A. Res. 3086, 28 GAOR (No. 50), U.N. Doc. A/9 233/Add.1. 30 November 1973,

[33] Article 2 of the Apartheid Convention

Another definition is found in the Rome Statute[34] and provides that: "the crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."*[35]*

It is worth noting that the definition adopted in the Apartheid Convention was motivated by what was happening in Southern Africa and South African in particular. Whereas, the definition preferred in the Rome Statute does not include reference to "practices in the Southern Africa". One must accept that apartheid did not only occur in South or Southern Africa and that the exclusion of the reference to "practices in Southern Africa" in the Rome Statute is welcomed. South Africa through the National Party government was the cradle of apartheid, but apartheid (systematic racial discrimination) was experienced in other countries as well.

2.3 Apartheid as a Crime Against Humanity

In as much as the Rome Statute has declared the crime of apartheid as a crime against humanity, it is important that one looks at the history underlying the final draft and declaration of this heinous crime as a crime against humanity. It is also important that one also looks at the various historic treaties and conventions that have defined and described crimes against humanity. One would note that the crime of apartheid has not always been part of the family of crimes against humanity. So this part of the paper will look at when and how the crime of apartheid came to be recognised as a crime against humanity and how the definition of crimes against humanity has developed over the years.

2.3.1 Charter of the International Military Tribunal

In 1945 the United Nations adopted the Charter of the International Military Tribunal and described Crimes against Humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetuated."[36]

2.3.2 Control Council Law No. 10

Control Council Law No. 10 was promulgated in 1946 to deal with the prosecution of war criminals and offences which were not covered by the International Military Tribunal Charter.

[34] Rome Statute of the International Criminal Court, done in Rome on 17 July 1998, in force on 01 July 2002
[35] Article 7(2)(h) of the Rome Statute
[36] Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1546, 1547, E.A.S No. 472, 82 U.N.T.S 284

The definition of crimes against humanity as per Control Council Law is "atrocities and offenses, including, but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where it is perpetrated."[37]

2.3.3 International Tribunal of the Former Yugoslavia

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia was promulgated by the United Nations to deal with humanitarian law violations in the former Yugoslavia. It defined crimes against humanity as "the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."[38]

2.3.4 International Tribunal for Rwanda

The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda[39] was established in 1994 to deal with international crimes perpetuated in Rwanda. This charter took the definition of crimes against humanity further than the preceding charters and defined it as "the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial and religious grounds: (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."

2.3.6 The Apartheid Convention

Kemp[40] and Nortje, [41] note that the Apartheid Convention was one of the international community's legal response to the racist policies and practices applied in South Africa.[42] Article

[37] Article 2(1)(c)
[38] UN Security Council Resolution827, 25 May 1993
[39] Security Council Resolution 955, art. 3, at 4, U.N Doc. S/RES/955 (1994); Statute of the International Tribunal of Rwanda, 33 I.L.M. 1598, 1603 (1994)
[40] Kemp, Gerald; Professor of Criminal Law, UWE Bristol, UK.
[41] Nortje, Windell; Senior Lecturer in Law, University of Western Cape, South Africa.
[42] Kemp and Nortje; Prosecuting the Crime against Humanity of Apartheid: The Historic First Indictment in South Africa and the Application of Customary International Law, JICJ (2023) 405-430

I(1) of the International Convention on the Suppression and Punishment of the Crime of Apartheid[43] declares that:

> *"The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security."*

Slye, submits that the Apartheid Convention was not unanimously adopted on technical grounds and that the classification of apartheid as a crime against humanity was well received.[44] He further states that others took issue with the fact that the Apartheid Convention attempted to expand international criminal jurisdiction and enforcement. The Apartheid Convention seek to punish and prosecute individuals who regardless of their motive or place of residence, abetted, encouraged, cooperated in the crime of apartheid.[45] Under this convention any State would have mandatory jurisdiction to prosecute such individuals or organization.

2.3.5 Draft Code of Crimes against the Peace and Security of Mankind

In 1996 the International Law Commission enacted the Draft Code of Crimes Against the Peace and Security of Mankind.[46] It defined crimes against humanity as "any of the following acts, when committed in a systematic manner or a large scale and instigated or directed by a Government or by any organization or group: (a) murder, (b) extermination, (c) torture, (d) enslavement, (e) persecutions on political, racial and religious grounds; (f) institutionalized discrimination on racial, ethnic, or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population, (g) arbitrary deportation or forcible transfer of population, (h) arbitrary imprisonment, (i) forced disappearance of persons, (j) rape, enforced prostitution and other forms of sexual abuse, (k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm."

2.3.7 The Rome Statute of the International Criminal Court

Gevers[47] argues that in 1998, the crime against humanity of apartheid was included in the Rome Statute of the ICC at the eleventh hour, and that it was promptly signed up to by a number of

[43] Also known as the Apartheid Convention, adopted in 1973, came into force in 18 July 1976

[44] Ronald C. Slye: Apartheid as a Crime against Humanity: A Submission to the South African Truth and Reconciliation Commission: Michigan Journal of International Law Vol. 20, Issue 2

[45] Article III of the Apartheid Convention

[46] Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the International Law Commission on the work of its Forty-Eighth Session, U.N GAOR, 51st Sess., Supp. No. 10, at 93, U.N. Doc A/51/10 (1996)

[47] Christopher Gevers, Lecturer, School of Law, University of KwaZulu Natal. gevers@ukzn.ac.za

States.[48] This resulted in the definition of the crimes against humanity being extended to include the crime of apartheid. Article 7(1)(j) of the Rome Statute defines crimes against humanity and lists different forms of crimes against humanity, but this paper will only focus on the addition of apartheid. The said article provides the following definition:

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

The Rome Statute goes further to define apartheid. Section 7(2)(h) defines apartheid as:

> *"The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime"*

The inclusion of apartheid in the Rome Statute under article 7 signified victory for the victims of this heinous crime. Lingaas,[49] notes that "the criminalization of apartheid and its inclusion in the Rome Statute, ensuring individual criminal responsibility, is more than a legacy to victims of systematic oppression and racial discrimination; the inclusion deserves merits as to the farsightedness of the international community when it comes to effectively dealing with current and future cases of apartheid."[50]

2.4 Conclusion

This chapter dealt with the evolution of the definition of crimes against humanity. The chapter looked at various International Conventions and Tribunals dealing with crimes against humanity and war crimes. It is clear that the definition of crimes against humanity, as defined in the said conventions and by the said Tribunals, initially did not include the crime of apartheid. As much as the other conventions referred to racial discrimination and segregation, the term apartheid was nevertheless not used. It might be accepted that before 1973, apartheid might not have been properly defined and understood by the International community hence the omission. This is based on the fact that the crime against humanity of apartheid was properly codified for the first time in the 1973 Apartheid Convention. The Apartheid Convention explicitly declared apartheid as a crime against humanity and called for the prosecution of those responsible of same. It was

[48] Christopher Gevers, Prosecuting the Crime against Humanity of Apartheid: Never, Again: (2018) African Yearbook on International Humanitarian Law 25

[49] PhD Candidate, Faculty of Law, Department of Public and International Law, University of Oslo, email: carola.lingaas@jus.uio.no.

[50] Carola Lingaas: The Crime Against Humanity of Apartheid in a Post-Apartheid World: Oslo Law Review, 2015, Issue 2, 86-115: http://dx.doi.org/10.5617/oslaw2566.

indicated in this chapter that the said convention was never put to effective use and that no one was ever prosecuted using it.

