

**THE CASE FOR THE
PROSECUTION OF APARTHEID
CRIMINALS IN CANADA**

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ABSTRACT

Given what happened in South Africa in support of apartheid, this dissertation explores the various approaches to justice that have been, and might be employed to deal with the enormity of the crimes committed. The notion of universal jurisdiction is explored as a way of expanding the discussion to include not just actions to be taken in South Africa but also possible action that could be taken by other countries.

The dissertation looks at what was done and not done, particularly by the United Nations and Canada during the apartheid era and after and as well in South Africa after the ending of apartheid. In this context it discusses the Truth and Reconciliation Commission, its structure, actions and shortcomings. It looks at the United Nations efforts, analyzing the genesis and import of the various declarations, principles and conventions that deal with either crimes against humanity in general and apartheid related crimes in particular. In this context, it also looks at the various war crimes/crimes against humanity trials that have been or are in progress. Finally, it looks at Canada as a case study. The focus is Canada's various responses to crimes against humanity. The dissertation discusses not only what Canada has done and not done, but what it could and might do.

In each case, South Africa, the UN and Canada, an historical account is presented. In the Canadian case, this is followed by a discussion of case law relevant to any future prosecution, deportation or extradition. The dissertation then looks at the reasons for action and inaction by Canada on various war crimes/crimes against humanity. It draws

attention to the importance of political pressure, and in this context considers the implications of moral panic.

The dissertation concludes by pointing out the lack of adequate response to the crime of apartheid, notwithstanding developments in South Africa and the United Nations. In the Canadian case, it concludes that there is ample precedent for using universal jurisdiction.

DEDICATION

“Some day, justice will be done. Let us hope that it will not be visited on the innocent”

Steve Biko quoted as saying this by Denzel Washington in the movie, *Cry Freedom*.

For Nelson Mandela

For your leadership in the struggle against apartheid and for the inspiration and interest you induced in me in the struggle for justice, and particularly South African justice, especially during the dark days of apartheid.

For Professor McCormack Smyth

For your everlasting support and guidance. May you forever rest in peace.

For Anne Stretch

For your incredible good natured personality and friendship. May you forever rest in peace.

ACKNOWLEDGEMENTS

The South African project has been a long life endeavour for me. Ever since I read Nelson Mandela's book, *No Easy Walk to Freedom* when I was a young boy, Mandela became a hero to me. When I was a young University of Zambia student leader I was detained without charge or trial for advocating freedom of thought and speech and for the liberation of Southern Africa. While in detention I surrounded my bed with cut-out photos and articles of and on Nelson and Winnie Mandela. After I came to Canada, I was one of the founders of the York Student Movement Against Apartheid in which we demonstrated against government, university and corporate investment in Apartheid South Africa. At law school, I founded the Nelson Mandela Law Society (NMLS) for the purpose of advocating for the demise of apartheid in South Africa. After I graduated from law school in 1989, NMLS was transformed into the Black Law Student Association of Canada (BLSAC) which eventually led to the formation of the Canadian Association of Black Lawyers (CABLE). At the time I founded the NMLS, there was no campus-based black student organization in Canada. The Nelson Mandela Law Society sponsored numerous conferences on Apartheid South Africa and other issues at Osgoode Hall Law School and York University between 1986 and 1989. The Nelson Mandela Law Society convinced the Dean of Osgoode Hall Law School, James MacPherson (now Justice MacPherson of the Ontario Court of Appeal) to grant Nelson Mandela an Honorary Doctorate of Laws in 1989, my graduation year. This was before

anyone knew that Mandela would ever be released from prison. Nelson Mandela picked up the Doctorate when he visited Toronto in June 1990 shortly after his release.

I was also one of the founding members of Lawyers Against Apartheid, a group that was formed in Ottawa. In 1996, I founded the Nelson Mandela Academy of Applied Legal Studies which trained paralegals to go out into the community to fight for the legal rights of economically disadvantaged people. Some of the students and graduates found their way to law schools.

It therefore is not surprising that my dissertation is dedicated to Nelson Mandela. He has inspired me to fight for justice even if sometimes it is merely demonstrating in the streets, writing articles and pamphlets or this dissertation. My supervisory committee will no doubt have contributed significantly to the achievement of completing this project and without the committee I would have no one to thank. I am grateful, particularly to my Supervisor Liora Salter for her constant and consistent encouragement and undying support. She shaped the organizational format and presentation of this thesis. She meticulously organized a new committee at the end of the process for which I thank her most profusely. I thank Charles Mwewa and Lucy Venturino for their incredible computer skills and controls at the key board and without whom this product would not be in the good shape or paper that it is hopefully in. I also thank others who have helped with technical support on this project, you all know who you are.

To the people of South Africa, you have provided me an abiding hope in the resilience of the human spirit, the tenaciousness to fight and to enjoy the freedom, the music and the beauty of South Africa.

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INTRODUCTION

This dissertation addresses the long-standing and vexing problem of calling apartheid criminals from South Africa to account for their actions¹. Given that there have been no prosecutions of those who have committed the crime of apartheid, defined as a crime against humanity and a war crime in the Apartheid Convention and the ICC statute, this dissertation focuses on the concept of universal jurisdiction in making the argument that there is much Canada could and should do in this regard even today. This is regardless as to whether universal jurisdiction is supported by state practice. There is much discussion about international justice and holding accountable those who have committed crimes against humanity and war crimes which raises the following question: What is the responsibility of foreign states when the states in which the crimes occurred, are unwilling, unable, incompetent or otherwise to prosecute the perpetrators of the crimes? The case of the crime of apartheid and the possible application of universal jurisdiction by Canada is a good case study to explore these questions.

Even before the twentieth anniversary of its freedom from apartheid, South Africa is already mired in the scars of its “unfinished business” through the injustices of the lack of prosecutions of and reparations for apartheid-era crimes. There are already signs that

¹ “Apartheid criminals” are those individuals who committed the “crime of apartheid” as defined in the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, UN GA Res. 3068 (XXVIII), 30 Nov. 1973, (1974) 13 ILM 50 [Apartheid Convention]. These individuals committed crimes against humanity and war crimes, practices which will be dealt with in Chapter One. Fuller definitions of what constitute crimes against humanity and war crimes with regards to apartheid are given in Chapter Two. Article 7 of the Rome Statute of the International Criminal Court lists the “crime of apartheid” as one of the examples of “crimes against humanity” alongside murder, extermination, enslavement, deportations, torture, persecution on racial and other grounds and so on and so forth. Article 8 of the ICC statute defines “war crimes” to include grave breaches of the Geneva Conventions of 12 August 1949, other serious violations of the laws and customs of international armed conflict and so on. Please see *Rome Statute of the International Criminal Court* of 17 July 1998, (1998) 37 ILM 999.

“where injustice goes unpunished, old conflicts keep flaring up again”². A series of “moral panics” (which will be defined in Chapter Six) have been bedeviling South Africa precisely because of the unresolved conflicts of apartheid. A few examples will suffice here. The liberation song of “Shoot the Boer” (farmer) had been made popular again by Julius Malema, an African National Congress (ANC) youth leader, in the early 2000s. This song panicked the white population because it was accompanied literally with the killings of several white farmers. Julius Malema was sued for promoting hate speech and possibly genocide. Judicial intervention was critical in reducing the moral panic unleashed by the continued singing and possible consequences of this song. The ruling African National Congress apparently supported the singing of that song. Judge Collin Lamont issued an injunction prohibiting the singing of that song³.

Another moral panic that gripped South Africa was the killing of the right-wing Nazi propagator and farmer, Eugene Terreblanche in April 2010. This was done right in the midst of the 50th anniversary of the Sharpeville Massacre of March 21st, 1960, when police killed 69 unarmed African demonstrators. The crime of apartheid is dated from March 21st, 1960, although apartheid as a form of government dated back to 1948 when the National Party came to power. The killing of Terreblanche raised the spectre in the white population that a race-war had now commenced⁴.

² Leila Nadya Sadat, *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* p. 16 Whitney R. Harris World Law Institute, Washington University Law, 2010, quoting Honourable J.J. Van Aartsen, Mayor.

³ The case is *Afri-Forum et al and Julius Malema et al* Case No: 20968/2010, Equality Court, Johannesburg

⁴ Headlines in South Africa and around the world stated “South Africa Risks Civil War After the Killing of White Supremacist Leader Eugene Terreblanche”. See mainly the *Mail and Guardian* of South Africa weekly issues of April 2010. See also *The Christian Science Monitor* of 4th of April 2010.

Another moral panic was evident in March 2013 when two bodies allegedly linked to Winnie Mandela's activities in the 1980s were exhumed, and speculations were rampant that Winnie Mandela would be prosecuted for apartheid-era crimes⁵. This development opened old wounds as to how Winnie Mandela, who fought against the crime of apartheid, could be threatened with prosecution when the real apartheid criminals were walking around with impunity⁶.

Another example of a moral panic that has recently been displayed is that of an apartheid security police officer named Steve Whitehead. This security officer was alleged to have engaged in the torture-murder of a popular trade unionist by the name of Neil Aggett in the 1980s. Neil Aggett is discussed in Chapter One. In November 2012, it was revealed that Whitehead was doing business with the ANC government. "Whitehead ... had never sought amnesty from the Truth and Reconciliation Commission or apologized to the Aggett family"⁷. It is stated that Whitehead is theoretically still vulnerable to prosecution⁸.

The basis for choosing the crime of apartheid in South Africa and using Canada as an example for the possible application of the concept of universal jurisdiction (to be defined and explored fully in Chapter Five) is that an international convention was set up to depict the practices of a self-named regime as a crime against humanity providing for universal jurisdiction to prosecute the perpetrators of these crimes. If the

⁵ See "Bodies Linked to Winnie Mandela Exhumed" *The Age World* 13 March 2013.

