Prosecuting the Crime against Humanity of Apartheid

The Historic First Indictment in South Africa and the Application of Customary International Law

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Abstract

Apartheid is a crime against humanity, yet no person has ever been prosecuted for this crime. In 2021 two individuals were indicted in South Africa for the crime of apartheid. This is an historic first in the country which gave the policy of apartheid its name and material content. The indictment is, however, also a reminder that the non-prosecution of apartheid is a legal and moral issue to be understood in the context of South Africa's transition from apartheid to democracy. Furthermore, the indictment, while historic and of international significance, concerns constitutional, procedural and prosecutorial issues that illustrate the complexities of the application of international criminal law in domestic criminal justice systems. This contribution argues that all these factors should be acknowledged and analysed. Ultimately, and despite the many obstacles and complexities, it is submitted that it is right to indict individuals who, through their crimes, made the apartheid system possible even if they were not in positions of leadership.

1. Introduction

As the Apartheid Convention[1] approaches the 50-year mark, a pivotal criminal process is unfolding in South Africa. In 2021, for the first time an indictment[2]

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1 International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention).

2 'COSAS Four' indictment. Copy on file with authors.

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for the crime against humanity of apartheid[3] was issued by the National Prosecuting Authority (NPA). The joint indictment was served on two accused persons, TE Mfalapitsa and CS Rorich, apartheid-era security police officers who are alleged to have committed several crimes, including murder, kidnapping and the crime of apartheid.[4] The indictment contains five counts relating to the kidnapping and murder in 1982 of three anti-apartheid activists, and the kidnapping and attempted murder of a fourth activist. The victims were members of the anti-apartheid Congress of South African Students (COSAS) and became known as the 'COSAS Four'. The trial was set down to start in April 2023.[5] The state was ordered to cover reasonable legal fees for one of the accused, thus paving the way for the trial to start without undue delay.[6]

This contribution will show that the first ever indictment for the crime of apartheid in South Africa is both pivotal and a stark reminder that there remains a significant accountability deficit pertaining to this crime against humanity.[7] Is this indictment a harbinger of more apartheid indictments to come? Significant temporal, substantive, procedural and institutional factors point to a situation where late prosecutions for the crime of apartheid in the paradigmatic case study — South Africa — will probably remain very rare, and aimed at the dwindling number of relatively junior to mid-level apartheid-era state officials who are still alive. The current cohort of potential apartheid accused is determined by certain realities. The passage of time means that, almost 30 years after the end of apartheid,[8] there are very few apartheid

3 For an historical discussion, see S. Dubow and W. Beinart (eds), *Segregation and Apartheid in Twentieth Century South Africa* (Routledge, 1995); G. Kemp, 'The Crime of Apartheid', in S. Sayapin et al. (eds), *International Conflict and Security Law*, Vol. 2 (TMC Asser Press, 2022) 1073–1091. As a crime against humanity under the ICCSt., see L. Van den Herik, and R. Braga da Silva, 'Article 7: Crimes against Humanity', in K. Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th edn., Hart, 2021) 135–316, at 241–244; K. Ambos, *Treatise on International Criminal Law, Vol II: The Crimes and Sentencing* (2nd edn., Oxford University Press (OUP), 2022) 130–131. For an analysis of the state wrong of apartheid under customary international law, see M. Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination', 71 *International & Comparative Law Quarterly* (2022) 831–855.

4 The provisional indictment was served at the first appearance of Mfalapitsa and Rorich in the High Court in Johannesburg on 19 November 2021, see Foundation for Human Rights, 'Press Release: Historic Crimes Against Humanity Indictment in COSAS 4 Case', 23 November 2021, available online at https://unfinishedtrc.co.za/press-release-historic-crimes-against-humanity-in dictment-in-cosas-4-case/ (visited 10 September 2022).

5 M. Githahu, 'Judge Hammers State Lawyers in CoSAS 4 Case', *Cape Argus*, 6 February 2023, available online at http://capeargus.pressreader.com/article/281552295011341 (visited 14 May 2023).

6 Foundation for Human Rights, 'Press Release: Renewed hope for justice – Police Minister decides against filing an application for leave to appeal in COSAS 4 legal cost battle', 14 April 2021, available online at https://unfinishedtrc.co.za/press-release-renewed-hope-for-justice-police-minister-decides-against-filing-an-application-for-leave-to-appeal-in-cosas-4-legal-cost-battle/ (visited 14 May 2023).

7 See, generally, C. Gevers, 'Prosecuting the Crime Against Humanity of Apartheid: Never, Again', *African Yearbook of International Humanitarian Law* (2018) 25–49.

8 South Africa's first democratic elections were held in 1994, marking the end of apartheid. The constitutional framework negotiated since the unbanning of the liberation movements and the

leaders alive.[9] Beyond the leadership, there exists a broader category of apartheid-era state officials (mainly former police, military and state security officers) who committed gross human rights violations and who either failed to apply for amnesty at the Truth and Reconciliation Commission (TRC) or were unsuccessful in their applications. Even this group is shrinking in number due to death, old age and ill health.[10]

Individual criminal liability is different from the broader moral and historical responsibility for apartheid, a burden shared by many white South Africans, even though a significant number are still reluctant to accept apartheid's status as a crime against humanity.[11] This contribution analyses the first apartheid indictment, considering the relevant international legal landscape (notably the state wrong of apartheid as well as individual criminal liability for the crime in its customary form) and the principles of South African constitutional law and criminal law and procedure. This analysis must be understood contextually with reference to the unfinished business of South Africa's transition from apartheid to democracy. We submit, in conclusion, that this first apartheid indictment is by no means a parochial South African matter. Indeed, there probably are lessons for an international audience even as attention is turning away from Southern Africa to the crime of apartheid allegedly committed in Israel/Palestine, Myanmar and beyond.[12]

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release of their leaders from prison in 1990, provided for transitional arrangements, including power-sharing in terms of the Interim Constitution of 1993 and the creation of a Truth and Reconciliation Commission (TRC).

9 Notably, the last head of the apartheid state, F.W. de Klerk, died in 2021, see, 'FW de Klerk: South Africa's last apartheid president dies at 85', *BBC News*, 11 November 2021, available online at https://www.bbc.co.uk/news/world-africa-59247115 (visited 14 May 2023); the prominent apartheid-era police minister, Adriaan Vlok, died early in 2023, see 'South Africa's apartheid-era police minister Adriaan Vlok dies', *BBC News*, 8 January 2023, available online at https://www.bbc.co.uk/news/world-africa-64202368 (visited 15 May 2023); Pik Botha, the long-serving apartheid-era Minister of Foreign Affairs, died in 2018, see 'Pik Botha: Key figure in South Africa's apartheid dies', *BBC News*, 12 October 2018, available online at https://www.bbc.co.uk/news/world-africa-45833957 (visited 14 May 2023).

10 South Africa does not follow a system of compulsory prosecution. However, prosecutors generally have a duty to prosecute if there appears to be a *prima facie* case and if there is no compelling reason for a refusal to prosecute. See National Prosecution Policy, at § 4(c), issued by the National Director of Public Prosecutions in terms of the National Prosecuting Authority Act 32 of 1998. The advanced age of an accused may be such a compelling reason not to prosecute a *prima facie* case. See S.E. van der Merwe, 'The Prosecution of Crime', in J.J. Joubert et al. (eds), *Criminal Procedure Handbook* (13th edn., Juta, 2019) 49–97, at 77.

11 In 2016, more than 20 years after the formal end of apartheid, a survey by the Institute for Justice and Reconciliation showed that between 30–50% of white South Africans did not regard apartheid to be a crime against humanity. For context and analysis, see C. van der Westhuizen, 'Apology as a Pathway out of White Unknowing', in M. Judge and D. Smythe (eds), *Unsettling Apologies – Critical Writings on Apology from South Africa* (Bristol University Press, 2022) 142–167.