The Rome Statute incorporated apartheid in its definition of the crimes against humanity, which was a significant move. This inclusion came at the eleventh hour. The inclusion of apartheid in the definition of the crimes against humanity brought hope to those who had suffered from apartheid policies, especially here in South Africa. In fact, the adoption of the Apartheid Convention and the Rome Statute was a clear indication that this gruesome and inhumane crime will not be tolerated. Having defined the crime of apartheid, there is no doubt that it falls within the ambit of the crimes against humanity. The next chapter will deal with the question of whether the ICC has jurisdiction to prosecute South African apartheid crimes.

CHAPTER THREE: **PROSECUTION OF APARTHEID CRIMES IN THE INTERNATIONAL CRIMINAL COURT**

3.1 Introduction

It is common cause that apartheid is a crime against humanity as defined in article 7(1)(j) of the Rome Statute. It is a known fact that the International criminal court has never prosecuted anyone in relation to the crime of apartheid. The question is why. One may argue that when the Rome Statute came into effect apartheid was already abolished in South Africa and by virtue of that the ICC has no jurisdiction. On face value, this argument is correct. One may also refer to the common law principle that the statute does not apply retrospectively.

In this chapter, however, one will argue that such is not a foregone conclusion. One will argue that the ICC may still enjoy jurisdiction over some of the South African apartheid crimes, particularly "enforced disappearances". This chapter will dissect this crime and argue that, by its nature, it may still be heard by the ICC.

3.2 The Rome Statute of the International Criminal Court

The Rome Statute is the founding document for the International Criminal Court. It is through this statute that the International Court finds its existence and authority. Like any other statute, the Rome Statute does not apply retrospectively. The Rome Statute contains crucial clauses which are relevant for this chapter and the argument pursued herein. I will mention few of these clauses which are self-explanatory.

Before July 2002,[51] there was no permanent International Court to deal with core crimes. The term "core crimes" refers to the most serious international crimes, namely, war crimes, crimes against humanity, genocide and the crime of aggression. Since there was no dedicated International Criminal Court, the United Nations or the International Community would always react by establishing a special tribunal to deal with whatever crime at hand. Nuremberg is one example of a reactionary tribunal. Ironically, the Rome Statute of the ICC was born from the Apartheid Convention. The Apartheid Convention provided for the prosecution of the perpetrators of apartheid by an international penal tribunal. The team that was tasked to do a study and research into the establishment of the said international penal tribunal developed their study and ended up recommending the establishment of the ICC. The said team was led by Cherif Bassiouni.[52] Gevers,[53] notes that 'Bassiouni went a few steps further producing not only a study but a draft convention, not only for the crime of apartheid but for international crimes generally'. This study was conducted in 1980. It took more than twenty years for the United Nations to adopt

[51] The effective date; The Rome Statute of the ICC came into effect in July 2002.

[52] Bassiouni, C; Professor of Law, DePaul University; Secretary-General of the International Association of Penal Law; Dean of the International Institute for Higher Studies in Criminal Sciences

[53] Gevers C; Africa and International Law; the Oxford Handbook of International Criminal Law (2020)

the Rome Statute. The promulgation of the Rome Statute was significant in that the ICC would deal with international core crimes instead of having to establish tribunals to deal with complaints like before.

As it has already been pointed out, the ICC is founded by the Rome Statute. Article 1 of the Rome Statute provides that:

> *"An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."*

Article 5 deals with the jurisdiction of the International Criminal Court and states that:

> *"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:*
>
> *(a) The crime of genocide;*
>
> *(b) Crimes against humanity;*
>
> *(c) War crimes;*
>
> *(d) The crime of aggression."*

The Rome Statute does not apply retrospectively. Article 11 (1) states: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Article 24 provides that: "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."

There are three methods by which the jurisdiction of the ICC may be triggered. However, for purposes of this paper, only Article 13(a) is relevant. Article 13 (a) provides that:

> *"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:*
>
> *(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14"*

This means that only States which have ratified the Rome Statute can enjoy a relationship with the ICC. South Africa is a party to the Rome Statute. The Rome Statute was "domesticated" by

South Africa in 2002 through the Implementation of the Rome Statute Act.[54] Article 14 (1) deals with the referral of a situation by a State Party and provides that:

> *"A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."*[55]

Now that I have dealt with the most relevant provisions of the Rome Statute, I will move on to discuss the crime of enforced disappearance and whether South African cases of enforced disappearances can be prosecuted in the ICC.

3.3 Enforced Disappearances

It was common practice for the apartheid regime to apprehend, arrest, detain and torture those who opposed the apartheid regime. For purposes of this paper, they will be referred to as "anti-apartheid activists" or "activists". It is common knowledge that most of the anti-apartheid activists were detained in sub-human conditions and without trial. It is also common knowledge that they were tortured in order to subdue them and to extract crucial information from them. Those who refused to surrender or to cooperate were tortured to death. Some were disappeared, that is, they were killed and their bodies destroyed or buried without the knowledge of their families. There are many of such cases here in South African.[56] Some families were able to recover the remains (bones) of their family members after 1994 as a result of the Truth and Reconciliation Commission.[57]

Some of the apartheid offenders were able to give credible information which led to the recovery of the remains of the activists they killed and buried without the knowledge of their family members. These families were able to rebury their remains in a dignified manner. However, some families were not that fortunate. Some of these families are still not aware what happened to their family members. They have, up to date, not found closure. Some parents lost their children during apartheid and they have also passed on without knowing the fate of their children. This scenario will be the basis of this chapter. The scenario described above is known as "enforced disappearance".

The crime of enforced disappearance is considered to be one of the most serious forms of crime against humanity. This crime is so serious that the United Nations saw it fitting to enact a convention to specifically deal with this crime and impose an obligation on the Nations to ensure

[54] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[55] Article 14(1) of the Rome Statute of the ICC.
[56] Nokuthula Simelane is one of the cases which remain unresolved.
[57] TRC was a commission set up to facilitate reconciliation between the apartheid offenders and the family members of those killed by apartheid regime

that those who perpetrate this crime are punished. The Preamble of the Convention on Enforced Disappearances[58] provides that:

> *"**Aware** of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity"*
>
> *"**Determined** to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance"*
>
> *"**Considering** the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation"*
>
> *"**Affirming** the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end"*

Article 2 of the Convention on Enforced Disappearance defines the crime of enforced disappearance and provides that:

> *"For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*

Article 2 of the Convention on Enforced Disappearance has a similar definition to the one provided in Article 7(2)(i) of the Rome Statute. Enforced disappearance is recognised in the Rome Statute and forms part of the definition of the crimes against humanity. Section 7(2)(i) of The Rome Statute defines enforced disappearance as:

> *"'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period"*

Both definitions make it clear that the abductor must have been acting under the authority, support or acquiescence of the State or a political organization. It also requires concealment of information about the fate and/or the whereabouts of the abductee. As stated above, this was one of the strategies of the apartheid government in South Africa. The law permitted security forces to detain people for purpose of interrogation and to use whatever force necessary to make

[58] International Convention for the Protection of all Persons from Enforced Disappearance; adopted by the U.N General Assembly in 2006 and came into effect in 2010.

them divulge crucial information about anti-apartheid activism. Some abductees would die and their bodies concealed from the families.

Sarkin,[59] sums up the above submission by arguing that "disappearances are however mostly commonly employed as a State's policy during times of political opposition, domestic unrest or armed conflict. They are often used to silence political adversaries. They are used to punish opponents, as well as means to deter others that may have philosophical or political differences with the State."[60] He further describes this crime by quoting, with approval, the description by O'Connell and remarks that "disappearance are a means by which a State can get rid of the opponents, without publicity of a trial. For the victims and their families, enforced disappearances are particularly horrific."[61]

In 1988 the Inter-American Court of Human Rights dealt with one of its ground breaking cases on enforced disappearances. In the case of Velasquez v Honduras,[62] the court stated the following regarding the crime of disappearances:

> *"Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years."*

It is without a doubt that the crime of enforced disappearance is one of the cruellest and gruesome form of crimes against humanity. Not only does it offend one's right to freedom of movement, but also ones right to dignity, right against cruelty, right against torture and the right to life itself. This crime also does not just affect the abductees, but their families as well.