⁶ There is a huge debate on this issue, see Larry May, *War Crimes and Just War* (St. Louis; Cambridge University Press, 2007).

⁷ Drew Forrest, "Neil Aggett's Tormentor Does Work for the State" *Mail and Guardian* 9 November 2012.

⁸ *Ibid.*

perpetrators of the historically well defined crime of apartheid are left unaccountable and with impunity, what does this mean in terms of the status of international justice and the calls for holding criminals against humanity and war criminals accountable?

Post-apartheid South Africa set up a unique post-conflict justice process in the form of the Truth and Reconciliation Commission (TRC) as will be seen in Chapter Three. This process was heralded as a precedent for securing justice while maintaining peace under a democratic regime. The lack of prosecutions means that this experiment has accorded impunity by default and is not a useful precedent. On the other hand, Canada has projected itself to the world as a country built on solid principles of justice, the rule of law, humanitarianism and objectively neutral in its relations with all the nations of the world. Canada has also advocated its abhorrence of impunity for war crimes and crimes against humanity. There is thus potential in Canada for the application of universal jurisdiction. Canada was also at the forefront in expelling South Africa from the commonwealth in the early 1960s and in imposing economic sanctions in the 1980s. Other bases for choosing the crime of apartheid and the possible application of universal jurisdiction by Canada are given in Chapter One.

Chapter Outlines

Chapter One, the introductory chapter, discusses in summary form the practices of apartheid which constituted the elements of the crimes against humanity. This chapter also discusses why it is important, for justice for victims of the crime of apartheid and

the development of international criminal law, to study the question of accountability posed by the post-conflict and post-apartheid justice in South Africa.

Chapter One is a foundational chapter. It begins the analysis by itemizing the reasons why apartheid criminals should have been and should be prosecuted. The chapter analogizes the practice of apartheid to that of Nazi Germany and how the labeling of apartheid as a crime against humanity stems from the Nazi precedent. The idea of prosecuting apartheid criminals enunciated by ANC and various scholars also originates from the example set by the prosecution of Nazi war criminals at Nuremberg.

The chapter discusses how apartheid was implemented through various laws and practices and its effects on the black population in South Africa and in neighboring countries.

This chapter sets the stage for what follows in Chapter Two.

Chapter Two discusses the responses of the United Nations, the international community, the main opposition to apartheid – The African National Congress (ANC) and scholars of renown to the practices of apartheid in South Africa.

The practices of apartheid resulted in strong condemnation by the United Nations (UN) which labeled apartheid as a crime against humanity. The ANC and several scholars called for the prosecution of apartheid criminals. This chapter dovetails into Chapter Three which deals with how those who committed the crime of apartheid were to be treated.

Chapter Three discusses the practices and responses of the post-apartheid South African government to apartheid-era crimes through the creation of the Truth and Reconciliation Commission (TRC) as a form of accountability.

This chapter discusses the negotiations that led to the demise of the apartheid regime and the constitution of the Truth and Reconciliation Commission (TRC), a process and mechanism for addressing the conflict of the past. I conclude that this process was used by the post-apartheid government as an excuse for the lack of prosecutions and reparations for the crime of apartheid. The “unfinished business” of apartheid-era crimes resides in this process, albeit that the TRC had recommended that prosecutions be embarked on and that reparations be made to the victims of apartheid.

Chapter Four discusses the possibility of the creation of the International Tribunal for the Prosecution of the Crime of Apartheid (ITPCA).

In order to address the impunity enjoyed by apartheid criminals, given their lack of prosecution in South Africa, one avenue that is open is that of the creation of a specialized tribunal. A tribunal was contemplated in the Apartheid Convention . There are now several specialized tribunals upon which the apartheid tribunal could be modeled. It is concluded that given the decision not to prosecute internally, South Africa would not cooperate in the setting up of an international tribunal.

Chapter Five discusses the concept and application of universal jurisdiction.

Another avenue that is possible in ending impunity for the crime of apartheid is the exercise of universal jurisdiction. The concept of universal jurisdiction is defined and

case law, where it has been exercised, is discussed. Universal jurisdiction however, is exercised in national jurisdiction.

Chapter Six discusses the politics and law of war crimes and crimes against humanity in Canada, a country which is used as a case study for the possibility of invoking the tool of universal jurisdiction to address the problem of accountability for the perpetrators of international crimes including the crime of apartheid.

The jurisdiction that has been chosen for the exercise of universal jurisdiction is Canada. This chapter traces the processes evident in Canada from 1945 to 2005 to come to grips with the issue of prosecuting war criminals from other jurisdictions in Canada. This process is as much political as it is legal.

Chapter Seven discusses civil measures Canada undertook in its opposition to apartheid South Africa before 1994 particularly how Canada handled the issue of sanctions against apartheid South Africa.

The previous chapter set the scene for this chapter. Chapter Seven begins to address how universal civil jurisdiction had been applied to the crime of apartheid during the apartheid era. As Canada has no law equivalent to the U.S. *Alien Tort Claims Act*, the discussion of universal civil jurisdiction is limited to that of sanctions and enforcement mechanisms.

Chapter Eight discusses the possibility of the use by Canada of its then new criminal code provisions on war crimes to prosecute apartheid criminals before 1994.

Chapter Six also sets the framework for Chapter Eight which analyzes how the application of universal criminal jurisdiction, enabled by the incorporation of the new

criminal code provisions, could have been applied in Canada to the crime of apartheid. There was no constituency in Canada propagating for the prosecution of apartheid criminals and Canada was resolved to prosecute Nazi war criminals only.

Chapter Nine discusses the law that would be applicable and the defenses that would be deployed if apartheid criminals were to be prosecuted in Canada under Canada's new war crimes legislation.

Prosecution of war criminals in Canada using the 1987 amendments to the *Criminal Code* were not successful. After the coming into force of the ICC statute in 2000, Canada enacted the *Crimes Against Humanity and War Crimes Act*. This chapter addresses the applicability of the new *Act* to the possible exercise of universal criminal jurisdiction against apartheid criminals. It also discusses the new cases Canada has prosecuted using this new legislation.

Chapter Ten discusses the role of the victims of apartheid in international prosecutions of apartheid criminals and in civil suits for reparations.

Victims of war crimes and crimes against humanity are supposed to be at the centre of criminal prosecutions but are often marginalized as they cannot bring private prosecutions themselves. In Canada they still cannot file civil suits against foreign perpetrators. This chapter discusses the need to empower victims to be fully engaged in the process of criminal prosecutions and civil litigation.

Chapter Eleven is the conclusion and presents in summary form the contents of the dissertation and concludes that apartheid criminals have continued to enjoy impunity and

their accountability can only be addressed through the exercise of universal jurisdiction by countries like Canada.

This chapter in addition to discussing reparations for the crime of apartheid, also deals with why it is absolutely imperative to ensure that the crime of apartheid which is an unfinished business, does not end up like the U.S. model where festering feelings of racial injustices continue to be prevalent. The state of affairs in the U.S. goes back to the injustices of slavery, injustices whose legacies remain largely unaddressed.

I further outline what further work still needs to be done on the question of the crime of apartheid.

CHAPTER ONE

THE CRIME OF APARTHEID

1.1 Introduction

This introductory chapter catalogues the practices of apartheid which induced the United Nations to label apartheid as a crime against humanity and as a war crime because of the evidence of gross and systematic violations of human rights. The chapter also elaborates on the justification for this study.

“If apartheid is a crime, why has no one been prosecuted”⁹, asked Garth Meintjens, an associate director at the Centre for Civil and human Rights at Notre Dame Law School in 2002. This question is germane in the context of the existence of: (1) the *United Nations International Convention on the Suppression and Punishment of the Crime of Apartheid*¹⁰, (ICSPCA) a convention which was signed in 1973 and came into force in 1976. It declared apartheid as a crime against humanity; (2) the incorporation into the 1998 statute of the United Nation’s sponsored International Criminal Court¹¹ (ICC), which became operational in 2002, of the “crime of apartheid” as one of the examples of the “crimes against humanity”; (3) the domestication of the statute of the International Criminal Court into the domestic laws of many countries including Canada¹² in 2000 and South Africa¹³ in 2002; (4) the proclamations and declarations by

⁹ Garth Meintjens, “If Apartheid Is A Crime, Why Has No One Been Prosecuted” (October-December 2002) *Africa Legal Aid* 19.

¹⁰ 1015 U.N.T.S. 243 (*Apartheid Convention*)

¹¹ U.N. Doc. A/Conf 183/0 available at <http://www.un-org/law/icc/statute/rome fra.htm>

¹² *Crimes Against Humanity And War Crimes Act* (2000). Canada left out the “crime of apartheid” and “forced disappearances”. This will be discussed later.

the anti-apartheid movements and numerous scholars that apartheid criminals would eventually be prosecuted; (5) the numerous United Nations Resolutions and Declarations and the numerous Security Council Resolutions on the crime of apartheid; (6) the worldwide revulsion of the crime of apartheid as evidenced by the imposition of various economic, military, cultural, sporting and other sanctions against South Africa; (7) the rulings of international tribunals such as the International Court of Justice against South Africa; (8) the findings of the constitutional court of South Africa in the *Basson* case that apartheid is a crime against humanity and that its perpetrators could be prosecuted, and (9) the finding by the Truth and Reconciliation Commission of South Africa that apartheid is a crime against humanity and its recommendations that those individuals who committed this offence and were not given amnesty should be prosecuted. The crime of apartheid could be prosecuted, not just in South Africa but, as Meintjens states, “all of the most serious international crimes committed by the apartheid regime are subject to either permissive or compulsory universal jurisdiction”¹⁴. For all the above prompts, the crime of apartheid presented itself as tailor-made for prosecution in South Africa and the exercise of universal jurisdiction.