12 The incorporation of international criminal law instruments such as the Rome Statute of the International Criminal Court, which provides for individual criminal liability, and instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which provides for collective state obligations to condemn apartheid, are setting the scene for increased focus on apartheid as a state wrong and as a crime under international law

2. The 'COSAS Four' Indictment

Much of what is now known about the matter only came to the fore during South Africa's transition to democracy, when some of the apartheid-era Security Branch members applied for amnesty before the TRC. The cause of death of three of the COSAS Four was for the first time revealed in the course of the TRC hearings.[13] Mfalapitsa and Rorich (together with several of their colleagues) applied for amnesty but their applications were denied.[14] At the amnesty hearing, the applicants, including Mfalapitsa and Rorich, stated that their actions were informed by a 'political objective', namely to protect and maintain the previous (apartheid) regime.[15] The amnesty application was in respect of the conspiracy to murder and the actual killing of the COSAS Four (as mentioned, one of the victims survived).[16] The Amnesty Committee found that the deaths of three of the COSAS Four were attributable to the former Security Branch officers, however, the Committee was not satisfied that there was any 'direct or proximate relationship or nexus between the offences and the political objective which the Applicants allegedly pursued'.[17] The Committee therefore rejected the amnesty application because the applicants' actions could not be justified in terms of the criteria set out in the relevant amnesty law.[18]

The COSAS Four case was referred by the TRC to the NPA for further investigation and prosecution. However, for more than 20 years nothing came of this. It turned out that political interference caused the suppression of almost all post-TRC cases. The prosecutorial inaction changed after the

beyond South Africa. See, for instance D. Keane, 'Palestine v Israel and the Collective Obligation to Condemn Apartheid under Article 3 of ICERD', 23 *Melbourne Journal of International Law* (2022) 1–25; Report of the Independent International Fact-Finding Mission on Myanmar, Human Rights Council, A/HRC/39/64, 12 September 2018, at § 88.

13 South African Press Association, 'Amnesty Hearing Told How Three Teenagers Killed in Krugersdorp', 3 May 1999, available online at https://www.justice.gov.za/trc/media/1999/9905/p990503b.htm (visited 14 May 2023).

14 TRC Amnesty Committee, 'Application in terms of section 18 of the Promotion of National Unity and Reconciliation Act 34 of 1995, AC/2001/198', available online at https://www.justice.gov.za/trc/decisions/2001/ac21198.htm (visited 14 May 2023).

15 From their statements, in Afrikaans, it appears that the applicants' political objective was the '*beskerming en instandhouding van die vorige regeringsbestel*' ('the protection and maintenance of the previous regime'). See *ibid.*

16 See A. Timol, 'Details Contained in the Application under the Inquest Act 58 of 1959, in the Magistrate Court of South Africa (Krugersdorp) Case No 2300/2020', available online at https://www.ahmedtimol.co.za/wp-content/uploads/2020/09/2020-09-03-Full-application-bundle_issued.pdf (visited 14 May 2023).

17 TRC Amnesty Committee, *supra* note 14.

18 S. 20(3)(f) Promotion of National Unity and Reconciliation Act 34 of 1995. The act, omission or offence to which the amnesty application relates 'is an act associated with a political objective committed in the course of the conflicts of the past'. The applicant also had to make a full disclosure of all relevant facts. For an assessment of the amnesty process and the fate of the post-TRC prosecutions, see G. Kemp, 'Perspectives on South Africa's Unfinished Business of Dealing with Past Atrocities, and Considering Present Priorities', 4 *Diritto Penale Contemporaneo* (2018) 264–272.

decision in the *Rodrigues* case.[19] In this case, before the Supreme Court of Appeal, the state acknowledged that a political decision was taken during the 14-year period between 2003 and 2017 to not to prosecute any cases of gross human rights violations committed during apartheid. The Supreme Court of Appeal quite appropriately characterized this political decision as 'perplexing and inexplicable'.[20] Indeed, no official explanation was offered by the state, and the Supreme Court of Appeal was not willing to find that this political decision during the period from 2003 to 2017 amounted to a lawful post-TRC amnesty. No evidence was presented to shed further light on the nature of the political decision, and the Supreme Court of Appeal thus left the question open for future determination.[21] As for the delay in the *Rodrigues* case in particular, the Supreme Court of Appeal held that, given the fact that the delays during the two periods 1971–1994 (the apartheid era), and 1994–2002 (transition to democracy and the amnesty process before the TRC), were for understandable reasons, and given the fact that the delay during the period 2003–2017 was due to a political decision, the application for a permanent stay of prosecution should be rejected and the case should be allowed to go to trial. Any alleged trial-related prejudice should consequently be dealt with by the trial court.[22]

João Rodrigues died in September 2021.[23] His death is illustrative of the impact of delayed and late prosecutions and the *de facto* amnesty that was instituted at the political level during the period 2003–2017.[24] The revelations about the political decision not to pursue apartheid-era gross human rights violations, and the *Rodrigues* case in particular, led to a renewed focus on post-TRC cases.[25] The revelations and court decisions led to an apparent change of policy at the NPA. Immediately after the decision by the Supreme Court of

19 For background, see H. Woolaver, 'Prosecuting Apartheid-era International Crimes in South Africa', in F. Jessberger, M. Vormbaum and B. Burghardt (eds), *Strafrecht und Systemunrecht – Festschrift für Gerhard Werle* (Mohr Siebeck, 2022) 423–436, at 435–436.

20 *Rodrigues v National Director of Public Prosecutions* [2021] 3 All SA 775 (SCA) at § 26.

21 *Ibid.*, at § 30.

22 *Ibid.*, at § 39.

23 Foundation for Human Rights, 'The Unfinished Business of the Truth and Reconciliation Commission', available online at https://unfinishedtrc.co.za (visited 4 September 2022).

24 For more on this, see G. Kemp, 'Späte Aufarbeitung in Südafrika', in M. Vormbaum (ed.), *Spätverfolgung von NS-Unrecht* (Springer, 2023) 473–487.

25 For instance, see the murder of the 'Cradock Four', K. Maughan, 'Cradock Four' Families Sue NPA, Police over Failure to Prosecute their Killers, cite De Klerk', *NEWS24*, 20 July 2021, available online at https://www-news24-com.cdn.ampproject.org/c/s/www.news24.com/amp/news24/southafrica/news/just-in-cradock-four-families-sue-npa-police-over-failure-to-prosecute-their-killers-cite-de-klerk-20210720 (visited 4 September 2022); the death in detention of Dr Hoosen Haffejee, Foundation for Human Rights, 'Press Release – The re-opened Inquest into the death in detention of Dr Hoosen Haffejee to be heard in the Durban High Court', available online at https://unfinishedtrc.co.za/press-release-the-re-opened-inquest-into-the-death-in-detention-of-dr-hoosen-haffejee-to-be-heard-in-the-durban-high-court/?fbclid=IwAR2cZ-ETJ2j8fwPS_YyqeRNhqRg2rGXxfLFSthXbztPv5ViQiugN1qe9xQ8 (visited 4 September 2022). For background to some of these cases, see G. Bizos, *No One to Blame? In Pursuit of Justice in South Africa* (David Philip Publishers, 1998).

Appeal in the *Rodrigues* case, the NPA announced that the prosecution authority in general, and the Directorate for Priority Crime Investigation in particular, welcomed the decision and expressed their commitment to prosecute apartheid-era crimes, in particular, those identified by the TRC for further investigation and prosecution.[26] It is this new prosecutorial policy that informed the decision to indict Mfalapitsa and Rorich for the crime of apartheid.

It is noted in the indictment that the Security Branch was a unit within the South African Police Force which was primarily tasked and used 'as part of a systematic attack or elimination of political opponents of the apartheid regime'. The indictment further notes that the Security Branch members 'were used to defend, attack and kill opponents of the apartheid system which was an institutionalized regime of systematic oppression and domination, by one racial group over other racial groups, and with the intention of maintaining that domination'. Furthermore, the indictment states that the accused persons 'acted in concert and in furtherance of a prior criminal agreement and/or common purpose' with other security officers who are since deceased, to commit the crimes mentioned in the indictment. The prosecution indicates in the indictment that the precise circumstances of the coming into being of the common purpose is unknown to the prosecution. However, the prosecution nevertheless alleges that the agreement or common purpose did exist at the latest, 'shortly before and for the duration of each of the relevant crimes, and that both accused were parties thereto'. Finally, the prosecution states that at all material times the planning and execution of the alleged acts occurred 'as part of a systematic attack against political opponents of the apartheid regime, and which the international community condemned as the crime of apartheid'.