3.4 Enforced Disappearances as a Continuing Crime

It has already been established that enforced disappearance is another form of crimes against humanity.[63] The phrase continuing crime entails that a crime is committed and maintained as opposed to it being completed crime. The crime against humanity of enforced disappearance of persons is committed when the perpetrator abducts a victim and its duration can continue for as long as the abductee is unaccounted for (even after death).[64] This submission is in line with the

[59] Jeremy Sarkin; Attorney South Africa, Attorney New York USA, Professor of Law, University of South Africa, former Chair-Rapporteur, U.N Working Group on Enforced or Involuntary Disappearance.
[60] Dealing with enforced disappearances in South Africa (with focus on Nokuthula Simelane case) and around the world. The need to ensure progress on the rights to truth, justice and reparations in practice; Speculum Juris Volume 29 part 1 2015.
[61] O'Connell: "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?" 2005 Harvard International Law Journal 295, 296.
[62] Velasquez-Rodriguez Case: Judgment of July 29, 1988, Inter-Am. Ct.H. R (Set. C) No.4)1988)
[63] Article 7(1)(i) of the Rome Statute
[64] Nissel Alan; Continuing Crimes in the Rome Statute, Michigan Journal of International Law, vol. 25:653, spring 2004.

definition of enforced disappearance in article 7(2)(i). One of the significant elements of the crime of enforced disappearance is that the abductor must refuse to give information on the fate or whereabouts of the abducted person(s). That refusal to give information on the whereabouts or the fate of the abductee means that the crime continues for as long as such information is concealed.

In the case of Solórzano v Venezuela,[65] the U.N Human Rights Committee also confirmed the "continuity principle" by holding that:

> *"while claims concerning the initial detention and torture in 1977 were inadmissible, the continued detention and the ill-treatment after 10 August 1978 [the critical date] should be examined on the merits…"*

Counsel representing the victims (400) of the alleged deportation from Myanmar to Bangladesh[66] made submission in favour of continuity character of some crimes submitting that: in the Appeals Chamber of the ICTR in the Nahimana[67] case stated that "a crime is considered continuing if it 'continues after an initial illegal act has been consummated; a crime that involves ongoing elements (such as driving a stolen vehicle) that continues over an extended period."

The First Provisional Criminal Chamber of Peru's Supreme Court of Justice[68] dealt with the crime of enforced disappearances and reiterated that:

> *"the offence is a "continuous offence" because the crime continues to be committed for as long as the whereabouts or fate of the person who has disappeared remain concealed. In this sense, the offence is not part of the past but continues to be committed for as long as the above-mentioned conditions are met."*

This concept can be easily explained by comparing it to the common law principle that theft is a continuing offence. In Ssengendo v S,[69] Dolamo J at para. 27 stated the following:

> *"it is trite law that theft is a continuing offence and that a person who becomes an accessory thereafter by assisting the thief to escape is a socius criminis and as such guilty of theft. What is meant by theft being a continuous offence is succinctly set out in LAWSA:*
>
> *Theft is a delictum continuum as a continuing crime. This means that the theft continues as long as the stolen property is in the possession of the thief or of some other person who was a party to the theft, or even some person acting on behalf or even, possibly, in the interest of the original thief…"*

[65] Communication no: 156/1983, U.N Hum. Rts. Comm, Mar. 26, 1986 in 94 ILR 400, 401 (1994)
[66] Rohingya People, Submissions on behalf of Victims Pursuant to Article 19(3) of the Statute; No. ICCRoC46(3
[67] Prosecutor v Nahimana et al. case no. ICTR-99-52-A, 28 November 2007, para 721
[68] Peru, Supreme Court of Justice, First Provisional Criminal Chamber, Castillo Páez case, Case No. 0012-2006-HC/TC
[69] Ssengendo v S case no: A564/13, WCHC, judgment delivered on 22 September 2014

The same way theft continues for as long as the property is not recovered and in the possession of the thief, enforced disappearance continues for as long as there is no information of the whereabouts or the fate of the abductee. It is important at this point to mention that this crime will be complete once the abductor reveals information on what happened to the abductee. This will be so even if the abductee was killed. It also goes without saying that where the abductee was killed, the abductor will face a charge of murder as well.

3.5 Continuing Crimes and the Jurisdiction of the ICC

It is settled that enforced disappearance continues for as long as the whereabouts or fate of the abductee remains unknown. Imagine a person who was abducted by the apartheid security forces in the 1980s and to date his or her family does not know what happened to the abductee. The family does not know whether the abductee is still alive or whether he died because no one came forth with information. The crime continues regardless of whether the abductee is alive or deceased. This is not an ordinary crime. This background must be considered bearing in mind the provisions of article 24[70] which indicates that the Rome Statute does not apply retrospectively. This means that the ICC will not enjoy jurisdiction over crimes committed before the effective date of the Rome Statute.[71]

It is submitted that the continuing nature of enforced disappearance have an effect of bringing the said crime within the jurisdiction of the ICC. In this regard, Nissel[72] argues that if one views the conduct after the initial abduction as not having ended, the continuing crime can fall within the ICC's jurisdiction, so long as the abductee is unaccounted for after the entry into force of the Rome Statute. This is the case with South African scenario. Activists were abducted pre-1994,[73] but some of them still remain unaccounted for to date. The reason they remain unaccounted for is that those who were authorized by the State to abduct them have refused to disclose what happened to the abductees.

Nissel,[74] further contrasts Articles 11[75] and 24[76] of the Rome Statute and suggests that article 24 has included continuing crimes within the jurisdiction of the ICC because it omitted the verb "committed" after the noun "conduct". In simple terms, if the drafters of the Rome Statute intended to exclude crimes of enforced disappearance committed prior to the effective date, they would have done so by including the word or the verb "committed" after "conduct". This interpretation seems to be in line with the goals of the ICC which is ending impunity for these egregious crimes. Ntsebenza SC,[77] argues that "Although the ICC Act applies prospectively only,

[70] Article 24 of the Rome Statute.
[71] 01 July 2002, effective date of the Rome Statute.
[72] Supra, note 53
[73] The year South Africa abandoned Apartheid and became a democratic Country.
[74] Supra
[75] Article 11: jurisdiction of the ICC
[76] Article 24: non-retrospectivity of the Rome Statute
[77] Advocate Dumisa Ntsebenza SC;

and its application is therefore limited to offences committed after 2000, this limitation arguably does not apply to crimes that are continuous in nature, such as enforced disappearance."[78]

However, Sadat's[79] interpretation of articles 11 and 24 are to the effect that they exclude continuing crimes from the jurisdiction of the ICC. This view seems to suggest that perpetrators of enforced disappearances, which are continuing crimes and still continue to date, will never be held accountable by the ICC. If this view is to be followed, then the ICC would be promoting impunity. It is a pity that since 2002 the ICC has not had to deal with the interpretation of articles 11 and especially 24. One would expect that in their interpretation of article 24, the court should give an interpretation that will promote human rights, accountability and discourage impunity.