The apartheid regime had long since the 1960's, been labelled as a crime against humanity by its victims and the United Nations. The Nazi practices and experience in Germany was the precedent and reference point. The very idea of prosecuting leaders of the apartheid regime in South Africa after the collapse of apartheid had been hinted at many times by the leaders of the South African liberation movements following the Nazi

¹³ *Implementation of the Rome Statute of the International Criminal Court* (Art. 27 of 2002).

¹⁴ Meintjens, *supra* at 20.

precedent. Samuel Daniels of the African National Congress for example hinted that after apartheid was overthrown, a tribunal would be set up to prosecute apartheid criminals and that appropriate sentences would be imposed. Sechaba, the official organ of the African National Congress also carried an editorial which stated¹⁵:

There is no crime in the book of crimes which Botha and his Generals have not committed. Be it murder of detainees, assassination of political and trade union leaders, raping women detainees, mutilation of genitals of thousands of men in torture sessions in detention, street executions with vigilantes and SADF death-squads, destabilisation and acts of aggression on neighbouring states, you name it, Pretoria has committed it, not once or twice but many times over. But each crime must be recorded separately, because the time to punish the guilty is fast approaching. No one can hold back the day of reckoning.

Oliver Tambo, in a speech to the United Nations on March 12th, 1964 entitled “Make Accomplices of Apartheid Account for their Conduct”, the leader of the African National Congress made what became a recurring theme of the African National Congress: the desirability of imposing economic and arms sanctions against South Africa and of holding the perpetrators and accomplices of apartheid, both individuals and corporate, legally accountable for their actions. He specified that, “in the past we have stated, and we repeat now, that the oppressed people in South Africa must and will settle accounts with their oppressors by any means open to them..[and] those outside South Africa who are accomplices in the perpetration of an acknowledged vice must

¹⁵ Sechaba (August 1987) at 1.

account for their conduct.”¹⁶ The African National Congress sent a message that “we cannot overemphasize the urgency of identifying all those forces and influences which should be held answerable for any past, present or future loss of life in South Africa.”¹⁷

Throughout the years, the African National Congress emphasized the connection between Nazism and apartheid. Just as Nazism had been politically, economically, militarily and culturally supported by other countries, so too was apartheid in South Africa. On March 21st, 1978, Oliver Tambo addressed a special UN Committee on the connection between Nazism and apartheid in these terms:

To put the matter briefly, the accession of the apartheid regime to power 30 years ago coincided with the efforts of the fascist forces, defeated in Europe, to regroup themselves wherever this was possible, in preparation for their re-emergence on the world scene, once more organised, once more strong enough to seek to impose their will on the peoples of the world. In South Africa these forces found fertile ground, enriched by a long history of colonial and white minority domination, and made specially favourable by the fact that the present rulers of our country had for many years prior to their 1948 victory organised themselves into Nazi vanguard of South Africa, adopted and schooled themselves to the philosophy and practice of Nazism and openly declared their determination to turn South Africa into a Nazi stronghold.

When, therefore, this Nazi vanguard came to power, and for so long as it retained its hold on this power, it was clear that the task which mankind had set itself – to rid the world of fascist tyranny – and for which it had already paid such high price, was as yet unaccomplished. Democratic humanity is thus faced with the task of dislodging and destroying the forces of Nazism, now embedded in the fabric of South African society.

When the United Nations resolved its 1975 General Assembly session that it has “a special responsibility towards the people of South Africa,” it was acknowledging and laying emphasis on the fact that we had inherited

¹⁶ In E.S Reddy, ed. *Oliver Tambo: Apartheid and the International Community: Addresses to the United Nations Committees* (New Delhi: Sterling publishers, 1991) at 17 found at www.anc.org.za/ancdocs/history/or/international accessed 05/10/2009).

¹⁷ *Ibid.*

the retreating but unrepentant forces of Nazi aggression and domination. What Nazism achieved through gas chambers and concentration camps nearly four decades ago has been repeated in our country over the past 30 years by the subtle methods and techniques, with Sharpeville and Soweto serving as danger signals alerting mankind to the gruesome inhumanity of the South African apartheid system. No one could possibly deny that millions of black people who should be alive and healthy today have died during the past 30 years, killed and consumed by the apartheid system and those who work it.

We want to suggest here that this “special responsibility,” by the very nature of its origin, is shared alike by the peoples of the world. It extends to the millions upon millions of the peoples of Europe, Africa, the Americas and Asia who stood together to defeat fascism, who came together to form this Organisation, and who, by that act, collectively pledged to ensure that the scourge of the swastika would never again haunt the world.

The world-wide programme of activities to observe the International Year against the inhuman apartheid system should therefore not overlook the Nazi component of that system, and should reflect the essential continuity of the struggle from Hitler to Vorster. These activities and actions should in part be targeted on all the well-known and notorious pillars of support for the apartheid regime, which are political, economic, military and cultural.¹⁸

On calling on the international community to “impose comprehensive and mandatory sanctions against South Africa”¹⁹ Oliver Tambo emphasized that:

The issue to which this Conference must address itself has a long history, for the question of white South Africa’s treatment of the black people is older than the United Nations itself. Since 1946, no other question has appeared so often on the United Nations agenda, or remained there for so long.

We have, today, to deal with a rouge regime that has repeatedly, consistently, and deliberately violated almost every single norm recognised by the international community.

- the apartheid regime stands today in breach of United Nations General Assembly, Security Council, and International Court of Justice decisions over its illegal occupation of Namibia;

¹⁸ *Ibid* at 49.

¹⁹ *Ibid* at 54.

- the apartheid regime stands today in breach of almost every single clause of the Universal Declaration of Human rights;
- the apartheid regime stands today judged as a criminal under the International Convention on the Suppression and Punishment of the Crime of Apartheid;
- the apartheid regime stands today in breach of the United Nations Charter for its repeated acts of aggression against its neighbours.

Let us, therefore, at the outset of this Conference be very clear about the nature of the problem with which we are dealing. We are not discussing a normally law-abiding member of the international community that has had a momentary lapse. We are dealing with an outcast, one who has continued to follow policies that have been declared a crime against humanity, a regime that has repeatedly acted in defiance of United Nations resolutions.

A number of well-known scholars treated apartheid as a crime against humanity; especially starting in the 1970's. They argued that apartheid criminals should face criminal prosecutions although there was no speculation as to how criminal prosecutions would unfold. For example, Kader Asmal's writings on Apartheid South Africa argued that "apartheid is a violation of international law [and commits Crimes against Humanity] and it has been recognized by the international community as a whole [as such]." And that its perpetrators deserved to be prosecuted.²⁰ G. Brahme's article in the same publication is appropriately titled, "Some remarks on Responsibility for the Crime of Apartheid under International law"²¹. Brahme echoes the same sentiments that apartheid is a crime against humanity and must be prosecuted.

²⁰ In *Apartheid, South Africa and International Law*, available at <http://www.anc.org.za/ancdocs/history/campaigns/legal/hmtl>. See also Asmal, "Judges and Justice in South Africa" (March 1989) Sechaba 9.

²¹ In *Apartheid, South Africa and International Law*, *supra* .

Albie Sachs who went on to become a judge of the Constitutional Court of South Africa from having been a member of the ANC,²² also urged for the prosecution of apartheid criminals under international criminal law as did E. Sagay.²³

In his seminal book, *International Law: A South African Perspective*,²⁴ John Dugard, a South African law professor and perhaps the most prolific authority on the South African judiciary and human rights practices under apartheid, also recognized that apartheid was a crime against humanity and that for those who signed the Convention, the Convention provided for universal jurisdiction. The crime of apartheid was also made an extraditable crime. Unfortunately, the Apartheid Convention was not implemented in practice during the apartheid era.²⁵

Professor Clark of Rutgers University wrote a widely read and influential article in the 1980's branding apartheid as a crime against humanity.²⁶

According to Professor Robert Currie of Dalhousie University Faculty of Law in his book *International and Transnational Criminal Law*²⁷ "it has not been seriously contested by any significant number of states ... that apartheid is indeed a crime against humanity and thus a crime under customary international law. [That those] states voting against adopting or refusing to ratify expressed little discomfort with treating apartheid as a crime against humanity."²⁸

²² In *Ibid.*

²³ In *Ibid.*

²⁴ (Capetown: Juta, 2000).

²⁵ *Ibid* at 161.

²⁶ "The Crime of Apartheid" in M.Bassiouni (ed.) *International Criminal Law 3rd ed.* vol. 1 (New York:Transnational, 2008).

²⁷ Robert Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010) at 294.

²⁸ *Ibid.*, at 294.

Although the opinions of scholars are not binding, and just because a scholar holds an opinion does not make that opinion true, it is beside the point. What is important is the holding of the opinion itself as opinions of scholars shape, in general, the current thinking and could be of persuasive value. These are the scholars who receive invitations to draft conventions and to act as expert witnesses in congressional hearings and at prosecutions of war criminals. Expert opinions influence the judiciary. Some experts get appointed to the judiciary or get elected to parliament where they influence policy making. In other words, long before apartheid was defeated, there were public calls and publications in the international community that labelled apartheid as a crime against humanity, with an arguable case that the perpetrators of the crime would be prosecuted just like the Nazis were, along with the colluding organizations, institutions and corporations. These perpetrators had been put on notice beginning in the 1960s that apartheid was regarded as a crime against humanity with the possible consequences of prosecutions.

The arguments that apartheid is a crime against humanity did not die out after apartheid was ended. The Truth and Reconciliation Commission said in 1998 that apartheid was a crime against humanity²⁹.