3. The Temporal Dimension

The alleged crimes listed in the 'COSAS Four' indictment occurred more than 40 years ago. The reasons for the delay in prosecution can be found in South Africa's transition and post-transition, as explained above with reference to the *Rodriques* case. It is necessary to briefly consider the temporal dimension of the first apartheid indictment, not only as a policy matter with historical significance but also in terms of international and domestic standards of fair criminal process.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that no statutory limitation shall apply to certain war crimes and crimes against humanity (including inhuman acts resulting from the policy of apartheid), irrespective of the date of their commission and even if such acts do not constitute a violation of the

26 J. Etheridge, 'NPA to Set up Specialist Unit to Probe, Prosecute Apartheid-era Atrocity Crimes', *NEWS24*, 27 June 2021, available online at https://www.news24.com/news24/southafrica/news/npa-to-set-up-specialist-unit-to-probe-prosecute-apartheid-era-atrocity-crimes-20210627 (visited 14 May 2023).

domestic law of the country in which they were committed.[27] States party to the Convention undertake to adopt legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in the Convention. States parties shall also abolish any such limitations, where they exist.[28] South Africa has not signed or ratified the Convention.[29]

Under South African criminal procedure, there is a general statutory limitation on the instigation of criminal proceedings. This is known as prescription. Certain exceptions apply. As noted, the crimes alleged in the 'COSAS Four' indictment occurred more than 40 years ago. Under both common law and statutory law, the state's right to institute a prosecution prescribes after 20 years, unless an exception is created under law.[30] Under common law and subsequently under the various versions of the Criminal Procedure Act, the crimes that were excluded from prescription have always been the most serious crimes, in particular those of which the death sentence may have been imposed, namely murder, rape and treason. After the end of apartheid and under the new democratic constitutional dispensation the death penalty was declared unconstitutional,[31] but the underlying historical rationale for prescription remained; the non-applicability of prescription was still reserved for the most serious crimes.[32] The list gradually extended to other serious crimes and the exceptions are now provided for in the Criminal Procedure Act of 1977, as amended.[33] These include the common law crimes of murder,[34] kidnapping[35] and the treaty-based crimes of genocide, war crimes and crimes against humanity as contemplated in the Implementation of the Rome Statute of the International Criminal Court Act.[36] There is no mention of crimes under customary international law. It is a closed list of crimes without a residual clause. The period of 20 years runs from the time when the alleged crime was committed. The charges of murder and kidnapping in the 'COSAS Four'

27 Art. I, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968, entered into force on 11 November 1970.

28 Art. IV, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

29 United Nations Treaty Collection, 'Status as at 14 May 2023: Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity', available online at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=_en (visited 14 May 2023).

30 For the common law, see V.G. Hiemstra and A. Kruger, *Hiemstra: Suid-Afrikaanse Strafproses* (7th edn., Butterworth, 2010), at 31, citing the Roman-Dutch authority, Mattheus *De Criminibus* 48 19 4 1.

31 *S v Makwanyane* 1995 (3) SA 391 (CC).

32 C. Theophilopoulos (ed.), *Criminal Procedure in South Africa* (Oxford University Press, 2019), at 196.

33 S. 18 Criminal Procedure Act 51 of 1977.

34 S. 18(a) Criminal Procedure Act.

35 S. 18(d) Criminal Procedure Act.

36 S. 18(g) Criminal Procedure Act.

indictment is therefore not problematic, at least not in terms of the time that has lapsed since the commission in 1982.

As will be explained further below, the indictment's inclusion of the crime of apartheid is a reference to the crime under customary international law, and not to the crime of apartheid as a crime against humanity as conceived in the Rome Statute of the International Criminal Court. The plain meaning of the list of exceptions in the Criminal Procedure Act therefore covers the crime of apartheid, but only in its statutory form as a crime against humanity and as provided for in the Implementation of the Rome Statute of the International Criminal Court Act, not in its customary international law form. This could pose a procedural hurdle for the prosecution. However, the exclusion of serious offences from the list of exceptions to the prescription rule is contentious. In 2018 the Constitutional Court held[37] that the inclusion of rape and compelled rape, but not all the other sexual offences whether in terms of common law or statute, constitutes an infringement of the prosecution's discretionary power to institute criminal proceedings. The provision on prescription was held to be arbitrary and irrational and as such inconsistent with the Constitution. The list of exceptions to the rule on the prescription of the right to institute a criminal prosecution has since been extended, not only to all sexual offences but also to common law and statutory crimes not previously included in the list, such as the crimes of bribery and corruption.[38] There is still no reference to the crime of apartheid, other than as provided for in the Rome Statute. It is conceivable that a constitutional challenge to the prescription of the right to prosecute the crime of apartheid (in its customary form) could be successful on the grounds that the exclusion of the crime of apartheid from the list of exceptions to prescription is arbitrary and irrational, or not in conformity with the interpretative injunction in section 233 of the Constitution, namely to find a reasonable interpretation of all legislation that is compatible with international law. Of course, the crime of murder (for which prescription does not apply) is a wrongful act for purposes of the crime of apartheid under treaty law and custom.[39] However, the idea that the operation of the prescription can be circumvented by riding on an exception for the common law crime of murder in order to prosecute the crime of apartheid under customary international law may not be very convincing. That could potentially offend the clear meaning of the provision in the Criminal Procedure Act and may very well also offend the right to a fair trial as protected under the Constitution.[40] The correct way to address this is to amend the prescription

37 *NL & others v Estate Late Frankel & others* 2018 (2) SACR 283 (CC) at § 89.

38 S. 3 Prescription in Civil and Criminal Matters Amendment Act 15 of 2020.

39 Jackson, *supra* note 3, at 845.

40 In *S v Zuma* 1995 (2) SA 642 (CC), at § 16, the Constitutional Court held that the '*caveat* is of particular importance in interpreting section 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.'

provision in the Criminal Procedure Act so that it is in line with the Constitution. And, even though South Africa is not a state party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, an amendment to add the crime of apartheid (as conceived under customary international law) as an exception to the rule on prescription, would align South African criminal procedure with international law. For purposes of this contribution, we assume that the prosecution in the 'COSAS Four' and similar apartheid-era cases will be allowed to proceed despite questions regarding the matter of prescription.

4. The Indictment in the Context of South Africa's Long Transition

The 'COSAS Four' indictment is both historic and pivotal. But it also opens up questions about South Africa's transitional and post-transitional choices with regards to the atrocities of the past. The historic first apartheid indictment concerns two individuals who were relatively junior officers in the apartheid state's security apparatus. They were not apartheid leaders by any stretch. While it cannot be assumed that this first apartheid indictment will also be the last to be issued by the NPA, the reality is that there are not many apartheid leaders still alive, which means that the cohort of potential accused persons will probably come from the list of around 300 individuals identified by the TRC as responsible for gross human rights violations in the period from 1960 to 1994. In 2002 the Amnesty Committee recommended that the NPA investigate over 300 cases involving alleged apartheid-era perpetrators.[41] However, as of 2020, apart from the trials of a number of former apartheid police officers and three security branch assassins for various crimes (but not the crime of apartheid), no other trials have thus far materialized.[42] The prosecution in the 'COSAS Four' case is nevertheless important because it will provide a court with a historic opportunity to apply the elements of the crime of apartheid in a criminal case. Section 31 of the Promotion of National Unity and Reconciliation Act provides that incriminating evidence that was led by the applicant at the TRC may not be used against the individual in a subsequent criminal trial.[43] As noted, both accused in the 'COSAS Four' case applied for amnesty, albeit unsuccessfully.

41 J. Redpath, *Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa* (Institute for Security Studies, 2012), at 50. For an overview of progress (or lack thereof) of post-TRC cases, see the work of the Foundation for Human Rights, *supra* note 25.

42 M. Schmidt, 'TRC: The Struggle for Justice Continues', *Financial Mail*, 30 May 2019, available online at https://www.businesslive.co.za/fm/features/2019-05-30-trc-the-struggle-for-justice-continues/ (visited 1 June 2023).