3.6 Conclusion

This chapter dealt with the prosecution of South African Apartheid Crimes in the International Criminal Court. It was noted that the Rome Statute came into effect in 2002 whilst apartheid was abolished in 1994. Articles 11 and 24 seem to be a stumbling block in the ICC's revisiting South African apartheid crimes. It was, however, submitted that even though the Rome Statute came into effect after apartheid was abolished, the ICC would still have jurisdiction over some of the South African apartheid crimes which have a continuing effect. More emphasis was put on the crime of enforced disappearance which is a continuing crime. There is consensus amongst scholars, legislation and case law that the crime of enforced disappearance is a serious form of a crime against humanity and needs to be dealt with.

Enforced disappearances was one of the strategies employed by the South African apartheid government to fight and suppress anti-apartheid activists. There are many cases of enforced disappearances where activists were abducted between the 1960s to early 1990s and their families still do not know what happened to their loved ones. One such well documented and publicised case is that of Nokuthula Simelane. The Simelane family still do not know what happened to their loved one.

The author is aware that the Rome Statute, in its definition of the crime against humanity[80], separates the crime of apartheid[81] from that of enforced disappearances[82]. It is submitted that, in the context of South Africa, it would be very hard to isolate the crime of enforced disappearances from that of apartheid. The two are inseparable, in the South African context, because enforced disappearances was one of the strategies of the apartheid regime. It is submitted further that the definition of the crime of apartheid is a broad term and as such it encompasses various inhumane acts and strategies used by the apartheid regime to defend and

[78] Para 38 of Opinion for National Prosecuting Authority concerning the TRC Component and TRC Prosecution
[79] Professor Leila N. Sadat; The ICC and the Transformation of International Law: Justice for the New Millennium 185-86 (2002)
[80] Article 7 of the Rome Statute
[81] Article 7(1)(j) of the Rome Statute
[82] Article 7(1)(i) of the Rome Statute

protect the apartheid system. These inhumane acts and strategies included, *inter alia*, murder, torture, enforced disappearances, etcetera.

It is submitted that the International Criminal Court has jurisdiction to prosecute crimes of enforced disappearances committed by the apartheid regime. This is so because this crime was committed in order to suppress anti-apartheid activists and in order to protect the apartheid system.

The next chapter deals with domestic prosecution of apartheid crimes in South Africa. It is noted that the National Prosecuting Authority is empowered to prosecute all criminal matters in South Africa, but it is concerning that they have never prosecuted perpetrators of apartheid.

CHAPTER FOUR: **DOMESTIC PROSECUTION OF APARTHEID CRIMES**

4.1 Introduction

We have noted in chapter three that the ICC is created by the Rome Statute which came into operation in 2002. We have also noted that it's jurisdiction is not retrospective.[83] However, it was argued that the ICC has jurisdiction to deal with continuing crimes which were committed before the effective date of the ICC. In this chapter, it is argued that the option to prosecute apartheid crimes domestically has no time limits. Section 18 of the Criminal Procedure Act[84] provides that there is no statutory limitation on the prosecution of crimes against humanity and war crimes as contemplated in Article 4 of the Rome Statute.[85] This chapter deals with the domestic prosecution of the apartheid crimes. This chapter will also explore the role of the National Prosecuting Authority in South African. The National Prosecuting Authority commonly known as the NPA is a body that is responsible for prosecuting offenders on behalf of the State. The NPA ought to exercise such functions without fear, favour and prejudice. The NPA is also independent and has its own enabling legislation. It is surprising, however, that the NPA has to date not prosecuted anyone in relation to the apartheid crimes.

4.2 Powers of the National Prosecuting Authority

The National Prosecuting Authority is a statutory body tasked with criminal prosecutions in South Africa. Like any other statutory bodies, the NPA derives its powers from legislation, that is, the Constitution[86] and the National Prosecuting Authority Act.[87] The Constitution and the NPA Act give the NPA powers to deal with all criminal matter and some relevant provisions will be discussed below. One will also look at some decided cases where the NPA duties were dealt with.

Our starting point is the Constitution. South African law is now based on the supremacy of the Constitution.[88] Prior to 1994, South Africa had no Constitution and that meant that State Institutions could do as they pleased. The NPA is founded in terms of the Constitution and its powers are defined therein. Section 179(2) of the Constitution[89] provides that:

> *"the prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings."*

[83] Article 24 of the Rome Statute
[84] Criminal Procedure Act 51 of 1977
[85] The Implementation of the Rome Statutes of the International Criminal Court Act 27 of 2002
[86] The Constitution of the Republic of South Africa, Act 108 of 1996
[87] Act 32 of 1998
[88] Section 2 of the Constitution
[89] The Constitution of the Republic of South Africa Act 108 of 1996

Section 179(4) of the Constitution[90] provides that:

> *"National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."*

The provisions of sections 179(2) and (4) were transplanted to and are regurgitated in the Preamble of the National Prosecuting Authority Act.[91] This symbolizes the importance of the authority vested on the NPA and its duty to prosecute without fear.

Similar provisions are found in section 20 of the NPA Act. Section 20 deals with the power of the NPA to institute and conduct criminal proceedings and provides that:

> "*(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-*
>
> > *(a) institute and conduct criminal proceedings on behalf of the State;*
> > *(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and*
> >
> > *(c) discontinue criminal proceedings,*
>
> *vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."*

In S v Basson,[92] the Constitutional Court dealt with an appeal by the State against the quashing of the charges preferred against Mr. Basson. In this matter Mr. Basson was accused of serious crimes against humanity which he committed during the apartheid era in furtherance of the apartheid regime's objective to get rid of those who opposed it. He faced*, inter alia*, charges of conspiracy to murder[93] where some of the said murders materialized outside South African borders. The NPA charged him and prosecuted him here in South Africa. Some of the charges were quashed because the High Court was not convinced that they had jurisdiction since those crimes materialized outside South Africa. The NPA had argued that, Basson was part of the planning (which was hatched in Pretoria) and even provided some of the poison that was used and manufactured locally.

The Constitutional Court reaffirmed the duties of the State to prosecute crimes and remarked that:

[90] Ibid, note 65
[91] National Prosecuting Authority Act 32 of 1998
[92] S v Basson 2005 (1) SA 171 (CC)
[93] In terms of Section 18(2) of the Riotous Assemblies Act, 17 of 1956.

"The constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework…"[94]

The court went further to state:

"The importance of the state's duty to prosecute crime is implicit in section 179(2) of the Constitution which provides that:

"The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter."[95]

The court further emphasized that the jurisdiction of the State, in our case the NPA, extend to cases predating our constitution by stating that:

"[T]he state's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the state to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes. We do not have all the details before us but it does appear that the crimes for which the accused was charged may well fall within the terms of this international law obligation. In the circumstances, it may constitute an added obligation upon the state. We conclude therefore that the question of the quashing of the charges in this case also raises a constitutional matter."[96]

4.3 Jurisdiction of the NPA and Domestic Courts to Prosecute Apartheid Crimes

This section focuses on the option to prosecute South African apartheid crimes against humanity within South Africa. In 1973, the United Nations declared apartheid as a crime against

[94] Para 32
[95] Para 33
[96] Para 37

humanity.[97] Apartheid was further included in the Rome Statute under the definition of the crime against humanity.[98] However, no one has ever been prosecuted for this heinous crime. Before 1994, South Africa was an apartheid State and all the organs of States were enjoined to protect the State by all means necessary. Therefore, one would not have expected the South African prosecutors to prosecute its own masters. Post 1994, the National Prosecuting Authority became independent from the executive and it was mandated by the Constitution to prosecute without fear, favour or prejudice. This means that, the NPA is now empowered to investigate and prosecute or decline to prosecute any case referred to them. It is astonishing, however, that thirty years into our democracy the NPA has not done enough in this regard.