It has, however, been disputed as to whether or not apartheid is indeed a crime under customary international law. Justice Sprizzo of the Federal Southern District Court in New York held that apartheid was not a crime under customary international law for the purposes of the *Alien Tort Statute* because the *Apartheid Convention* has not been

²⁹ *Truth and Reconciliation Commission of South Africa Reports* (1998) vol. 1 at 94 and vol. 5 at 222, Dugard, *supra*.

adopted by most world powers³⁰. Other scholars have disputed outright that apartheid was a crime against humanity.³¹ Booyesen argues that the *Apartheid Convention* cannot be used as a basis of criminal prosecutions as it is, among other weaknesses, poorly drafted. He further states that the system of apartheid cannot be equated to classical international criminality. It was merely repressive but not criminally so. He argues that the *Apartheid Convention* itself is more akin to a political statement than a legal document upon which justiciability can lie.

If no one has been prosecuted for the crime of apartheid, given the advocacy for same reviewed above and as Meintjens maintains, apartheid criminals have escaped with impunity from their having committed war crimes and crimes against humanity. The aim of this dissertation is to investigate if, how and why apartheid criminals have gotten away with impunity and what legal and political avenues if any may be available to bringing them to account. In order to address the questions raised including that of Meintjens, a historical and comparative approach will be adopted. The dissertation will discuss what measures the United Nations, the post-apartheid government, the international community, Canada, victims and various constituencies have taken to address the criminality of apartheid.

This situation will be examined through the prism of the Canadian jurisdiction. I will address several questions. How was apartheid treated in international criminal law before its demise? Were there any prospects for the prosecution of apartheid criminals

³⁰ In *Re South African Apartheid Litigation: Ntsebeza et al v Citigroup Inc. et al*, 346 F.Supp 2nd 538, 2004.

³¹ See H. Booyesen, "Convention on the Crime of Apartheid" (1976) 2 SAYIL 56 and G.N.Barrie, "The Apartheid Convention after United Nations versus South Africa" (1986).

before the end of apartheid? Should Canada, as an example, have prosecuted apartheid criminals between 1948 and 1994? Can Canada prosecute apartheid criminals post-1994? Can a case be made for the prosecution of apartheid criminals in Canada? Does the crime of apartheid lend itself to the exercise of universal jurisdiction? Can the exercise of universal civil litigation against corporate aiders and abettors of apartheid be replicated in the criminal forum?

The study is oriented more to the legal theoretical exploration of the possibilities, imperatives and limitations of universal criminal jurisdiction than to the practical predilections of the exercise.

The application of universal jurisdiction is proposed as a new model to address the impunity enjoyed by apartheid criminals. It is new in the sense of not having been applied to the pursuit and prosecution of apartheid criminals anywhere.

The crime of apartheid is worthy of study for important reasons: to test the claims of nation states that they will invoke universal jurisdiction to stem the impunity of war criminals and criminals against humanity. I will assess the cogency and political will of states that have domestic legislation to prosecute or extradite or provide other accountability mechanisms for those who are suspected of having committed war crimes or crimes against humanity but have been left unprosecuted by their national state.

I will argue that apartheid has elicited fewer attempts to prosecute its proponents within and without South Africa while other previously ill-defined or less defined criminal conduct has been prosecuted after the fact (Bosnia, Iraq, East Timor, Sierra Leone, Rwanda, Yugoslavia, Congo and Cambodia) utilising the concept of universal

jurisdiction. This is interesting in light of the fact that South Africa was also condemned by the United Nations more often than any other nation for gross human rights violations between 1946 and 1994.³² There was also a very developed world-wide anti-apartheid movement between 1948 and 1994 including in the areas of economic sanctions, visiting, armaments and sports.

Why should Canada be the laboratory for the case study on the prosecution of apartheid criminals in the contemporary world? Why should Canada apply universal criminal jurisdiction against apartheid criminals? I will argue that there are many reasons: Canada had one of the largest and broadest Commission of Inquiry on Nazi War Criminals in history; Canada was the first western country to bring in major changes to its criminal laws to permit the domestic prosecution of war criminals in Canada and its legislation was copied elsewhere³³; Canada has had an international reputation for legal and political neutrality, fairness and lack of politically motivated international stances; Canada has been one of the leading countries in the promotion and success of the introduction of the International Criminal Court (ICC); Canada's Louise Arbour was the second chief prosecutor at the new International Criminal Court following the resignation of the first prosecutor, Justice Goldstone of South Africa. Canada has attempted, a modicum of vigorous investigation and prosecution of war

³² See Resolutions adopted by the United Nations General Assembly on the question of Apartheid, 1962-1988 (UN Centre Against Apartheid, New York, 1988). See numerous briefs in the *Apartheid Litigation* case and in following chapters.

³³ This was triggered by the *Commission of Inquiry on War Criminals* (Ottawa, 1986 (The Jules Deschenes Report)).

criminals, particularly Nazi war criminals;³⁴ Canada has a separate war crimes section within the Federal Department of Justice; Canada has included in its *Immigration Act* and *Citizenship Act*, the investigation and exclusion of war criminals from coming to Canada; the former Liberal Minister of Justice Irwin Cotler, had been one of the world's and Canada's most vociferous proponents of the prosecution of war criminals before and after he became Minister of Justice; Canada is known to have accepted a lot of immigrants from South Africa before and after the collapse of apartheid; after the Supreme Court of Canada threw out the first case on war criminals,³⁵ Canada tightened up its legislation to correct the Supreme Court's interpretation of international law and ensure the possibility of prosecution and conviction of war criminals;³⁶ Canada's Supreme Court has ruled that a Rwandan immigrant was a deportable and should be removed back to Rwanda to face prosecution for the commission of war crimes;³⁷ Canada, using the new war crimes legislation, recently convicted a Rwandan war criminal of genocide, war crimes and crimes against humanity, and rape;³⁸ Canada has a very well known, deserved, and oft-copied reputation for justice of its judiciary among nations particularly in reference to its *Charter of Rights and Freedoms*. Canada and

³⁴ Chile Eboe-Osuji, "Crimes Against Humanity: From Finta to Mugesera" Canadian Council on International Law (website, November 2002).

³⁵ *R. v Finta* [1994] 1 SCR 701.

³⁶ Canada, *Crimes Against Humanity and War Crimes Act* (2000).

³⁷ *Canada v Mugesera et. Al.* 2005 SCC 40.

³⁸ *R v Munyaneza*, 2009 QCSC 2201. An appeal to the Quebec Court of Appeal was filed. Shortly after the sentencing of Munyaneza in October 2009, Canada arrested another Rwandan, Jacques Mungwarere and charged him with the same international crimes as had been visited on Munyaneza. Canada is also vigorously pursuing Rwandan criminals under the Immigration avenue of revocation of refugee status and deportation, see , Adrian Humphreys, "Man Linked to Family's Killing in Sixth Appeal", *National Post* 3 February , 2010 at A7. *Mugesera* is the most famous Rwandan immigration case in Canada.

Australia were the leading major western countries to denounce apartheid and impose economic sanctions in the 1980s.³⁹

Recently, in 2007, the former Canadian Prime Minister Brian Mulroney released a book⁴⁰ in which he articulated Canada's abhorrence of war criminals and criminals against humanity including apartheid criminals whom he likened to the Nazis. Linda Freeman in her book *The Ambiguous Champion: Canada and South Africa in the Trudeau and Mulroney Years*⁴¹ states that Canada was the most vocal western country in terms of imposing economic sanctions against South Africa because of the criminality of apartheid. Canada has therefore been dealing with the issue of the criminality of apartheid for a very long time and would not need to be convinced late in the day that apartheid was a crime against humanity for purposes of prosecution.

Canada has various constituencies advocating for the prosecution of war criminals. The most successful have been the Canadian Jewish Congress and Rwandan Canadians. Other communities fought and won apologies or compensations. These include Japanese Canadians, Chinese Canadians and Ukrainian Canadians. These are among other factors, compelling reasons for making Canada a good case study for the investigation and prosecution of apartheid criminals and the utilization of the concept of universal jurisdiction.

The topic of prosecuting apartheid criminals abroad has been broached in relation to the statutory exercise of jurisdiction in civil matters against corporations that benefited

³⁹ Prime Minister Brian Mulroney likened apartheid to Nazism, see *Memoirs: 1939-1993* (Toronto: MS, 2007).

⁴⁰ *Ibid.*

⁴¹ (Toronto. U. Of T. Press, 1997).

from apartheid.⁴² Using the *Alien Torts Claims Act* (ATCA) (1789) of the United States, numerous corporations were sued for reparations in the United States by the victims of apartheid.⁴³ That litigation has spawned a flood of scholarly literature as will be seen.⁴⁴ There is no equivalent study on the possibilities or implications of criminal prosecutions of South African Apartheid criminals based on the concept of universal jurisdiction. There is no literature or study presumably because there have been no such prosecutions of Apartheid criminals using the concept of universal jurisdiction. Even the prosecution of Apartheid criminals for ordinary crimes related to apartheid within South Africa itself has spawned scant literature, disproportionate to the monstrosity of the crime of apartheid.⁴⁵ The few full-scale studies include: Marlene Burger and Chandre Gould, *Secrets and Lies: Wouter Basson and South Africa's Chemical and Biological Warfare Programme* published in Cape Town by Zebra in 2002, and Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* published in Leiden by Martinus Nijhoff Publishers in 2009. Why have apartheid criminals gotten away with impunity?

In many cases, those who have written about it have been very lukewarm to the very idea of the exercise of universal jurisdiction with respect to apartheid criminals. For example, Geoffrey Robertson, a prominent British Barrister who also served as a judge

⁴² Kristen Hutchens, "International Law in the American Courts – *Khulumani v Barclay National Bank Ltd.*: The Decision Heard "Round the Corporate World" (2005) 9:5 *German Law Journal* 639.