43 See also K. Christie, *The South African Truth Commission* (Palgrave, 2000), at 121; L. McCarthy, 'Prosecutorial Discretion', in C. Villa-Vicencio, and E. Doxtader (eds), *The Provocations of Amnesty: Memory, Justice and Impunity* (David Philip Publishers, 2003) 12–17, at 12.

5. The Legal Basis for Charging the Crime of Apartheid

South Africa is a state party to the Rome Statute of the International Criminal Court and has fully incorporated this treaty into domestic law.[44] The crime of apartheid is therefore criminalized under domestic criminal law as a crime against humanity as per Article 7 of the Rome Statute.[45] This statutory crime is however not available for the NPA in the case against Mfalapitsa and Rorich because the Implementation of the Rome Statute of the ICC Act does not have retrospective or retroactive application. The Implementation Act entered into force on 16 August 2002.[46] It has long been a standard in South African criminal law that statutes do not have retrospective operation, unless the legislature 'clearly intended the statute to have that effect'.[47] This rule of interpretation now has the status of a fundamental right.[48] The Implementation of the Rome Statute Act explicitly provides that 'no prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the [Rome] Statute'.[49] The Rome Statute entered into force on 1 July 2002.[50] The NPA, in drafting the 'COSAS Four' indictment, therefore refrained from any references to the Rome Statute or indeed the Implementation Act. Rather, the text of the indictment refers to customary international law, or to no explicit legal basis at all, as follows:

- The crime against humanity of murder, read with section 232 of the Constitution.
- Alternatively, murder.
- The crime against humanity of apartheid.

44 South Africa signed the Rome Statute on 17 July 1998 and ratified it on 27 November 2000. The Statute was fully incorporated into domestic law via the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. For more background, see M. du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example', 5 *Journal of International Criminal Justice* (2007) 460–479.

45 The definitions of the core crimes as provided for in the Rome Statute were incorporated directly into South African law via a Schedule appended to the Implementation Act. The Implementation Act does not refer to the ICC Elements of Crimes, however, it is suggested that it would be in line with the practice of statutory interpretation for a criminal court to refer to the Elements of Crimes as a means to assist the court in its interpretation of the definitions. See G. Kemp et al., *Criminal Law in South Africa* (4th edn., Oxford University Press, 2022), at 643.

46 Implementation of the Rome Statute of the International Criminal Court Regulations, Government Notice R1089 in *Government Gazette* 23761, 16 August 2002.

47 *NDPP v Carolus* 1999 (2) SACR 607 (SCA) at § 31.

48 *Savoi and others v NDPP* 2014 (1) SACR 545.

49 S. 5(2) Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

50 United Nations Treaty Collection, 'Status as at 14 May 2023: Rome Statute of the International Criminal Court', available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en. (visited 14 May 2023).

Section 232 of the Constitution incorporates customary international law directly into South African law.[51] The alternative charge of murder refers to the common law crime of murder under South African law. It is notable that the 'crime of apartheid' is included in the indictment without any reference to either a statutory or common law basis. However, given the presumption against retroactive and retrospective application of statutes, as explained above, it makes sense that the indictment does not refer to the Implementation of the Rome Statute of the ICC Act. The reference to the 'crime against humanity of apartheid' therefore must be a reference to the crime under customary international law. This reading is also consistent with the rest of the charges, which explicitly refer to section 232 of the Constitution, that is, customary international law (the direct application of custom is discussed in Section 8, below). The somewhat cryptic reference in the indictment to the 'crime against humanity of apartheid', without further explanation or without explicit reference to the form of the crime under customary international law or statutory law, may potentially be problematic from a fair trial point of view in that South African criminal procedure generally expects charges to be clear and with sufficient detail to give the accused the opportunity to adequately prepare for the trial.[52] There is also a substantive aspect of legality at stake here. The Constitutional Court held that the principle of legality, as protected in the Constitution, requires *reasonable* certainty of definition (the *ius certum* aspect of legality).[53] In statutory law, this refers to the formulation and construction of the statutory text. Common law crimes, of which there are only a handful left in South Africa, are also subject to the *ius certum* principle. While it will be difficult to argue that the elements of common law crimes such as murder or assault are not reasonably certain, the courts have accepted, in principle, that common law crimes can be constitutionally challenged if there is uncertainty regarding an element or elements of the definition of the common law crime.[54]

Since the alleged acts of apartheid were committed prior to the entry into force of the Rome Statute in 2002, and prior to South Africa's transformation of that treaty into domestic law (also in 2002[55]), neither the ICC nor a South African criminal court has jurisdiction over these Rome Statute crimes.[56] As noted, this explains the NPA's decision to indict Mfalapitsa and Rorich with the crime of apartheid, but without reference to statutes or treaties. It is

51 Kemp et al., *supra* note 45, at 649; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at § 37; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at § 5.

52 S. 35(3)(a) Constitution of the Republic of South Africa, 1996.

53 *Savoi v NDPP* 2014 (1) SACR 545 (CC), at §§ 16–28.

54 *S v Friedman* (1) 1996 (1) SACR 181 (W).

55 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

56 M.E. Bennun, 'Amnesty and International Law', in Villa-Vicencio and Doxtader (eds), *supra* note 43, at 95.

presumably the crime under customary international law that will be prosecuted. Foreign case law on the status of apartheid as a crime under customary international law is ambiguous,[57] but the Constitutional Court of South Africa noted (persuasively, in our view) that 'the practice of apartheid constituted crimes against humanity'.[58] This observation by the Constitutional Court was not a reference to the Implementation of the Rome Statute Act, 2002, or even the Rome Statute itself, but rather to the status of apartheid as a crime under international law that *preceded* the advent of South Africa's democratic Constitution of 1996. South Africa's apex court's statement should therefore be seen as domestic judicial support for the view that apartheid as a crime under international law is indeed a crime under South African common law.[59]

6. The Status and Conceptualization of Apartheid as a Crime under International Law

The Apartheid Convention was one of the international community's legal responses to the racist policies and practices applied in South Africa. Although there is, more than four decades after the adoption of the Apartheid Convention, no state practice in the form of case law on the criminal prosecution of individuals for the crime of apartheid, it is possible to point to the consistent affirmation of the letter and spirit of the Convention from 1973 onwards. At a human rights conference held in Cape Town in 1979, participants noted that the Apartheid Convention clearly provides for the prosecution in an international tribunal or in domestic courts of persons accused of conduct constituting the crime of apartheid.[60] At that point, in 1979, there were already 49 states parties to the Apartheid Convention. Even some conservative academics in South Africa at the time acknowledged that apartheid was condemned by the international community as a crime against humanity since at least the adoption of the Convention on the Elimination of all forms of Racial Discrimination of 1965.[61] This is not to say that the status of apartheid as a crime under customary international law is contingent on the views of academics and other elites in any given situation. However, it is relevant to

57 In the USA, courts declined to hold corporations that were doing business in apartheid South Africa liable for complicity under the Alien Tort Statute of 1789. The courts did not find apartheid to be a violation of the law of nations. See *In re South African Apartheid Litigation: Ntsebeza et al v Citigroup et al* 346 F Supp 2d 538; *Khulumani v Barclay National Bank Ltd.*, 504 F.3d 254 (2007).

58 *S v Basson* 2005 (1) SA 171 (CC) at § 37.

59 J. Dugard et al., *Dugard's International Law* (5th edn., Juta, 2018), at 230.

60 L. Henkin, 'International Instruments for the Protection of Human Rights', in C.F. Forsyth and J.E. Schiller (eds), *Human Rights: The Cape Town Conference – Proceedings of the First International Conference on Human Rights in South Africa, 22–26 January 1979* (Juta, 1979) 224–235, at 229.