Academics and authors have questioned the NPA's reluctance to prosecute the apartheid offenders. It is common knowledge that when South Africa transitioned from apartheid to democracy, there were reconciliatory talks between the then apartheid leaders and leaders of anti-apartheid movements. Those talks were known as the Truth and Reconciliation Commission (TRC). This paper will not dwell much into the details of the said commission. It will focus on what is necessary for the purposes of this paper. The TRC was created in terms of the Promotion of National Unity Act.[99] One of the integral objects of the TRC was that those who had committed atrocities during the apartheid era must come forward with the truth in exchange for amnesty from prosecution. It was, further, part of the talks that those who did not come forward will not be granted amnesty and will be prosecuted. Same applied to those who attended, but concealed information. There are numerous reports that there is quite a huge numbers of offenders who were not granted amnesty. However, they have not been prosecuted, thirty years after the TRC. The matters of those who were not granted amnesty are gathering dust in the desk of the NPA/NDPP.

Raligilia,[100] questions the reluctance to prosecute apartheid crimes and remarks that "the most genuinely controversial point for transitional justice in South Africa was the failure of the NPA to prosecute the perpetrators of gross human rights violations committed under the apartheid regime."[101] Raligilia, further goes on to submit that "the NPA has a constitutional mandate to prosecute without fear, favour or prejudice. Unfortunately, the current reluctance to prosecute those crimes gives an impression that there is fear or favour in relationship to prosecuting the perpetrators."[102]

Section 232 of the Constitution,[103] incorporates International Customary Law into South African law provided such law is consistent with our Constitution or Act of Parliament. In 2002, South

[97] The Convention on the Suppression and Punishment of the Crime of Apartheid was adopted in November 1973 by the General Assembly
[98] Article 7(1)(j) of the Rome Statute
[99] The Promotion of National Unity and Reconciliation Act 34 of 1995
[100] Raligilia Konanani Happy, LLB, LLM, LLM, Senior Lecturer, University of South Africa
[101] Raligilia, Beyond Foot Dragging: A Reflection on the Reluctance of South Africa's National Prosecution Authority to Prosecute Apartheid Crimes in Post-Transitional Justice
[102] Ibid, note 96
[103] Section 232 of the Constitution of the Republic of South Africa Act 108 of 1996.

Africa domesticated the Rome Statute by enacting the ICC Act.[104] The main objectives of the ICC Act is, *inter alia*, to create a framework to ensure that the Rome Statute is effectively implemented within South Africa,[105] to provide for the crime of genocide, crimes against humanity and war crimes,[106] to enable the NPA to prosecute such crimes and the High Courts to hear cases brought against any person accused of having committed such crimes within the Republic and even beyond our borders.[107] The ICC Act is, therefore, a crucial piece of legislation in the fight against impunity when it comes to crime against humanity of apartheid.

One must also bear in mind that like the Rome Statute and any other legislation, the ICC Act also does not apply retrospectively. In this regard section 5(2) provides that:

> *"no prosecution may be instituted against any person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute."*

This means that, even though it was submitted earlier that the jurisdiction of domestic courts is unlimited for serious crimes, the State or the NPA cannot rely on the ICC Act to prosecute all apartheid crimes which amount to crimes against humanity. In this regard, Kemp submits, in his article on the COSAS Four indictment, that neither the South African criminal courts nor the ICC has jurisdiction over the Rome Statute crimes since they were committed before the effective date of the Rome Statute and also prior to domestication of the Rome Statute via the ICC Act.[108] There is, however, I submit an exception to this general rule. In chapter three, *supra*, there was a lengthy discussion on the crime of enforced disappearances and how it can be accommodated by the ICC. The same argument applies herein regarding the ICC Act. My submission is that the ICC Act may be used to prosecute crimes of enforced disappearances committed before the effective date, but still continues or continued after the effective date.

The continuing nature of enforced disappearances and the need to deal with them was also emphasized by the U.N Working Group on Enforced or Involuntary Disappearances. The UN Working Group in its submissions, stated that:

> *"Even if some aspects of the violation [enforced disappearance] may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented. Similarly, in criminal law, the Working Group is of the opinion that one consequence of the continuing character of enforced disappearance is that it is possible*

[104] The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002
[105] Section 3(a) of the ICC Act 27 of 2002
[106] Section 3(c) of the ICC Act
[107] Section 3(d) of the ICC Act
[108] Kemp G and Nortje W; Prosecuting the Crime against Humanity of Apartheid. The Historic First Indictment in South Africa and the Application of Customary International Law, JICJ (2023) 405-430

to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated, and the conviction should cover the enforced disappearance as a whole."[109]

It is a widely-accepted that enforced disappearance is a continuing crime and as such deserves the full might of the law and need to be prosecuted under the ICC Act.

4.4 The Impact of TRC to the Prosecution of Apartheid Crimes

The Truth and Reconciliation Commission in South Africa was established to uncover detailed truths about human rights violations during apartheid in South Africa, and to encourage forgiveness, which is believed to be necessary to allow South Africa to put its past behind it and move forward.[110] The TRC was mandated by the Interim Constitution[111] which provided that:

"In order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under the Constitution shall adopt a law providing the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed."

In compliance with the prescript of the Interim Constitution, Parliament enacted the Promotion of National Unity and Reconciliation Act.[112] It has already been submitted that the TRC was empowered to investigate human right violation and crimes committed during apartheid. The TRC was empowered to either grant amnesty[113] to those who provided full disclosure to the satisfaction of the commission and refuse[114] amnesty to those who did not qualify or withheld information. The TRC was mandated to investigate the period from March 1960 to December 1993, later extended to May 1994. Section 20(1) of the Promotion of National Unity and Reconciliation Act[115] provides that:

"*(1) If the Committee, after considering an application for amnesty, is satisfied that*-

(a) the application complies with the requirements of this Act;

[109] Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48.
[110] Paul Lansing and Julie C. King; South Africa's Truth and Reconciliation Commission: The conflict between Individual Justice and National Healing in the Post-Apartheid Age; Arizona Journal of International and Comparative Law, Vol. 15, No. 3 1998
[111] Constitution of the Republic of South Africa Act 200 of 1993
[112] See note 82
[113] Section 20(7) of The Promotion of National Unity and Reconciliation Act 34 of 1995
[114] Section 21(1) of The Promotion of National Unity and Reconciliation Act 34 of 1995
[115] The Promotion of National Unity and Reconciliation Act 34 of 1995

(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."

The Act prohibited both civil and criminal liability for those granted amnesty. In this regard, section 20(7) of the Act provides that:

"(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organization or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence."

The granting of amnesty to apartheid perpetrators did not seat well with most of the human rights activists and international law scholars. The crime of apartheid was widely condemned as a crime against humanity, but when time to act against the perpetrators presented itself, no action was taken. The proposed granting of amnesty and more specifically section 20(7) was challenged in the Constitutional Court in the case of AZAPO.[116] In this case the applicants challenged the constitutionality of section 20(7) of Act 34 of 1995[117] and wanted same to be declared unconstitutional. The applicants argued that s 20(7) violated citizens' right to access to court and have disputes settled by court as provided by section 22 of the Interim Constitution.[118] The court, however, found that section 20(7) was constitutional. It also acknowledged that access to court as provided for in section 22 was an important right, but that the said right was limited in terms of the limitation clause.[119] The court also reasoned that amnesty was permitted by the epilogue because it was an incentive for offenders to disclose the truth about the past atrocities and violations. The court reasoned, *inter alia*, that:

"In the result, I am satisfied that the epilogue to the Constitution authorized and contemplated an "amnesty" in its most comprehensive and generous meaning so as to enhance and optimize the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore, entitled to enact the Act in the terms which it did."[120]