⁴³ *In re: South Africa Apartheid Litigation*, MDL No. 14993 (Jes) (SDNY) (Nov. 2004).

⁴⁴ Hutchens *Supra*.

⁴⁵ Marlene Burger and Chandre Gould, *Secrets and Lies: Wouter Basson and South Africa's Chemical and Biological Warfare Programme* (Cape Town: Zebra, 2002); Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden et al: Martinus Nijhoff Publishers, 2009).

at the Special Tribunal for Sierra Leone stated in his book, *Crimes Against Humanity-The Struggle for Global Justice 3rd ed.*, published in London by Allen Lane in 2006, stated that the prosecution of apartheid criminals would be a non-starter. His argument was that no major western country signed the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, the treaty that criminalised apartheid.⁴⁶ Lyal Sunga who worked for the United Nations Human Rights Commission came to the same conclusion. In his book *Individual Responsibility In International Law For Serious Human Rights Violations*, he argued that it was doubtful whether the conduct prohibited by the *Apartheid convention* would even be considered part of international customary law.⁴⁷

The study is based on the analysis of case law, scholarly studies and secondary literature as well as reports from various sources. Attempted interviews of government officials, ministers, judges and others was aborted when it became clear that either the subjects did not want to convey any meaningful information because of confidentiality.

The dissertation offers instead a sustained review of the literature on the interplay between law and politics in the litigation and resolution of complex legal and political issues presented by the exercise of universal jurisdiction for the prosecution of the crime of apartheid and other international crimes in general. I will offer a synthesis of what I call models of legal and political litigation for the prosecution of war crimes and crimes

⁴⁶ Geoffrey Robertson, *Crimes Against Humanity-The Struggle for Global Justice 3rd ed.* (London: Allen Lane, 2006).

⁴⁷ Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht: Martinus Nijhoff, 1991) at 79.

against humanity, for the removal of impunity from the perpetrators of these crimes and for the benefit of the victims as well as the international community.

1.2 The Crime of Apartheid

After the demise of apartheid the Truth and Reconciliation Commission composed the most comprehensive evidence to date of gross and systematic violations of human rights in South Africa. The Truth and Reconciliation Commission set up by *The Promotion of National Unity and Reconciliation Act*, No. 34 of 1995 of South Africa (the Act) accepted that apartheid was a crime against humanity and defined gross human rights violations as:

The violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period of March 1960 to the cut-off date [of May 1994] within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.⁴⁸

It is not necessary to go far into the history of South Africa in order to demonstrate the criminality and violence of apartheid, suffice to review the immediate period of the 1980s, with sporadic references to the period between 1948 and the 1980s.

⁴⁸ Section 1(1)(ix). This statement is derived from many international human rights conventions.

Apartheid was not an arbitrary system of governance. It was based on laws governing all aspects of life. Of interest are the "security laws" that justified the arrest, detention, torture and sometimes killings of Africans. The most comprehensive law was the *Internal Security Act* of 1982⁴⁹. This Act was a consolidation of all previously existing security laws, most of which it also repealed. The earlier security laws included⁵⁰ :

- (a) The Suppression of Communism Act No. 44 of (1950);
- (b) The Bantu Administration Act No. 38 of (1927);
- (c) The Public Safety Act No. 3 of (1953);
- (d) The Criminal Procedure Act No. 56 of (1955);
- (e) The Riotous Assembly Act No. 17 of (1956);
- (f) The Unlawful Organizations Act No. 34 of (1960);
- (g) The General Amendment Act No. 37 of (1963);
- (h) The Terrorism Act No. 83 of (1967);
- (i) The Affected Organizations Act No. 31 of (1974).

⁴⁹ For a good study of repression in South Africa using the *Internal Security Act*, 1982, see I. E. Sagay, *State Terrorism in South Africa* (New York: UN Centre Against Apartheid, 1984). See also Nicholas Haysom, "Human Rights Index" in (May 1985) I SAJHR 80.

⁵⁰ Sagay *ibid* at 3.

The publication of the International Defence and Aid Fund entitled *Apartheid: The Facts*⁵¹ had captured neatly the utilization and compass of these security laws at the hands of the South African police and army:

The widest powers derive from the so-called 'security' laws. These are aimed at people or organizations whose activities and aims the regime describes as 'furthering the aims of communism', 'terrorism', 'endangering the security of the State or the maintenance of order', 'endangering the public peace' or 'threatening essential services'. The definition of these terms is so loose and the power conferred by the laws so wide, that the regime is able to use the law to act against any form of effective opposition to the *apartheid system*. The limits to its capacity to use these powers are not contained in the laws, but are set only by political and practical considerations.

Under the 'security' laws, there are powers to detain people without trial; to ban people, organizations and meetings; to break up meetings: and to imprison people. By the restrictions they place on meetings, the laws licence attacks against protesters and demonstrators, which on many occasions have included the police killing people. The laws have also created conditions under which the torture of detainees has become routine.

Section 28 of the *Internal Security Act* for example empowered the Minister of Law and Order to order the preventive detention of any person he considered engaged in or likely to be engaged in, "activities which endanger or are calculated to endanger the security of the State or the maintenance of law and order". Section 29 permitted police to hold detainees for interrogation indefinitely, in isolation and without access to relatives or lawyers. Section 30 empowered a State Attorney-General to issue an order denying the court its usual authority to release a charged person on bail if he "considers it necessary in the interests of the security of the state or the maintenance of law and

⁵¹ In cooperation with the UN Centre Against Apartheid (New York and London, 1983).

order". Section 31 empowered a state Attorney-General to authorize incommunicado detention without charge of potential state witnesses until the end of the trial at which they are expected to testify. If they refuse to testify, they may be sentenced to up to five years' imprisonment for contempt of court. If they refute in court a statement made while in security police detention on the grounds that it was made under duress, they may be charged with perjury.

In 1984 for example the above *Internal Security Act* sections were used to detain the following numbers of people:⁵²

Section 28 (Preventive Detention) - 28

Section 29 (Detention for interrogation) - 280

Section 31 (Detention of potential witnesses) - 18

Section 50 (Short term preventive detention) - 72

Section 50 of the *Criminal Procedure Act*, or no legislation at all, for period of less than 48 hours. - 152

According to Amnesty International, many detainees had been tortured or severely ill-treated while detained incommunicado⁵³. Many studies have in fact also confirmed that opportunities for torture exist when detainees are held incommunicado anywhere in the world⁵⁴. It is not surprising that torture and ill-treatment are now outlawed by treaty law.

⁵² SAJHR *supra* at 81.

⁵³ Amnesty International, *South Africa: Briefing* (London, 1986) at 17.

⁵⁴ See ANC *Torture is Part of the System, infra*

Not only did incommunicado detentions offer opportunities for torture in South Africa, they also led to extra judicial killings by security police of those tortured. At greater risk of torture and death in prison were political detainees, though even mere criminals had been known to die in prison.

Indications of torture are not only revealed in numerous deaths in prison (to which I will return shortly) but also in numerous cases of detainees requiring hospitalization during or after detention due to injuries or serious mental disturbance. Dr. Wendy Orr, a district surgeon responsible for medically examining detainees and prisoners in the Port Elizabeth area, for example submitted evidence on 25th September, 1985 to the Supreme Court of widespread and regular torture and ill-treatment of detainees. Her evidence was supported by sworn statements from over 40 people, including detainees⁵⁵. The figure for the whole of South Africa would be staggering. Tortured detainees had no recourse to law as existing laws and regulations granted immunity in advance to all law enforcement officials for any actions committed "in good faith" in the exercise of their powers.

The inquests that were conducted after the deaths in prison of Steve Biko, the leader of the Black Consciousness Movement, and Neil Aggett, a white trade unionist, revealed the extent of torture in South African prisons.⁵⁶ The gravity and widespread use of torture in South African prisons had also been revealed more clearly by a nation-wide empirical study conducted by three professors at the Institute of Criminology of the

⁵⁵ Reported in Amnesty International *supra* at 8.

⁵⁶ See *Torture is Part of the System: State Violence in South Africa and Namibia* (London: African National Congress, 1984) and Catholic Institute of International Relations (C.I.I.R.) et al, *Torture in South Africa* (London, 1982).

University of Cape Town.⁵⁷ One hundred and forty-four former "security legislation" detainees were interviewed. The period covered was between 1974 and 1983. Most of those detained were involved in all kinds of political work: student organizations, trade unions, community and political organizations.

Using the operational definition of torture of the United Nations *Declaration on Torture* (to which I will return later), the results came as follows and I quote the whole tabulation:

Only 17% of cases claimed no form of physical torture. The most frequent form of torture (75%) was beating, which included punching, hitting, kicking, slapping as well as beating and whipping with a variety of implements and other forms of assault. The next three most frequently reported forms of physical abuse were forced standing (50%), maintaining abnormal body positions, which includes crouching, standing on toes with arms up stretched, holding chairs or other objects above the head, and holding a position as if sitting in an imaginary chair (34%) and forced gymnasium-type exercises (28%). In addition, 25% reported having been subjected to electric shock, 18% to strangulation either by hand or by means of a cloth or towel, and 14% to suspension in various forms.

Other forms of physical torture were reported by 27% of cases. Hand analysis of these other descriptions revealed the following most frequent forms of abuse:

Manacles, including handcuffs, legs constantly chained and chains placed around neck (15%); pulling out or burning hair or beard (5%); genital abuse (3%), and falanga, which involves beating the soles of the feet with some implement (3%). A further range of abuses were reported by one or more cases and included: being wrapped in canvas, kept barefoot, burning

⁵⁷ D. H. Foster, D. Sandler and D. M. Davis, "Detention, Torture and the Criminal Justice Process in South Africa" in (May, 1987) *Int'l J Soc L* 105. See also their book, *Detention and Torture in South Africa* (London: James Currey, 1987).

matchsticks placed under nails, sand in shoes while doing exercises, being thrown into the air and allowed to fall, given salted water to drink, hands cut with knife, placed in boot of car, nose twisted, fingernails crushed by brick, petrol poured over body and set alight, breasts squeezed, held out of moving car, tied to a tree, and scrubbed on face and body with a hard brush. Even this substantial list does not entirely exhaust the range of abuses reported⁵⁸.