61 For notes on the comments by Prof Marinus Wiechers, at the time professor of law at the University of South Africa, panel discussion chaired by Prof B. Ranchod, see Panel Discussion on the European Convention on Human Rights and Human Rights and International Law, in Forsyth and Schiller, *supra* note 60, at 249–250.

point out that by 1982, when Mfalapitsa and Rorich allegedly committed acts constituting the crime of apartheid, the *status* of this crime as a crime under international law was acknowledged by some legal academics in South Africa (but it must be noted that the customary status of individual criminal liability for the crime of apartheid, as opposed to the prohibition directed at states, is not categorically asserted,[62] even by some of South Africa's most prominent international lawyers[63]). For its part, the TRC accepted that apartheid was a crime against humanity.[64] Indeed, based on the evidence presented pertaining to the period 1960–1994, the TRC endorsed the view that apartheid as a form of systematic racial discrimination and separation constituted a crime against humanity.[65] While the TRC noted the legal status of apartheid as a crime under international law, the Commission, because of the founding principles of truth and reconciliation on which it was established, did not call for international criminal prosecution of those who 'formulated and implemented apartheid policies'.[66] That part of the TRC report, dealing with apartheid as a crime against humanity, thus acknowledged its status as an international crime, but distanced the TRC from any calls for international prosecutions. Notably, though, is the silence in that part of the report on any possible *domestic* prosecutions in South Africa for the crime of apartheid.

The TRC opted to employ the 1996 ILC Draft Code (rather than the 1991 Draft Code) to explain the specific acts classified as crimes against humanity. The TRC stated that it was satisfied that the 1996 Draft Code definition of crimes against humanity 'reflects and incorporates many of the legal developments that have occurred since Nuremberg'.[67] Unlike the 1991 Draft Code, the 1996 Draft Code does not make reference to apartheid as a separate crime, but lists a set of acts that constitute crimes against humanity[68] (including, 'institutionalised 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'). While the status of apartheid as a crime under international law seems to be clear enough from a domestic point of view, the content of this crime is particularly important to determine

62 Van den Herik and Braga da Silva, *supra* note 3, at 243–244.

63 J. Dugard et al., *Dugard's International Law* (5th edn., Juta, 2018), at 230.

64 The TRC referred to various UN General Assembly and Security Council resolutions, as well as international conventions and instruments, including the Apartheid Convention, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the 1991 and 1996 ILC Draft Codes of Crimes against the Peace and Security of Mankind, the Preamble to the African Charter on Human and Peoples' Rights, and the ILC Draft Articles on State Responsibility, to explain the status of apartheid as a crime against humanity. The TRC Report preceded the adoption of the Rome Statute of the ICC, 1998, but the TRC Report referred to the drafting process of this multilateral treaty which included references to acts committed in the execution of the policy of apartheid as a crime against humanity. See TRC, *Truth and Reconciliation Commission of South Africa Report, Vol. I* (1998), at 94–97.

65 TRC, *Truth and Reconciliation Commission of South Africa Report, Vol. IV* (1998), at 222.

66 TRC, *supra* note 64, at 94.

67 *Ibid.*, at 98.

68 Art. 18(f) ILC Draft Code of Crimes against the Peace and Security of Mankind, 1996.

since the prosecution in the 'COSAS Four' (and other anticipated apartheid cases) will not have the benefit of a statutory definition to refer to in court. Nevertheless, the legality principle protected in the Constitution[69] requires the prosecution to assert both status and content of the criminal norm.

Carola Lingaas noted that apartheid is codified in the Rome Statute as a crime against humanity.[70] This codification in itself is strong indication of the crime's customary status.[71] There is general academic support for the proposition that the crime of apartheid has customary status.[72] In support of this, authors usually refer to international condemnation, via United Nations resolutions, of South Africa's apartheid policies.[73] The adoption of international instruments, notably the International Convention on the Elimination of All Forms of Racial Discrimination (henceforth, 'ICERC'),[74] the Apartheid Convention, the Rome Statute of the International Criminal Court[75] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, should be viewed as further evidence of not only the international condemnation of apartheid but indeed the criminalization of the norm. Article 2 of the Apartheid Convention clearly defines apartheid as a crime. Miles Jackson, in a comprehensive analysis of the definition of apartheid in custom and the ICERC, posits that the definition in Article 2 of the Apartheid Convention gives content to the customary prohibition on apartheid (and to the rule in Article 3 of the ICERC).[76] Jackson notes that the process

69 S. 35(3)(*l*) Constitution of the Republic of South Africa, 1996.

70 See C. Lingaas, *The Concept of Race in International Criminal Law* (Routledge, 2020), at 184. The crime of apartheid was not included in the lists of crimes against humanity published by the Preparatory Committee or the Ad Hoc Committee. The West was reluctant to include the crime in the Rome Statute, but a strong South African delegation argued in Rome for its inclusion as a specific crime in Art. 7. See C.K. Hall and K. Ambos, 'Article 7: Crimes against Humanity', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Hart, 2016) 144–294, at 233.

71 Lingaas, *ibid*. The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* (94-1-T), 7 May 1997, at § 622, confirmed the customary law status of apartheid as a crime against humanity. It is interesting to note that the crime of apartheid does not appear in the ICTY Statute or the International Criminal Tribunal for Rwanda Statute. See Hall and Ambos, *ibid*.

72 See generally M. du Plessis, 'Apartheid', in P. Caeiro et al. (eds), *Elgar Encyclopedia of Crime and Criminal Justice* (Edward Elgar, 2022).

73 For UN resolutions condemning the apartheid *Bantustan* policies, see GA Res 2775, 26 UN GAOR, Supp (No 29) 39, UN Doc A/8429 (1971); GA Res 3411, 30 UN GAOR, Supp (No 34) 35, UN Doc A/10034 (1975). The UN also adopted resolutions declaring apartheid to be a crime against humanity, for instance: GA Res 2189; GA Res 2202; GA Res 39/72A; GA Res 2074. The Security Council in several resolutions referred to apartheid as a 'crime against the conscience and dignity of mankind'. See UNSC Res 392, 19 June 1976, and subsequently, UNSC Res 418 (1977); UNSC Res 473 (1980); UNSC Res 591 (1986). For an overview, see Kemp, *supra* note 3, at 1077–1083.

74 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, at 195, entered into force 4 January 1969.

75 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998, entered into force 1 July 2002.

76 Jackson, *supra* note 3, at 839.

which led to the customary rule on apartheid, on the one hand, and the criminalization in the Apartheid Convention, on the other hand, should not be seen as a divergence in the concept of apartheid under international law. This is to say, there is not one concept of apartheid as an international wrong which binds states and a different one which is the criminal definition under the Apartheid Convention.[77] As explained, the Rome Statute of the ICC (and the Implementation of the Rome Statute of the ICC Act) are not directly relevant for purposes of the 'COSAS Four' indictment. It is nevertheless useful to note the relationship between the meaning of apartheid in custom and the definition of the crime of apartheid as an act constituting a crime against humanity in the Rome Statute.[78] In the Rome Statute, the crime against humanity of apartheid means 'inhumane acts' of a character similar to those referred to in paragraph 1 of Article 7,[79] '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'.[80] In terms of the Elements of Crimes, the perpetrator of the crime of apartheid committed an inhumane act against one or more persons. The perpetrator was aware of the factual circumstances that established the character of the act. The conduct in question must have been committed in the *context* of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups (this is, incidentally, also the language used in the 'COSAS Four' indictment).[81]

The crime against humanity of apartheid is a crime of intent. The perpetrator must therefore have intended to maintain such a regime of oppression by his or her conduct. And the conduct must have been committed as part of a widespread or systematic attack directed against a civilian population. It must be shown that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[82] Jackson pointed out that the context element in the Rome Statute creates a difference from the definition in the Apartheid Convention. While the Apartheid Convention refers to 'systematic oppression', the existence of an institutionalized regime appears not to be a prerequisite for

77 Jackson, *supra* note 3, at 839–840.

78 For an analysis, see Van den Herik and Braga da Silva, *supra* note 3, at 301–305.

79 These are: murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, forms of sexual violence, persecution, enforced disappearance and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

80 Art. 7(2)(h) ICCSt.

81 For instance, *Count* 5 in the 'COSAS Four' indictment alleges that the accused are guilty of the crime against humanity of apartheid, in that 'on or about 15 February 1982 at or near Krugersdorp … the Accused did unlawfully and intentionally kill Eustice ''Bimbo'' Madikela, a male person; Peter Matabane (Ntshingo Mataboge), a male person; and Fanyana Nhlapho, a male person, as part of an institutionalized regime of systematic oppression and domination, by one racial group over other racial groups, and with the intention of maintaining that domination'.