[116] Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others 1996 (4) SA 672 (CC) (25 July 1996)
[117] The Promotion of National Unity and Reconciliation Act 34 of 1995
[118] The Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution)
[119] Section 33 of the Interim Constitution Act 200 of 1993
[120] At para 50

Dugard,[121] criticizes the AZAPO judgment for placing more emphases on amnesty instead of focusing on the outcry from the International scholars and remarks that:

> *"It was the first challenge to a statute enacted by South Africa's democratically elected Parliament; and it concerned an issue on which the nation is deeply divided. Mahomed DP's response was to address the agony of the applicants and the sufferings of the victims of apartheid in eloquent and caring language of a kind seldom found in a judicial decision; to expound the importance of amnesty to the constitutional compact that ushered in the new democracy. The judgment does not, however, show concern for the international legal order that condemned apartheid as a crime against humanity, that served as a standard by which the laws of apartheid were measured in the years without hope. This was a judgment that called for the broad brush of history, for an exposition of why apartheid was judged by the international community to be a crime against humanity, for an examination of the experience of other societies that have emerged from darkness, for an explanation of the reason why international law does not compel a society bent on reconciliation to prosecute those who have committed the most heinous crimes in the name of the state…"*[122]

It will be noted, however, that the Act did not just advocate for a blanket approach to amnesty. The Act also provided for the refusal to grant amnesty for those who did not qualify. In this regard, section 21[123] states that:

> *"(1) If the Committee has refused any application for amnesty, it shall as soon as practicable notify-*
>
> *(a) the person who applied for amnesty;*
>
> *(b) any person who is in relation to the act, omission or offence concerned, a victim; and*
>
> *(c) the Commission,*
>
> *in writing of its decision and the reasons for its refusal."*

The idea was that those who were not granted amnesty would be prosecuted. Such has never happened to date which raises serious questions about the reluctance of the NPA in prosecuting these crimes. The continued non-prosecution of those who were not granted amnesty is disturbingly shocking and suggests that the NPA is a party to impunity. The TRC referred to the NPA some 300 cases of those people who did not apply for or were not granted amnesty.[124] These

[121] Dugard John; Professor of Law, University of Witwatersrand; Director of the Research Centre for International Law, University of Cambridge

[122] Dugard, J; Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question; South African Journal on Human Rights, 258, 1997

[123] Section 21 of Promotion of National Unity and Reconciliation Act 34 of 1995

[124] Ntsebenza, Dumisa; Opinion for the National Prosecuting Authorities concerning the TRC Component and TRC Prosecutions. Ntsebenza SC compiled this opinion on the request of the Deputy National Director of Public Prosecutions. The opinion covers a

were mainly South African Police Security Branch or other police officers. It is not clear why such cases have not been fully investigated and prosecuted more than twenty-five years since the TRC concluded its work. One cannot help, but wonder whether such reluctance is motivated by politics rather than legal reasons.

4.5 The Impact of the Recently Re-Opened Inquests to Domestic Prosecution

It is common cause that during apartheid all organs of State were enjoined to defend and protect the State and its apartheid policies which offended the majority of South Africans. This includes the judiciary which played a pivotal role in maintaining and applying apartheid laws. This is evident in the manner in which they dealt with the inquests of anti-apartheid activists who died, mostly, under police custody. It is common cause that the security forces and the police were authorized to detain anti-apartheid activists for interrogation purposes. It is also common cause that they were also authorized to use force during the said interrogations. In some cases, the use of force resulted in the death of detainees. Some of these deaths included high profile human rights activists like Steve Biko[125] and Ahmed Timol[126] to mention but a few. Cases of those who died during such detentions were referred to courts for inquest. I will deal with two of the said inquests to illustrate how the State institutions played a role in preserving apartheid and also look at how the recent decisions might help push the NPA to the right direction.

4.5.1 Timol Inquest

Ahmed Timol was an anti-apartheid activist and he was a member of the South African Communist Party which, at the time, was banned by the apartheid regime. Timol was arrested and detained by the South African Police in October 1971 at a roadblock. He died in detention, four days after his arrest. The SAP alleged that Timol had committed suicide by jumping from the 10th floor. An inquest into his death was held in 1972 and the Magistrate found that there was no one who could be held liable for his death. In other words, the Magistrate accepted that Timol committed suicide. Timol's family was not happy with the said finding and were only able to have the inquest re-opened in terms of section 17A of the Inquest Act[127] in 2017. Mothle J presided over the re-opened inquest.[128] Mothle J, rejected the SAP's version that Timol committed suicide by jumping from a building. He made several damning findings against the SAP officers. I will highlight some.

Amongst others, Mothle J found that:

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review of the work carried out under the TRC Component for its effectiveness and the extent to which it I fit for purpose. It also covers an opinion on whether any organ of State is responsible for interfering and/or hindering the work of the NPA

[125] Steven Bantu Biko was a leader of the Black Consciousness Movement.

[126] Ahmed Timol was an anti-apartheid activist in the underground South African Communist Party.

[127] Inquest Act 58 of 1959

[128] The Re-Opened Inquest into the Death of Ahmed Essop Timol; IQ: 01/17, judgment delivered on 12/10/2017; Gauteng Division of the High Court, Pretoria

"the evidence of the 2017 re-opened inquest, unmasked the cover up, but due to the absence of the interrogators who have all passed on, the real events leading to the push could not be established. However, the evidence prima facie and logically points out that at the time Timol was pushed either out of the window of room 1026 or at the roof top, he was in the company of members of the Security Branch in charge of his interrogation on duty."[129]

Further that:

"it is the court's prima facie view that the push occurred during interrogation under circumstances where the Security Branch involved, resorted to torture. The torture to Timol was applied with a view to extract information…. There is no evidence supporting the view that the Security Branch had direct intent to commit murder. There are theories suggesting that possibility but no evidence to back that up. However, the evidence supports murder through dolus eventualis. Dolus eventualis is present in instances where "the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed…"[130]

The re-opened inquest into the death of Timol was the first of many deaths that occurred in detention. It is reported that there are more than sixty detainees who died in detention under the Security Branch. Mothle J also lamented the need to have most, if not all, inquests of this nature being re-opened. He remarked as follows:

"The inquest also reveals that there are many more families who are seeking closure on the unanswered questions concerning the death of their relatives in detention. They, like all families whose relatives died in detention, need healing. They need closure."[131]

Further that:

"it is thus the view of this court that the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to have the initial inquest re-opened. The Human Right Commission, working in consultation with the law enforcement agencies, should be sufficiently resourced to take on this task."[132]

I agree with Judge Mothle's suggestion. Government institutions have a major role to play in assisting families of those who died in detention and apartheid victims in general. It took Timol's family forty-six years to have Timol's inquest re-opened. Fortunately for them, they were not

[129] At para 316 of Timol
[130] At para 317 of Timol
[131] At para 339
[132] At para 340

alone in that battle. They were assisted by The Human Rights Foundation and other NGOs. The re-opening of inquests on the deaths that occurred in detention might expose the cover ups done by the apartheid law enforcement agencies.

The conclusion of the 2017 Timol's inquest meant that the ball was placed in the court of the NPA as they have to decide whether to prosecute those implicated by the court's findings. The issue is that most of those found liable have since passed on. However, the NPA will have to decide on whoever that is still alive and they can always rely on the doctrine of common purpose.