In addition to physical torture, psychological torture was also part of the system. The findings on this aspect of torture are reported as follows:

No cases reported an entire lack of psychological abuse. Over half of the cases reported having been subjected to the following forms: false accusations (83%); solitary confinement (79%); verbal abuse (71%); threats of violence to self (64%); contradictory styles of interrogation (57%); and being given misleading information (51%)⁵⁹.

These figures show that almost no one was safe from torture in South African prisons. Torture was so pervasive that the system itself could be called "torturous" i.e. it was based on torture.

Gordon Winter, an ex-intelligence officer in South Africa also described from experience some of the horrible torture methods and causes of numerous deaths in South African prisons in his book, *Inside BOSS, South Africa's Secret Police*⁶⁰.

Torture resulted in many deaths in South African prisons. As of the period from 1963 to 1984, for example, sixty individuals had been recorded as having died in prison. The majority of the deaths occurred in 1969 (6); 1976 (13), and 1977 (14). The official

⁵⁸ *Ibid* at 111-113.

⁵⁹ *Ibid* at 113.

⁶⁰ Gordon Winter, *Inside Boss: South Africa's Secret Police* (Harmondsworth: Penguin, 1981).

South African explanation of the cause of the deaths are tabulated with names of the victims and dates of their deaths by the Lawyers' Committee for Civil Rights under Law in their publication, *Death in Detention and South Africa's Security Laws*⁶¹ as:

OFFICIAL CAUSE OF DEATH	NUMBER OF DEATHS
Suicide by hanging	20
Strangulation	1
No further details	2
Death by hanging	1
Suicide:	
jumping from window or down stairs	5
Natural causes:	
various	14
slipped in shower or on soap	2
fell down stairs	1
hit head on desk after fainting	1
Accidental:	
fell from tenth floor window	1
hit back of head against wall	1
injury to neck in fall on chair	2
Shot while escaping	2
Police assault	6
Undisclosed	6
TOTAL	60

As can be seen from the table, the majority of the deaths were allegedly caused by suicide by hanging. But friends of the victims alleged that "suicide under torture is murder"⁶² thus imputing directly the deaths to official acts of murder.

⁶¹ (Washington, D.C., 1983). By the end of 1987 about 20 extra deaths since 1984 had been reported to have occurred in prisons in South Africa.

⁶² Poster reproduced in *Torture is Part of the System supra* at 13.

The torture and deaths of political prisoners in South Africa was only part of the story. There were many deaths caused directly by apartheid in South Africa. There was firstly official "judicial murders". Judicial murders occurred when political prisoners were forced to confess under torture to crimes they did not commit. These "confessions" were then used to convict the victims which convictions in turn attracted the death penalty. Secondly the nature of apartheid induced the subject population to commit all sorts of crimes which directly led to imprisonment⁶³. Some of these ended up dying mysteriously in prison. Thirdly, there were many arrests due to infractions of the pass laws. Pass laws were the cornerstone of apartheid. According to Amnesty International's publication, *South Africa: Imprisonment under the Pass Laws*,⁶⁴ 238,000 Africans were arrested in 1984 alone for pass law and other infractions. A sizeable percentage of those arrested either for committing certain crimes or for pass law infractions never saw the light of the day again⁶⁵. According to the report, *Torture is Part of the System* there were on average two hundred (200) deaths in South African prisons every year.

South Africa had one of the highest execution rates under the death penalty in the world. For example there were 130 people hanged in South Africa in 1980; 96 in 1981; 100 in 1982; 90 in 1983; and 115 in 1984⁶⁶. In addition there were over 200 people who died mysteriously in South African prisons per year, in addition to the political detainees who died as a result of torture.

⁶³ This should be a subject for another study.

⁶⁴ (London 1986).

⁶⁵ Winter, *supra*.

⁶⁶ Amnesty International *South Africa: Imprisonment Under Pass Laws, supra* at 16.

Compared to Nazi Germany or what happened in Rwanda in 1994, the apartheid system never reached the genocidal threshold. As Leo Kuper says in his book *Genocide: Its Political Use in the Twentieth Century*⁶⁷, genocide covers a wide range of forms: religious, racial, ethnic etc. and can also encompass varied conditions of colonization and decolonization etc. In South Africa it never reached the level of “racial genocide”. Though the definition of genocide in line with the *Genocide Convention* is restricted to "intentional acts", in South Africa there was no intention to kill en mass despite the fact that massive deaths occurred directly as a result of the apartheid system.

Kuper, in his book, discusses South Africa in a chapter entitled, "The non-genocidal society" and alludes to the "strong genocidal potential" of apartheid in relation to Africans, in these terms:

The government segregates, and socially isolates, Africans, denying them membership in the wider community, and withholding the protection of a common humanity; it systematically deprives Africans of a wide range of basic human rights; it uproots vast numbers living in settled communities, so as to eliminate 'black spots', and it resettles them, in many cases with little or no regard for their survival; it tolerates health conditions which take a heavy toll of infant mortality, and generally of preventable deaths; it permits a wage structure which, apart from the extreme discrimination against Africans, denies hundreds of thousands an adequate level for sustenance; it canalizes African labour in a dehumanization to the level of a commodity; it condones, perhaps even authorizes, the torturing to death of political prisoners; and it subjects Africans to a daily routine of humiliation and deprivation. Yet the genocidal massacre of whole sections, including men, women and children, is not part of government practice, and the murders are on a smaller scale than one would expect from so tyrannical and brutal a regime. Here, too, there must be powerful restraints against genocide⁶⁸.

⁶⁷ (London: Hammondswork, 1978).

⁶⁸ *Ibid* at 203.

Kuper continues further:

Many people already equate apartheid with genocide. I have taken a different view - that the policies and practices of apartheid have considerable genocidal potential, but that the level of violence and murder by the South African government and its agents, high as it is, falls below what one would predict, and that this suggests the pressure of powerful restraints on the government⁶⁹.

The supposed restraints on the government according to Kuper included regime need for African labour, demographic superiority of Africans, availability of other options e.g. forced removals and Bantustans, and external pressure.

1.3 Forced Mass Removals and the Bantustans

Apartheid was premised on exclusive white economic and political control of South Africa. Mass removals were necessary to retain white exclusivism. The pass laws were invented to maintain that system.

The major law that became the purveyor to mass removals and eventually to the Bantustans was passed in 1913 as the *Land Act*. It stipulated in the main that 87% of the land in South Africa was to be reserved for white occupation 13% was reserved for Africans. *The Land Act* of 1913 was resuscitated into vigorous existence by the *Group Areas Acts* of 1950 and 1966.

Since 1960, according to the South African Council of Churches writing in 1984, 3,372,900 people had been forced to move and a further 1,740,500 were threatened⁷⁰.

⁶⁹ *Ibid* at 206.

⁷⁰ *Relocations: The Churches Report on Forced Removals* (Nottingham: Russell Press Ltd., 1984) at 14.

Eight Million Africans had been deprived of their South African citizenship which in itself was a violation of international law. These eight million people were regarded as citizens of the Bantustans⁷¹. There were ten of these areas: Ciskei, Transkei, Kwazulu, Kangwane, Qwa-Qwa, Bophuthatswana, Kwandebele, Lebowa, Gazankulu and Venda. No country in the world except South Africa recognized these areas as independent.

Despite numerous U.N. protests about these illegal removals to these areas, South Africa continued to remove and deport Africans to these areas until the end of apartheid. Their homes were torn down by government bulldozers or burned while property was still inside. Residents were rounded up and hauled onto trucks which dumped them in uninhabited and sometimes inhabitable lands. Some of those who protested at the removals were arrested and detained. Some were simply shot on sight by the police⁷².

A reviewer of a well-documented book on these removals entitled *The Surplus People: Forced Removals in South Africa*⁷³ had commented:

The lesson of Nuremberg is that the iniquity in our midst is the responsibility of us all. When evidence is called on apartheid, perhaps the most compelling testimony will be given by those among the three million victims of forced removals in South Africa. A vast human tragedy has been documented here With material like this available the common citizen could never plead with conviction 'I did not know'⁷⁴.

1.4 Repression in the Bantustans

⁷¹ For a general report on the Bantustans See Barbara Rogers, *Divide and Rule: South Africa's Bantustans* (London: I.D.A.F., 1976).

⁷² Laurine Platzky and Cheryl Walker, *The Surplus People: Forced Removals in South Africa* (Johannesburg: Ravan Press, 1985).

⁷³ *Supra*.

⁷⁴ Charles Nupen in (July 1986) 2 SAJHR at 250-1.

The Bantustans were located on economically barren lands. The lands were unable to support the existing population levels. All of the Bantustans without exception had internal security acts modelled on the repressive South African *Internal Security Act*. In 1981 for example, when Ciskei obtained its "independence", 320 trade unionists were detained during the first week under the new security law⁷⁵. Further in 1984 for example, a total of 532 people were detained under the security legislations of the Transkei, Ciskei, Venda and Bophuthatswana⁷⁶. Like in South Africa, many of those arrested and held incommunicado were tortured and quite a number of deaths in prison occurred.

The Bantustans served the South African regime very well. Stated the African National Congress:

The degree of repression in the Bantustans is increasing. Previously, these areas were seen primarily as reservoirs of labour for the country's mines, farms and factories. Now they combine that function with repression of activists in the war against apartheid⁷⁷.