82 See Art. 7(1)(j) ICCSt.

a determination that the wrong of apartheid occurred. Rather, under the Apartheid Convention, the norm is violated the moment that the state, with a racist oppressive purpose, 'imposes the first of the measures that constitute the enumerated acts of the wrong'.[83] The focus in the Apartheid Convention is therefore not so much the existence of an institutionalized racist regime, but whether there existed state conduct with the purpose to 'establish a regime of systematic oppression on racial grounds'.[84] A prosecution for the crime of apartheid at the ICC or in a domestic criminal court, based on the Rome Statute definition, would require an interpretation and delineation of that definition, which will not be the case in the 'COSAS Four' matter. The difference in definition between the crime of apartheid in the Rome Statute and the state wrong under international law is not the focus here, but it is important to determine the elements of the crime of apartheid under customary international law, since that is the crime mentioned in the COSAS Four indictment.

Jackson's conceptualization of the definition of apartheid in custom and the ICERD identifies three key elements. These elements constitute the contours of the *prohibition of apartheid*. The gist of the elements will be noted here. With the assistance of Jackson's conceptualization of the definition of apartheid in custom, specifically, we will turn to the summary of facts in the COSAS Four indictment in order to establish if the legal and evidentiary aspects of the *crime of apartheid* are properly alleged in this pivotal indictment.

According to Jackson, the three key elements of the prohibition of apartheid are: wrongful acts, the purpose requirement and racial groups.

A. Wrongful Acts

The wrongful acts constituting apartheid in custom can for the most part be considered violations of fundamental rights under international law. Fundamental rights listed in and developed under instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights inform the normative content of the wrongful acts of apartheid.[85] It is important to remember, as Jackson pointed out, that for the state wrong of apartheid, it is not necessary that a contextual element of systematic and institutionalized racial domination has come into being. If any of the enumerated acts of apartheid was committed with the necessary *purpose*, that is, to establish such an institutionalized racist system, it will be enough to establish the wrong. Of course, by 1982, when the alleged crimes against the COSAS Four were committed, apartheid as systematic and institutionalized racial domination had clearly come into being in South Africa. At any rate, according to Jackson, the scale and gravity of the wrong of apartheid in custom is not primarily located in the contextual element, but rather in the mental element, that is, the *goal* of the state

83 Jackson, *supra* note 3, at 844.
84 *Ibid.*
85 *Ibid.*, at 845.

conduct.[86] For instance, a single murder or a single act inflicting serious bodily or mental harm,[87] committed by a state agent and with the purpose of establishing (or maintaining) a system of racial oppression, will constitute a wrongful act of apartheid in custom.

B. The Purpose Requirement

The conduct constituting the wrong of apartheid must be 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'.[88] This, according to Jackson, constitutes apartheid's specific intent.[89] The purpose requirement goes to the heart of the crime of apartheid. Racist and discriminatory state policies have a long history, and this is especially true in settler-colonial societies.[90] But, as Jackson noted, not all 'regimes of inequality' that arise as a result of state conduct will meet the legal definition of apartheid. For the purpose requirement of apartheid, it is not enough to look at evidence of racism or inequality, indeed, the focus is on the goal of racial domination and systematic oppression.[91] That is to say, incidental racism and inequality will not necessarily be enough. This may sound a bit abstract, but South Africa's transition to democracy and the findings of the TRC provide some concrete insight into a state that acted through its agents to reach (and maintain) the goal of racial domination. Of course, it is true that apartheid, as a continuation of settler-colonialism, was conceptualized and refined by academic, political and clerical elites,[92] but their goals were realized by the many willing agents of the state in the civil service, the police and security police and the military. Jackson is therefore correct to say that 'there is no need for the wrongful purpose to be located in the political leadership of the State'. Indeed, from the perspective of state liability (which is the context of Jackson's analysis), 'a State is responsible for apartheid where *any* of the individuals whose acts are attributable to it acted with the requisite purpose'.[93] According to this understanding of the purpose requirement, individual state agents may very well act with different goals in mind, but as long as their goals include the purpose of establishing or maintaining racial domination, it will be enough to establish apartheid's purpose requirement.[94]

86 *Ibid.*, at 846.
87 Art. 2(a) Apartheid Convention provides that the wrong of apartheid could be established by the 'denial to a member or members of a racial group or groups of the right to life and liberty of person'. 'Murder' and 'infliction of serious bodily or mental harm' are listed as subcategories of this wrong.
88 Art. 2 Apartheid Convention.
89 Jackson, *supra* note 3, at 847.
90 Kemp, *supra* note 3, at 1074–1077.
91 Jackson, *supra* note 3, at 848.
92 Kemp, *supra* note 3, at 1074.
93 Jackson, *supra* note 3, at 848. Emphasis in the original.
94 Jackson, *ibid.*

C. Racial Groups

Apartheid in South Africa is, first and foremost, associated with systemic racism and racial discrimination. The TRC concluded that 'apartheid, as a system of enforced racial discrimination and separation, was a crime against humanity'.[95] Apartheid as an international wrong means that the inhuman acts like murder, kidnapping, torture and so forth, are aimed to establish and maintain 'domination by one racial group of persons over any other racial group of persons'.[96] Article 1(1) of the ICERD defines 'racial discrimination' as follows:

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[97]

Domination by one group over another group (defined by race, colour, descent, national origin or ethnic origin) plays a central role in apartheid as defined in the ICERD and this corresponds with how the wrong of apartheid is constructed in the customary rule and in the Apartheid Convention[98] (which provides the definition for the customary rule).[99] Two pieces of apartheid-era legislation illustrate the centrality of race to the apartheid system and the way in which race was used by the white minority government to dominate other racial groups (as classified by the apartheid state). The Population Registration Act of 1950 provided for state powers to divide and classify the entire South African population into different racial groups, namely: white, coloured (persons of mixed racial background and certain groups of Asian descent, mainly Indian and Chinese) and Bantu (Black African). For its part, the Group Areas Act of 1950 allowed for spatial apartheid, with cities and towns and neighbourhoods divided on the basis of race (this statute also served as the basis for the forced removal of people on the basis of race from areas designated for certain groups).[100] It is the case that 'race' as an element of the wrong of apartheid is not clearly defined in international law.[101] Indeed, domestic apartheid laws, including the two foundational statutes mentioned above, also did not define race. Instead of a definition of race, the authorities made use of various criteria, including skin colour, appearance, social acceptance, language and descent, to classify people.[102]

95 TRC, *supra* note 64, at 94.
96 Jackson, *supra* note 3, at 850.
97 Art. 1(1) ICERD.
98 Apartheid Convention, Art. 2, which makes reference to the 'policies and practices of racial segregation and discrimination as practiced in southern Africa'; and to the 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'.
99 Jackson, *supra* note 3, at 850.
100 Kemp, *supra* note 3, at 1078.
101 See, generally, Lingaas, *supra* note 70 at 143–186.
102 *Ibid.*, at 159.

D. The Elements of the Crime of Apartheid in the COSAS Four Indictment

In terms of the 'COSAS Four' indictment, it is noticeable that one of the counts alleges that the act of killing was done as part of 'a systematic attack or elimination of political opponents of the apartheid regime, with knowledge of the attack'. Another count alleges that the act of killing was done 'as part of an institutionalized regime of systematic oppression and domination, by one racial group over other racial groups, and with the intention of maintaining that domination'. These allegations are based on summary facts, which include the state's assertion that the planning and execution of the acts (including the killings) occurred as part of a systematic attack against political opponents of the apartheid regime, 'and which the international community condemned as the crime of apartheid'.[103] Of course, this claim regarding the international community's condemnation of apartheid as a crime must be linked to the temporal element; the crystallization of the customary prohibition, even though no such date is mentioned in the indictment. But it is a crucial aspect, given the importance of the legality principle (including *ius acceptum*) protected in the Constitution.[104]

7. When did the Customary Prohibition Crystallize?

In terms of the principle of legality, then, prosecuting two individuals for the crime of apartheid, because of their conduct in 1982, will require a criminal court to ask whether apartheid was a crime under international law in *1982*.[105] In South African criminal procedure, the constitutional right to a fair trial includes the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'.[106] The crimes alleged in the 'COSAS Four' indictment occurred on or about 15 February 1982 at or near the town of Krugersdorp, South Africa. As we have seen, the accused are charged for the crime of apartheid under customary international law. It is for purposes of the legality principle therefore important to determine if apartheid was a crime under international law *on or about 15 February 1982*. Looking at the international condemnation of apartheid, including the unanimous reaffirmation of the criminality of apartheid expressed in UNSC Resolution 473 of 1980, one must agree with Jackson's assessment that '... by the late 1970s the customary

103 'COSAS Four' indictment, summary of substantial facts, at § 20.