4.5.2 Aggett Inquest

Neil Aggett was an anti-apartheid activist and a Doctor by profession. He was arrested and detained in 1981. He was subjected to interrogation and torture. He died in detention on the 5th February 1982. The Security Branch alleged that he hung himself using a scarf. An inquest to his death was conducted and concluded in December 1982. The family lawyer argued that Aggett died of torture and similar fact evidence was presented, however, the presiding Magistrate concluded that no one was to blame for his death. Like in Timol's case, Aggett's family was not satisfied with the said findings. This inquest was also re-opened in terms of section 17A of the Inquest Act.[133]

Makume J found the following:

> *"Having heard all the evidence, I have come to the conclusion that Dr. Neil Hudson Aggett was killed by members of the security branch. The evidence of Detainee Coleman supported by that of Jabu Ngwenya and Sisa Njikelane is vital. It is clear that something happened between 22h30 on the 4th February 1982 and 1h30am on the 5th February 1982."*[134]

Further that:

> *"The fact remains that Aggett was assaulted and tortured. The suspects were known to him and he told Sergent Blom-Visser who they were. Those suspects included Lieutenant Whitehead who became angry and promised to carry on with further investigation."*[135]

Makume J overturned the findings of the 1982 inquest that Aggett committed suicide:

> *"Accordingly it is my well-considered view that Dr. Neil Aggett did not commit suicide he was killed by members of the security branch at John Vorster Square."*[136]

[133] The Re-Opened Inquest into the Death of Dr. Neil Hudson Aggett; case no: 445/2019; GPHC judgment delivered on 04/3/2022
[134] At para 286
[135] At para 287
[136] At para 293

The findings in this case mean that the matter was or is to be referred to the NPA to decide whether to prosecute the named suspects or not. Again, the challenge is that the said finding came very late and as such most of the perpetrators have since passed on. The NPA is, however, called upon to make an informed decision on whether to prosecute or not.

4.5.3 Calls to Re-Open Inquests of Other Political Deaths

There have been calls from the public for the Department of Justice to re-open inquests of other political leaders and activists who died in the hands of the SAP. Such calls are possibly motivated by the outcomes of the inquests discussed in this paper.[137] The findings in both those inquests revealed what Mothle J, called a "cover up" by State institutions. The said findings confirmed what the public already suspected and/or believed. The public and the families of the victims have always rejected the so-called "accidental deaths" or "suicide" as alleged by the SAP. In May 2024,[138] the Department of Justice announced that Minister Lamola has accepted a request from the NPA to re-open the inquests into the deaths of Chief Albert Luthuli,[139] Griffiths Mxenge[140] and Booi Mantyi.[141] In all these inquests, no one was found to have been liable for the death of these distinguished anti-apartheid activists. Minister R. Lamola confirmed the re-opening of these inquests and is quoted saying

> *"with these inquests, we open very real wounds which are more difficult to open 30 years into our democracy, but nonetheless, the interest of justice can never be bound by time. The truth must prevail."*

The public and not just the families of the three activists deserve to know what led to their death. The current versions on how they demised do not make sense, the same way that the versions of the deaths of Timol and Aggett did not make sense. One can only hope that these inquests will unearth the truth. Should the courts find anyone responsible for their death, the NPA must be ready to fulfill its constitutional duty which is to prosecute without fear, favor and prejudice.

4.6 Conclusion

This chapter explored the prosecution of apartheid crimes domestically. There was an outcry by the International community calling for the banning and punishment of apartheid in South Africa. It was expected that once South Africa acquires freedom, perpetrators of apartheid would be prosecuted. However, this was not done. Instead, South Africa opted for reconciliatory talks. This chapter discussed the impact of the TRC in the failure or reluctance to prosecute apartheid crimes. It was noted that the TRC's objective was not to grant blanket amnesty. However,

[137] Timol and Aggett re-opened inquests
[138] SAnews.gov.za; May 14, 2024: Inquests re-opened into Luthuli, Mxenge and Mantyi apartheid era deaths.
[139] Founder and former President of the African National Congress killed in 1961
[140] A prominent anti-apartheid activist and human rights lawyer killed in 1981
[141] A prominent ant-apartheid activist killed in 1985

amnesty was granted to those who qualified with the set criteria.[142] Those who did not quality ought to have been prosecuted. There is quite a number of perpetrators who were not granted amnesty, but their dockets are gathering dust in the offices of the NPA. This chapter also dealt with the powers vested on the NPA to prosecute criminal matters and it was argued that the NPA is not performing its Constitutional function in ignoring apartheid crimes.

This chapter also looked at the recently decided inquests of Timol and Aggert. The aim herein was to explore how the recently re-opened inquests would affect future prosecutions. The re-opened inquests also exposed how State organs, including the judiciary, shielded and covered up for the State. The said inquests further made recommendations that the perpetrators be investigated and/or prosecuted. It was made clear that the NPA has a constitutional duty to prosecute these crimes and should not be complicit to undermining the rule of law.

[142] Section 21(1) of The Promotion of National Unity and Reconciliation Act 34 of 1995

CHAPTER 5: **CONCLUSION**

5.1 Introduction

There are no better words to express the dilemma facing South Africans in their quest for justice than the words of Judge Frankel as quoted by Mohamed DJ, in Azapo[143]

> *"Some aspects of this difficulty are covered by Judge Marvin Frankel in a book he authored with Ellen Saideman:*
>
> > *"The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode - trials of war criminals of a defeated nation - was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators. A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and the police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life. The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathizers in the population at large. If they are treated too harshly or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget. These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise. Since the situations vary, the nature of the problems varies from place to place."*[144]

This paper discussed the challenges encountered in the prosecution of the heinous crime of apartheid. The focus was mainly on South African apartheid crimes. It was noted that apartheid first raised its ugly head in South Africa in 1948. The International community and international law scholars joined South African human rights and anti-apartheid activists in their call to declare apartheid a crime against humanity. In the 1960s apartheid was declared a crime against humanity by the United Nations. The Apartheid Convention was promulgated in order to suppress and punish this heinous crime. There was, however, great reluctance from the same International Institutions to prosecute the said crimes. This reluctance was not only with regards

[143] At par 31 of Azapo

[144] Frankel Out of the Shadows of the Night: The Struggle for International Human Rights (Delacorte Press, New York 1989) at 103-4.

to the International Institutions, but here at home as well where the NPA is expected to take a leading role in prosecuting apartheid crimes.

There was a beacon of hope, for those who suffered from apartheid, when South Africa became a democratic State. Such hope was short lived when the TRC was announced. TRC was as a result of a compromise, if I may say so, between the former leaders of the apartheid regime and leaders of anti-apartheid movements like the ANC. It seems the two groups opted for a settlement which involved a smooth transition where people are asked to forgive and forget or rather forgive, but not forget. TRC was criticized because it was perceived to have perpetuated impunity. This paper discussed the AZAPO case where the granting of amnesty[145] was challenged. This paper further noted that TRC did not grant blanket amnesty to every perpetrator. There was a set criteria and those who were not granted amnesty were or ought to have been handed over to the NPA for further investigations and prosecution. However, the NPA has not prosecuted any of the perpetrators thirty years into democracy in South Africa. This calls for serious concern and raises questions on the NPA's failure to prosecute without fear, favour or prejudice as mandated by the Constitution. It was also submitted that domestic prosecutions are not time bound, meaning the NPA will not be restricted by how far back the crime was committed like the ICC. It is submitted that the NPA would be a more competent institution to prosecute apartheid crimes.

On the other hand, it was argued that the ICC has jurisdiction to prosecute crimes committed from the effective date.[146] This means that the ICC will not have jurisdiction over crimes committed before it was established. The author accepts that the general rule is that a statute does not apply retrospectively. The author, however, goes on to argue that even though *prima facie* the ICC has no jurisdiction to prosecute South African apartheid crimes since apartheid was abolished in 1994, there are cases which remain unresolved. The author makes reference to enforced disappearances which by its nature is a continuing crime. There is a plethora of authorities which were cited to show that enforced disappearance is an inhumane act used by the government to silence those who opposed it. On the same vein, there is consensus amongst scholars and case law that enforced disappearance continues for as long as the families do not know the fate of their loved ones. This means that even though someone was abducted before 1994, the ICC will enjoy jurisdiction over such a crime post 2002 for as long as the fate of the abductee is unknown.