To cement the connection between apartheid South Africa and the Bantustans, the police forces and armies of the latter were trained by their counterparts in the South African police and the South African Defence Force.⁷⁸

The international community regarded the Bantustans as part of South Africa. The creation of Bantustans violated two principal norms of contemporary international law:

⁷⁵ *The Surplus People, Supra* at 37.

⁷⁶ *Supra* at 81.

⁷⁷ Quoted in *The Surplus People, Supra* at 35-6.

⁷⁸ *Supra* at 4.

the right of a people to self-determination and the prohibition on race discrimination⁷⁹. The Bantustans were not viable territorial units apart from violating the territorial integrity of South Africa itself. The denial of citizenship as a result of the Bantustans was also a violation of international law.

1.5 Crime of Apartheid in Namibia

Namibia, a former Germany colony, was occupied by South Africa during the course of the First World War. In 1920 the League of Nations mandated South Africa to govern the territory on its behalf. This mandate continued after 1945 under the United Nations. However, in 1966, the United Nations terminated South Africa's mandate to rule over Namibia by resolution 2145⁸⁰. In 1971 the International court of Justice (ICJ) declared South Africa's continued occupation of Namibia illegal and a crime against humanity⁸¹.

The crimes for which apartheid in South Africa was condemned and which had led the international community to regard as crimes against humanity as stipulated in ICSPCA (*Apartheid Convention*) were also committed in Namibia on a similarly pervasive scale. These crimes like in South Africa were committed in the process of implementing security legislations in the maintenance of apartheid.

⁷⁹ *Ibid* at 50.

⁸⁰ For a review of the Namibian debate, see Gay T. McDougall, "International Law, Human Rights and Namibian Independence" (August 1986) 8 HRQ 443 and Geisa Maria Rocha, *In Search of Namibian Independence: The Limitations of the United Nations* (Boulder: Westview, 1984).

⁸¹ Advisory Opinion of 21 June 1971 (ICJ) Paragraphs 117 to 127. See Rocha *ibid*.

The most pernicious of the security legislation in Namibia was perhaps the *Terrorism Act* (No. 83) of 1967. This legislation authorized the death penalty for what were called "terrorist activities". These were defined as any behaviour with "intent to endanger the maintenance of law and order". The police and army would use the *Terrorism Act* to arrest, detain and imprison people for practically any reason and for any length of time.

In Namibia in 1977, the South African government began to enact legislative acts by simply assigned letters with a number. The government began with the proclamation AG9⁸². This Act authorized indefinite incommunicado detention. In addition there existed proclamation AG26⁸³ which authorized the cabinet unequalled powers to detain, indefinitely and without charge, any person who was believed to be a threat to law and order in Namibia. Like in South Africa, torture in Namibian prisons was very well documented⁸⁴. For example, a Father Heinz Hunke in his publication entitled, *Torture - A Cancer in our Society* (1978) documents the pervasiveness of torture in Namibia. Detainees were subjected to electric shock torture; beatings with fists and rifle butts; burning with cigarettes; hanging by the arms, sometimes with a weight added; sleep deprivation; and solitary confinement. As in South Africa, a good number of detainees died in prison under unexplained circumstances.

1.6 Repression and Liberation Movements in Southern Africa

⁸² See McDougall *supra* for a discussion of security legislation in Namibia.

⁸³ *Ibid.*

⁸⁴ See Amnesty International, *Human Rights Violations in Namibia* (London 1982).

The crimes committed by apartheid South Africa against Black citizens in South Africa and Namibia, forced the victims of repression to flee as refugees and to form liberation movements in neighbouring countries and elsewhere. These liberation movements began to make incursions into South Africa. South Africa, in defence of apartheid, proceeded to pursue the liberation movements' freedom fighters in the neighbouring states and elsewhere. Had South Africa not been committing criminal acts against the Black population in South Africa and Namibia, there would have been no need for the struggle for liberation and freedom in these countries. There would have been no refugees and no struggle for self-determination. South Africa was therefore the aggressor and in its aggression against the freedom fighters and neighbouring countries, war crimes and crimes against humanity were committed. This state of affairs stemmed from the policy of apartheid.

Apartheid South Africa had repeatedly committed aggression against neighbouring countries in Southern Africa. Aggression is a crime against international peace i.e. it is an international crime which gives rise to international responsibility⁸⁵. According to the United Nation's definition of aggression⁸⁶:

Art. 1. Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations....

Art. 3. Any of the following acts [without being exhaustive] ... is act[s] of aggression...

⁸⁵ Article 5 of the United Nations Definition of Aggression.

⁸⁶ U.N. G.A. Res. 3314(XXIX) 14 December 1974, reprinted in (1974) 13 ILM 710.

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above ... or its substantial involvement therein.

Angola⁸⁷ and Mozambique⁸⁸ received the brunt of South African aggression than the other Southern African countries. Southern Angola was more or less permanently occupied by South African troops since the late 1970's. Over 700,000 people had been killed as a result of South African aggression in neighbouring countries and about 8 million people had been displaced from their homes⁸⁹. Among the numerous sources of information on South African aggression in Southern Africa, perhaps Joseph Hanlon's *Beggar Your Neighbours: Apartheid Power in Southern Africa*⁹⁰ and Richard Leonard, *South Africa at War: White Power and the Crisis in Southern Africa*⁹¹ maybe the most well documented. They describe the depth and destructiveness of South African war of aggression and destabilization against its neighbours. A picture that comes out is a picture of South African commission of crimes against peace, war crimes and crimes against humanity in these countries, as defined by the *Nuremberg Principles* as will be discussed later. In May, 1978 to just give an example of the criminality of apartheid in Southern Africa, South Africa attacked Southern Angola, ostensibly to strike against South West Africa People's Organization (SWAPO) guerrillas, and killed 612 people

⁸⁷ Michael Wolfers and Jane Bergerd, *Angola in the Front Line* (London: Zed Books, 1983).

⁸⁸ Robert Davies, *South African Strategy Towards Mozambique in the Post-Nkomati Period: A Critical Analysis of Effects and Implications* (Uppsala: S.I.A.S., Research Report, no. 73, 1985).

⁸⁹ Hanlon *infra*.

⁹⁰ (Bloomington: Indiana University Press, 1986).

⁹¹ (Wesport: Lawrence Hill and Company, 1983).

and wounded 689 people⁹². One Trevor Edwards, a British mercenary in South Africa described the torture and murders committed by the South African army during its military operations against neighbouring countries: "Our main job is to take an area and clear it. We sweep through it and we kill everything in front of us, cattle, goats, people, everything. We are out to stop SWAPO and we stop them getting into villages for food and water Sometimes we take the locals for questioning. It's rough. We just beat them, cut them, burn them. As soon as we're finished with them, we kill them." These are war crimes and crimes against humanity *par excellence*. In one such operation, a twelve year old boy in Southern Angola was tortured in order to make his mother talk: "... we played water polo with him, put him in this kind of dam and pushed him about, let him sink. Every so often we took him out. He wouldn't cry. He just wet himself. The mother didn't say anything. In the end we just left him in the water and he drowned"⁹³. Such incidents occurred over and over and in multiplied numbers every day in Southern Africa. This resembled perfectly Nazi war crimes in occupied territories during Second World War.

South African aggression was not limited to human targets in terms of torture and war related deaths, it also affected the political and economic infrastructures of the target countries. In July, 1986, for example, the Southern African Development Coordination Conference (SADCC) presented a memorandum to the summit meeting of the heads of state of the Organization of African Unity (OAU) in Addis Ababa which detailed the

⁹² Cited in *ibid* at 80.

⁹³ Quoted in *ibid*.

cost of South African aggression since 1980⁹⁴. It had cost over \$20 billion involving: direct war damage; refugees; transport and energy costs. These costs translated themselves into immediate human tragedies e.g. famine, deprivation of shelter, fear and other atrocities.

1.7 The Application of Law of Prosecutions

What has been discussed above constituted the crime of apartheid for which the perpetrators could be prosecuted. It is necessary, therefore, before talking about the application of law to possible prosecutions of the crime of apartheid to indicate those who must bear criminal responsibility for the crime of apartheid.

1.7.1 Penal Responsibility for the Crime of Apartheid

Modern international law now recognizes and pins criminal responsibility for committing international crimes on individuals as well as institutions and organizations. In the case of the crime of apartheid, it is necessary to pinpoint exactly which individuals and institutions ran the state that was responsible for those acts that have been labelled international crimes.

According to Joseph Hanlon⁹⁵, the nerve centre of the apartheid state and by extension the crime of apartheid, was the State Security Council which had obviously evolved with different characteristics and configurations over the years. The State

⁹⁴ ."The Cost of South African Aggression" Addis Ababa, July 1986, Memorandum by S.A.D.C.C. to the O.A.U.

⁹⁵ *Supra*

Security Council made the key decisions in South Africa and thus had held the real power, according to Hanlon. Hanlon argued that the South African Cabinet and Parliament only rubber stamped what had already been decided by the State Security Council⁹⁶. The State Security Council included: The Prime Minister (who was Chairman); Minister of Defence; Foreign Affairs; Justice; Law and Order; Finance; and Manpower. It also included bureaucrats such as: Head of National Intelligence Service (NIS formerly Bureau of State Security - BOSS); Military Intelligence; the Police; and Defence Force and the Directors - General of Foreign Affairs and Justice.

Among others who also bore responsibility are the Head of the prison department, local directors of all prisons; the military commanders whose units had been responsible for murder and torture in the townships and in foreign countries i.e. Namibia and other Southern African countries. None of the personnel of apartheid listed above, has been prosecuted for the crime of apartheid as defined by ICSPCA.