104 S. 35(3)(*l*) Constitution of the Republic of South Africa, 1996.

105 S. 35(3)(*l*) Constitution of the Republic of South Africa, 1996, provides that everyone who is arrested for allegedly committing an offence has the right not to be convicted for an act or omission that was not an offence either under national or international law *at the time it was committed or omitted*. For more on the importance of the principle of legality in South African criminal law, see G. Kemp (ed.), *Criminal Law in South Africa* (4th edn., Oxford University Press, 2022), at 22–25; C.R. Snyman, *Snyman's Criminal Law* (7th edn., LexisNexis, 2020), at 31–42.

106 S. 35(3)(*l*) Constitution of the Republic of South Africa, 1996.

rule [binding states] had formed'.[107] While the customary status of the state wrong of apartheid is not in doubt (at least in terms of the timeframe under discussion), it is asserted by Paul Eden that it is doubtful that the apartheid system in South Africa was a crime against humanity under customary international law, giving rise to *individual criminal responsibility*.[108] Eden is very critical of what the author calls the tendency to 'short-circuit' the voluntarist approach to the creation of customary international criminal law and a willingness to present 'oughts' (*de lege ferenda*) as 'ises' (*lex lata*)'.[109] Eden's traditionalist methodology is anchored in the foundational principle of legality (*nullum crimen, nulla poena sine lege*). Furthermore, Eden's approach 'acknowledges that the normative force of transformative initiatives will always need to be rooted in the social reality of state practice'.[110] Indeed, it is noted that 'the vast majority of the parties to the Apartheid Convention failed to incorporate the crime of apartheid into their domestic law prior to the drafting of the Rome Statute'.[111] It is also noted that South Africa is not a party to the Apartheid Convention and indeed failed to assert in the apartheid litigation cases in New York[112] that 'apartheid *per se* was a very serious crime under international law'.[113]

The COSAS Four indictment challenges the view that acts of apartheid in South Africa in the year 1982 could not be acts constituting the crime against humanity under customary international law, giving rise to individual criminal liability (even though it was a state wrong in custom). It will be shown in Section 8, below, that the NPA is not disingenuous in their approach to the COSAS Four case. The customary status of apartheid as a crime against humanity may be a contested notion, as briefly noted here, but the NPA's decision to charge the two individuals in the COSAS Four case with the crime of apartheid is not fanciful. Indeed, as is noted in the next section, the Constitutional Court accepted the proposition that apartheid can be prosecuted on the basis of customary international law. This view can certainly be challenged, as we have seen, but with the Constitutional Court's dicta in hand, the NPA will probably be able to overcome the first hurdle, namely the question of whether, in 1982, apartheid was a crime against humanity under customary international law. The NPA will have a legal basis (albeit a contested one) to pursue the COSAS Four case, but some procedural and constitutional questions remain.

107 Jackson, *supra* note 3, at 835.
108 P. Eden, 'The role of the Rome Statute in the criminalization of apartheid', 12 *Journal of International Criminal Justice* (2014) 171–191.
109 Eden, *supra* note 108, at 172.
110 *Ibid.*, at 173.
111 Eden, *supra* note 108, at 190.
112 *In Re South African Apartheid Litigation* cases, 346 F. Supp 2d 538 (S.D.N.Y. 2004), at 553.
113 Eden, *supra* note 108, at 190.

8. Direct Application of Customary International Law

The problem with the direct application of customary international (criminal) law in national courts is not unique to South Africa. Indeed, one of the justifications for the proposed Crimes against Humanity Convention[114] (which also provides for the crime of apartheid)[115] is the concern about fair trial rights in cases of prosecutions that rely entirely on customary international law.[116] This is not to say that there is no rationale to pursue a criminal prosecution on the basis of direct application of customary international law. South African courts had on at least two occasions accepted the possibility (*in principle*) of direct application of customary international law in criminal matters. The Constitutional Court initially left open the question of whether direct reliance on customary international law could be used as the basis for a prosecution under the common law.[117] But in a subsequent matter the Constitutional Court explicitly endorsed the view that customary international law could serve as the basis for a criminal prosecution in South Africa.[118] The Court stated:

> Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and *apartheid* require states, even in the absence of binding international treaty law, to suppress such conduct because "all states have an interest as they violate values that constitute the foundation of the world public order". Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.[119]

The reference is clearly to the crime of torture, but the Constitutional Court seems to have accepted the proposition that other crimes (including apartheid) are also crimes in South Africa because of their prohibition under customary international law. The Constitutional Court stated that when a crime is prohibited under customary international law and that prohibition has the status of a peremptory norm, then that crime is a crime in South Africa. The Constitutional Court did not refer to it, but it should be noted that the International Law Commission (ILC) has identified the prohibition of racial

114 Draft Articles on Prevention and Punishment of Crimes Against Humanity, adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10).

115 Art. 2(1)(j) Draft Articles on Prevention and Punishment of Crimes Against Humanity.

116 Gevers, *supra* note 7, at 45.

117 *S v Basson* 2007 (3) SA 582 (CC) at § 172.

118 The Constitutional Court of South Africa did not go quite as far as the Kenya Court of Appeal (Nairobi), which held that the state has a *duty* under customary international law to prosecute crimes which attract universal jurisdiction (this would include crimes against humanity). See Court of Appeal (Nairobi), Civil Appeal 105 of 2012 and Criminal Appeal 274 of 2011 (Consolidated), *Attorney General & 2 others v Kenya Section of International Commission of Jurists*, Judgment, 16 February 2018 [2018] eKLR.

119 *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at § 37 (emphasis added).

discrimination and apartheid to have the status of peremptory norms of general international law (*jus cogens*).[120]

The rules of evidence determine that customary international law is judicially noticed.[121] Unlike matters pertaining to foreign law, expert evidence regarding the rules of public international law (including customary international law) will normally not be allowed.[122] However, it is submitted that a court conducting the historic first trial of apartheid as a crime under customary international law may very well benefit from expert evidence on the content and scope of this crime.

Customary international law is treated as part of South African law and can only be overridden by legislation or if it is in conflict with the Constitution.[123] Courts will generally refer to the decisions of international tribunals and courts, domestic courts (foreign and South African), and international law treatises for guidance.[124] Prosecuting the crime of apartheid on the basis of customary international law will be a novelty, not only in South Africa but also internationally. The court in the COSAS Four case will therefore not benefit from any foreign cases for guidance. However, a South African criminal court will be in a good position to take judicial notice of the notorious aspects of apartheid as conceptualized in South Africa. There is judicial authority for the proposition that courts in South Africa may take judicial notice of the existence of a specific political system in a specific country if it is sufficiently notorious.[125] Can a fact be any more notorious, namely that there existed a system of apartheid in South Africa between 1948 and 1994?[126]

9. Individual Responsibility, the Systemic Nature of Apartheid, and the Dynamics of South Africa's Transition to Democracy

It is necessary to briefly consider the first apartheid indictment in the context of South Africa's transition. The TRC Report noted that the amnesty provisions in the TRC Act required applicants to 'declare the nature of their offences—effectively acknowledging their culpability'.[127] Mfalapitsa and Rorich, the

120 See non-exhaustive list of norms that the ILC has referred to as having *jus cogens* status, UN Office of Legal Affairs, 'Chapter V Peremptory norms of general international law (jus cogens)', available online at https://legal.un.org/ilc/reports/2019/english/chp5.pdf (visited 5 September 2022).

121 P.J. Schwikkard and S.E. van der Merwe, *Principles of Evidence* (4th edn., Juta, 2018), at 528.

122 *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C).