5.2 Recommendations

It is evident, throughout this paper and available literature, that there have been no prosecutions for the crime of apartheid in South Africa. It is also clear that the continued non-prosecution or the reluctance thereof raises serious concerns and makes the NPA and the ICC accomplices to impunity. I believe the below recommendations would help in prosecution of apartheid crimes

[145] Section 20(7) of the TRC Act
[146] July 2002.

and bring about an end to impunity. There is no doubt that such prosecutions are necessary and would bring closure to the families who lost their loved ones at the hands of the apartheid regime. These prosecutions would also bring meaning to the term "no one is above the law".

5.2.1 Recommendation 1 (Prosecution by the ICC)

Chapter three dealt with the prosecution of apartheid crimes in the ICC. It is accepted and appreciated that the ICC cannot have jurisdiction over crimes committed before its establishment. The author's argument was that the ICC may, however, have jurisdiction over continuing crimes such as enforced disappearance so long as it is shown that they were committed to protect the apartheid system. There was a discussion on articles 11[147] and 24[148] of the Rome Statute which both deal with the jurisdiction of the ICC. The question is whether article 11 is a total bar to South African apartheid crimes. The author recommends that the said article should be interpreted in such a way that crimes with continuing nature, like enforced disappearances, be accommodated. The author is not challenging article 24 which deals with non-retrospectivity of the Rome Statute.

The Preamble of the Rome Statute deals with the objectives of the said statute and provides that:

> *"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"*

Further:

> *"Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"*

So, the Preamble speaks about a) effective prosecution of serious crimes of international concern, and b) putting an end to impunity. For South Africans who suffered the atrocities of apartheid, these goals will not be achieved if article 11 is not interpreted to accommodate enforced disappearances at least. One must always bear in mind that the Rome Statute was brought about as a result of the study, done by Bassiouni and his team, on the implementation of the Apartheid Convention. The initial objective was to establish a Tribunal to prosecute apartheid crimes, but that did not materialize hence we find ourselves in this difficult position. As much as the establishment of an International Criminal Court to deal with the core-crimes is welcomed, on the other hand it actually derailed the intended prosecution of apartheid crimes using the Apartheid Convention. It seems the whole focus shifted from the desire to prosecute apartheid crimes to the establishment of the ICC. Even during negotiations and when the Rome

[147] Jurisdiction ratione temporis
[148] Non-retroactivity ratione personae

Statute was adopted, they conveniently forgot to revisit the prosecution of South African apartheid crimes in their totality.

The ultimate decision on whether South African cases of enforced disappearance, emanating from the apartheid era, would be accommodated by the ICC rests with the ICC itself. Obviously, there will be an issue around jurisdiction and the ICC will have to hear arguments on the interpretation of article 11. The author has submitted that enforced disappearance was one of the strategies used by the apartheid regime to deal with those who opposed it. One also notes that the Rome Statute just gives definitions of both the crimes of apartheid and that of enforced disappearances. The Rome Statute does not list the strategies used by the apartheid regime to protect itself. It is, therefore, recommended that the Rome Statute be amended in order to list or incorporate the strategies used by an apartheid government to protect itself against those who oppose it. The crime of enforced disappearances must be listed amongst such strategies.

5.2.2 Recommendation 2 (Domestic Prosecution)

Chapter four dealt with domestic prosecution of South African apartheid crimes. It was noted that domestic prosecution has no time limit like the ICC. The NPA can prosecute for crimes committed even as far back as 1948 when apartheid was legitimized by the National Party. The chapter also highlighted the impact of the TRC to the prosecution of these crimes and the fact that TRC was not about granting blanket amnesty to apartheid offenders. The chapter also dealt with the impact that the recently re-opened inquests might have in putting pressure to the NPA to prosecute apartheid crimes. It is against this background that the author makes the below recommendations.

The TRC has already laid a foundation and grounds for prosecution of apartheid perpetrators. The NPA was given a list of those who were not granted amnesty. The problem is that the NPA has not acted against those individuals. The author recommends that the NPA continue to investigate those cases and where there are prospects of a successful prosecution, they must prosecute.

The High Court in Timol and Aggett have already pronounced on how the State Institutions used to “cover up” the wrongs perpetrated during apartheid by apartheid forces. In both matters the courts made orders that the NPA must investigate and bring those responsible for the deaths of Timol and Aggett to book. The NPA is, however, still dragging its feet. In Timol, Judge Mothle even went as far as recommending that all the inquests of people who died in detention should be re-opened. He further recommended that the families in those cases be assisted by State institutions to investigate and gather more information especially where the finding were that no one could be found responsible for the deaths. I have already submitted that I support this recommendation. The NPA, the Department of Justice, Public Protector and the South African Human Rights commission can play a crucial role in assisting the said families.

It is accepted that the NPA has already established a unit or team to deal specifically with prosecution of cases emanating from TRC. It is recommended that the said unit must be beefed up, in terms of personnel and resources, so that it can adequately perform and fulfill its functions. It is also recommended that those who are appointed to investigate and to prosecute these crimes should be given the necessary training and education in the sphere of international criminal law. Such education and training will enhance their ability to deal with such crimes. Without proper training, adequate personnel and resources, the said unit would fail.

In South Africa we already have courts which are designated and specialize in certain offences and/or disputes, such as the Electoral Court[149], Specialized Commercial Crimes Court[150] and the Equality Court.[151] It is, therefore, recommended that Parliament should enact legislation that will establish and designate some courts as Apartheid Crimes Court. These courts will specialize on the prosecution of apartheid crimes. Having such specialist courts will ensure that apartheid crimes matters are brought to court and expedited since its only mandate would be to deal with the crime of apartheid. This will also ensure that victims of the crime of apartheid receive quality access to justice. The establishment of this court would be a significant step by the government in ensuring an end to impunity. This will also put pressure on the NPA to speedily investigate and prosecute apartheid crimes. Considering the high profile nature of these prosecutions, it is further recommended that Judges of the High Court should preside over those matters. It is further recommended that the Judges who will be presiding, in the said courts, be given training on international criminal law. Such training will enhance their knowledge on the subject at hand so that they are able to preside and properly adjudicate over such matters.

5.3 Conclusion

It is submitted that the recommendations made in this chapter will assist in dealing with the challenges noted in the preceding chapters. There may have been a number of challenges highlighted, but they all boil down to one thing and that is the reluctance or failure to prosecute apartheid crimes both domestically and internationally. Like all other crimes against humanity, apartheid crimes need to be prosecuted without fear, favor or prejudice. It is not enough that apartheid is classified as a crime against humanity, such classification has to be backed up by actions to show that it is being condemned. These recommendations would help bring about an end to impunity.

[149] Electoral Court is established by the Electoral Commission Act 51 of 1996 to, *inter alia*, adjudicate electoral disputes.

[150] Commercial Crimes Court was established in 1999 to adjudicate over commercial crime cases.

[151] Equality Court established by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to hear matters relating to hate speech, unfair discrimination and harassment.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Sabelo Simo Mthethwa (200303967)
School Of Law
Pietermaritzburg

Dear Mr Sabelo Simo Mthethwa,

Original application number: 00017652
Project title: The prosecution of South African apartheid crimes domestically and at the International Criminal Court

Exemption from Ethics Review

In response to your **renewal** application received on 6 August 2024 , your school has indicated that the renewal has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
pp Academic Leader Research
School Of Law