123 See also s. 232 of the Constitution of the Republic of South Africa, 1996.

124 Schwikkard and Van der Merwe, *supra* note 121, at 528.

125 *Grgin v Grgin* 1961 (2) SA 84 (W); *S v Vries* 1996 (2) SACR 638 (Nm) 671.

126 See also Panel Discussion on the European Convention on Human Rights and Human Rights and International Law, *supra* note 60, for remarks about the views and acknowledgement of South African academics, even by the late 1970s.

127 TRC, *supra* note 64, at 119.

'COSAS Four' indictees, were denied amnesty by the TRC. Their unsuccessful amnesty applications were for the alleged murder of the anti-apartheid activists.[128] That is why the NPA could include the murder charge in the indictment. The two did not apply for amnesty for the crime of apartheid. But was apartheid a crime under international law (and not only the various gross human rights violations referenced in the TRC Act) even within the realm of possible crimes for which amnesty could be applied for? Section 20 of the TRC Act required applicants to 'apply for amnesty for each offence committed'. Furthermore, applicants were required to 'make full disclosure of their crimes in order to qualify', and they were also required to 'declare the nature of their offences — effectively acknowledging their culpability'. In cases where amnesty applications were not made or where applications were unsuccessful, 'the way was left open for conventional criminal trials, where the prosecuting authority decided that there were sufficient grounds for prosecution'.[129] None of the TRC Amnesty Committee applicants applied for amnesty for the crime of apartheid, as such. The reason is simple: The TRC had a mandate, stemming from the political and constitutional compromise reached during the negotiations of the early 1990s. The constitutional and legal parameters of the TRC's mandate can be summarized as follows:

- Analysing and describing the 'causes, nature and extent' of gross violations of human rights that occurred between 1 March 1960 and 10 May 1994, including the identification of the individuals and organizations responsible for such violations;
- Making recommendations to the President on measures to prevent future violations of human rights;
- The restoration of the human and civil dignity of victims of gross human rights violations through testimony and recommendations to the President concerning reparations for victims;
- Granting amnesty to persons who made full disclosure of relevant facts relating to acts associated with a political objective.

The relative success of the TRC in achieving these goals is debatable but is not the focus here. The relevant part of the TRC legacy is that it made a recommendation that a cohort of individuals who were responsible for gross human rights violations during the apartheid era should be prosecuted. It was only after a neglect of more than two decades that the NPA started to make a modest attempt to implement that crucial TRC recommendation. The question, however, is this: with the pool of potential accused persons shrinking due to the passage of time, is it morally defensible to focus only on the 'foot soldiers' of apartheid?

128 See Foundation for Human Rights, *supra* note 4.
129 TRC, *supra* note 64, at 119.

The summary of facts in the COSAS Four indictment does not refer to the role of the accused in the formulation and design of the policy of apartheid (with its core aim of racial domination). As far as we can tell from the indictment and in terms of their roles in the apartheid state apparatus, the accused were not policymakers or racial ideologues per se, but rather enforcers of the system and in particular the elimination of those who resisted apartheid. This aspect will probably play a key role in the prosecution of apartheid cases in South Africa going forward (given the fact that there are not many apartheid leaders still alive).[130] Indeed, in its report, the TRC referred[131] to this aspect of apartheid as a crime against humanity by citing the *Barbie* case[132] in France. In *Barbie* the court relied[133] on the definition of crimes against humanity as provided for in the Nuremberg Charter, namely:

> persecutions on political, racial or religious grounds … performed in a systematic manner in the name of a State practicing by those means a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.[134]

The COSAS Four were targeted by the apartheid state, through its agents, because they opposed the system of apartheid. By prosecuting the individuals who killed those who resisted apartheid, justice is served. There is the question of legality. We don't think legality concerns (including the *ius acceptum* aspect) should be dismissed out of hand. In a pivotal, historic first prosecution of apartheid, the principle of legality will have to be addressed, not least because South Africa's post-apartheid Constitution puts a premium on fair trial rights. Having said that, one should also not lose sight of the Constitutional Court's acceptance of a way for democratic South Africa's criminal law to serve the interests of justice in a balanced way. This includes the possibility to prosecute the crime of apartheid under customary international law. But the broader question remains: Does a prosecution of relatively obscure agents of the apartheid state (as opposed to leaders) satisfy the justice imperative for the many victims of the system of apartheid in South Africa? A quote from an amnesty hearing reproduced in the TRC Report is emblematic of this moral conundrum. The individual quoted here was one of the most notorious killers and torturers of the apartheid-regime. The words reflect a deep resentment; the resentment of an individual who did not conceptualize the system or the policies collectively known as apartheid, but who was ruthless in his loyalty to his leaders, to the state, and to the system. But let Eugene de Kock speak for himself:

> Yet the person who sticks most of all in my throat is former State President FW de Klerk. Not because I can prove, without a shadow of doubt, that he ordered the death of X or

130 See Etheridge, *supra* note 26.
131 TRC, *supra* note 64, at 101.
132 *Barbie*, International Law Reports, Vol. 78 (1988), at 124–148.
133 *Ibid.*, at 137.
134 Art. 6(c) Charter of the International Military Tribunal (Nuremberg Charter), 1945, United Nations Treaty Series Vol. 82, 279.

> cross-border raid Y. Not even because of the holier than thou attitude that is discernible in the evidence he gave before the [TRC] on behalf of the National Party. . .It is because, in that evidence, he simply did not have the courage to declare: 'Yes we at the top levels condoned what was done on our behalf by the security forces. What's more, we instructed that it should be implemented. Or - if we did not actually give instructions, we turned a blind eye. We didn't move heaven and earth to stop the ghastliness. Therefore, let the foot soldiers be excused'.[135]

There were many individuals like de Kock. Apartheid was opposed by the majority of South Africans, and individuals like de Kock were employed to brutally suppress this opposition. De Kock's moral indignation must thus be understood in systemic terms. He killed and tortured because of apartheid, and yet, the leaders of that system declined to take meaningful responsibility. Leaders like FW de Klerk, the last apartheid president, consistently maintained that he and other members of his cabinet never ordered the extrajudicial killing or other gross human rights violations of opponents of apartheid. As for the system of apartheid as such, de Klerk simply refused to accept that it was a crime against humanity,[136] although he expressed regret for harm caused by a 'well-intended' policy gone wrong.[137]

The fate of people like Eugene de Kock, João Rodrigues, TE Mfalapitsa and CS Rorich is not a parochial matter; it goes to the heart of the international condemnation of apartheid as a crime against humanity. But there is an asymmetry in the near universal condemnation of apartheid as a crime against humanity and the total lack of prosecutions of individuals responsible for this crime.

10. Concluding remarks

Apartheid as a system has a long history. It has its roots in settler-colonialism and was conceptualized and formalized by the intellectual and political elites of Afrikaner nationalists who came to power in 1948.[138] As a systemic crime, it was made possible by a vast array of civil servants and members of the security forces, including the police.

The non-prosecution of apartheid criminals (especially at the leadership level) still lingers as the unfinished business of South Africa's transition from repression to democracy. But this is not a parochial South African matter; it has legal and moral significance for international human rights and

135 TRC, *supra* note 65, at 264, § 19.

136 See C. McGreal, 'De Klerk seeks Accountability. What about his Own?' *The Guardian*, 22 March 2021, available online at https://www.theguardian.com/global-development/2021/mar/22/fw-deklerk-apartheid-crimes-accountability-south-africa (visited 4 September 2022).

137 See S. Kraft, 'De Klerk Apologizes for Apartheid: South Africa: Regret for the Past, he says, was the Main Reason for Power-Sharing Talks with Black Leaders', *Los Angeles Times*, 10 October 1992, available online at https://www.latimes.com/archives/la-xpm-1992-10-10-mn-705-story.html (visited 4 September 2022).

138 Kemp, *supra* note 3, at 1075–1080.

international criminal justice projects. It would be relatively easy to prosecute the individuals mentioned in this contribution for 'ordinary' crimes under domestic law; crimes like murder and kidnapping. But there is, in our view, a *prima facie* case of apartheid as a crime under customary international law to answer. It is important to let the courts of democratic South Africa adjudicate this case as well as possible future cases. If not now, when?