1.8 Conclusion

This chapter has discussed the gross and systematic human rights violations committed by the apartheid regime in South Africa for which accountability was mandated. The next chapter discusses the responses of the United Nations to the gross human rights violations that were being committed under apartheid in particular, and the framework the United Nations has set in dealing with impunity and accountability for gross human rights violations in general.

⁹⁶ See John Dugard, "Collective Cabinet Responsibility and Human Rights" in (May 1985) 1 SAJHR 52.

CHAPTER TWO

THE UNITED NATIONS AND THE CRIMINALISATION OF APARTHEID IN INTERNATIONAL LAW

2.1 Introduction

This chapter discusses the evolution of the treatment of apartheid as practised in South Africa between 1948 and 1994 in international criminal law. It will be shown that apartheid criminals were slated for prosecution during and after the apartheid era. The discussion in this chapter will lay the foundation for arguing in later chapters why apartheid criminals should not get away with impunity. It also lays the foundation for the assessment of how apartheid criminals got away with impunity.

2.2 Apartheid in South Africa: The United Nations Involvement

This section deals with United Nations involvement with the issue of apartheid. The United Nations General Assembly and the Security Council perhaps issued more resolutions and declarations against the apartheid regime and how it was a threat to the peace and security in the world than on any other topic in the post-war world between 1948 and 1994.⁹⁷ Although United Nations General Assembly Resolutions and Declarations are not of binding international law import, they are regarded as evidence of evolving international thoughts and practices and may develop from “soft” to “hard” law of treaties or conventions. Quite a number of important international conventions

⁹⁷ John Dugard, “Convention on the Suppression and Punishment of the Crime of Apartheid” United Nations (2008) www.un.org/law/ar1 at 1.

began as mere Declarations. *The Apartheid and Torture Conventions* are just two of the examples of such evolution from soft to hard law.⁹⁸ United Nations Security Council Resolutions are binding international law.

As John Dugard has stated, apartheid was annually condemned by the General Assembly as contrary to Articles 55 and 56 of the Charter of the UN from 1952 to 1990 and was regularly condemned by the Security Council after 1960.⁹⁹ The triggering event for the Security Council condemnation was the Sharpeville massacre of March 21st, 1960 when the South African police killed 69 Africans who were involved in a peaceful demonstration. The Truth and Reconciliation Commission of South Africa that was convoked in 1995 to exorcise the past and compile a “truthful” record of the crimes committed under and during apartheid, with a view to reconciling the various racial and political communities who were in mortal combat, dated the criminality of apartheid as a crime against humanity as of March 1960. Sharpeville was a watershed in South African history. Sharpeville became the “moral panic” of South African condemnation by the international community¹⁰⁰. The concept of moral panic will be discussed later.

The first mention by the UN of apartheid as a “Crime Against Humanity” came in the 1965 UN resolution entitled “Implementation of the Declaration on the Granting of Independence to Colonial Countries and People” in which it proclaimed that “the practise of apartheid as well as all forms of racial discrimination threatens international

⁹⁸ For a discussion of soft law and hard law, see Andrew T. Guzman and Timothy L. Meyer, “International Common Law: The Soft Law of International Tribunals,” Internet accessed, march 1st, 2012

⁹⁹ Dugard, *supra*, see *Apartheid Convention supra*.

¹⁰⁰ For the “Moral Panic” triggered by Sharpeville see Tom Lodge, *Sharpeville: An Apartheid Massacre and its Consequences* (Oxford; Oxford University Press, 2012).

peace and security and constitute a crime against humanity”¹⁰¹. In 1966, the UN General Assembly in Resolution 2202 again labelled apartheid as a crime against humanity¹⁰². It took the Security Council 20 years to endorse the label of apartheid as a crime against humanity in resolution 556 of 1984.¹⁰³ Between 1965 and 1984 two conventions and a protocol to a convention had condemned apartheid as a crime against humanity; in 1971 the International Court of Justice had called the occupation of Namibia illegal and a crime against humanity; the Soweto massacres of 1976 and the murder of Steve Biko in 1977 had taken place.

The two conventions before the collapse of apartheid in 1994 that declared apartheid as a crime against humanity were, firstly, the 1968 UN *Convention on the Non-applicability of Statutory Limitations to War crimes and Crimes against Humanity* and secondly the 1973 UN *International Convention on the Suppression and Punishment of the Crime of Apartheid*. Protocol 1 (1977) of the *Geneva Conventions* of 1949 included apartheid as a crime against humanity.

What are the attributes of an international crime to which apartheid fit? International crimes include war crimes, crimes against humanity, genocide, torture, piracy, slavery, aggression, forced disappearances, hijacking of aircrafts, extra-judicial executions, forced removals, arbitrary detentions and related offences¹⁰⁴.

¹⁰¹ Dugard, *supra*.

¹⁰² Dugard, *supra*.

¹⁰³ Dugard, *supra*.

¹⁰⁴ A good compilation is that of Cherif M. Bassiouni (ed) *International Criminal Law* 3rd ed. 3 Volumes (New York: Transnational Publishers, 2008).

International crimes were perhaps defined and delineated for the first time in the *Nuremberg Principles*. A crime is called an international crime for the following reasons¹⁰⁵:

(a) It is a wrongful act infringing international obligations that are essential for the protection of fundamental interests of the international community as a whole and which therefore concern the international community as a whole; (b) It is an especially heavy violation of international law; (c) It is, for these very reasons, recognized by the international community as being an international crime. The United Nations General Assembly embodies the international community and generally expresses the will of most humanity. This is the case even when there is no unanimity.

The Nuremberg Principles were recognized on December 11, 1946 by the United Nations General Assembly as norms of international law.

2.3 Apartheid as a Crime in Conventional International Law

Article 1 of the *International Convention on the Suppression and Punishment of the Crime of Apartheid*¹⁰⁶ which entered into force on July 18, 1976 stipulates that:

(1) The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies 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

¹⁰⁵ G. Brahmé, "Some Remarks on Responsibility for the Crime of apartheid under International Law" in *Apartheid, South Africa and International Law* (New York: UN Centre Against Apartheid, 1985) at 198.

¹⁰⁶ *International Convention on the Suppression and Punishment of the Crime of Apartheid* (United Nations, *Treaty Series* vol. 660, at 195).

principles of the Charter of United Nations, and constituting a serious threat to international peace and security.

(2) The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

Thus apartheid was recognized as a crime against humanity by treaty law. As is common knowledge, treaties are one of the most important binding sources of international law, commanding adherence not only by states parties to a particular treaty, but by the international community generally. Apartheid was a crime violating not only international law but was also a serious threat to international peace and security. The crime of apartheid as a crime against humanity was not limited to its practices in South Africa and Namibia, it extended to similar practices elsewhere as article 11 of the *Apartheid Convention* makes clear:

For the purpose of the present Convention, 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: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by

denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form organized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association,

- (d) Any measures, including legislative measures designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

The *Apartheid Convention* is broader in compass than the *Nuremberg Principles*. The principle of the illegality of racial discrimination, like that practiced in South Africa had increasingly been elevated in international law if not already recognised as part of *jus cogens* - a peremptory norm of international law which cannot be derogated from or set aside by treaty or acquiescence. Non-discrimination as a case of *jus cogens*, apartheid as practiced in South Africa constituted a specific and particular case of violation of *just cogens*¹⁰⁷. Racial Discrimination is also outlawed by treat law, as recognised in the *International Convention on the Elimination of All Forms of Racial Discrimination* that came into force in 1966. Racial discrimination is thus a violation of international law. Considering the numerous U.N. Resolutions and Declarations against apartheid practices in South Africa; numerous treaties similar to *Apartheid Convention*.; various national legislations; various pronouncements in international circles; press releases, policy statements etc., apartheid had already become a violation of customary

¹⁰⁷ See *Bassiouni*

international law, conventional international law as well as general principles of law recognized by the community of nations.

Apart from being an international crime on the basis of being a crime against humanity in regards to its treatment of the majority population in South Africa as defined above, apartheid according to Brahme¹⁰⁸ was also a crime against peace. This is because of: (a) its continued colonial and illegal occupation of Namibia, which in itself was also a violation of the principle of the right to self-determination of peoples¹⁰⁹ and, (b) its aggression and destabilization of neighbouring states. It was inevitable that in the course of its occupation of Namibia and its aggression against neighbouring states, apartheid also committed war crimes and crimes against humanity in those other countries as defined in the *Nuremberg Principles*. If this is the case, then apartheid committed and it continued to commit all the major international crimes, namely, crimes against peace; war crimes and crimes against humanity for which the international community has universal jurisdiction to prosecute the perpetrators of those crimes.

The *Apartheid Convention* is regarded as the first convention to explicitly provide for universal jurisdiction for the prosecution of the perpetrator of the crime of apartheid¹¹⁰.

Article V goes further to stipulate more concretely universal jurisdiction by virtue of the acquisition of jurisdiction over the alleged criminal:

¹⁰⁸ Brahme, *supra* and see also *Declaration on the Granting of Independence to Colonial Countries* (United Nations General Assembly Resolution 1514(XV) of 14 December 1960).

¹⁰⁹ *Ibid.*

¹¹⁰ See Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht: Martinus Nijhoff, 1991).

Persons charged with the acts enumerated in article 11 of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

The concept of universal jurisdiction will be discussed later. This Convention is stronger as well, than the *Genocide Convention* as it provides for universal jurisdiction. The *Genocide Convention* provided for prosecution only by the states in which genocide took place. For the *Apartheid Convention* there would be no need for extradition unless the state has not yet accepted jurisdiction and there would also be no need for waiting for the constitution of an international tribunal, as required by the *Genocide Convention*.

The coming into force of the Apartheid Convention in 1976 was followed by attempts by the United Nations to give stronger teeth to the convention and the exercise of universal jurisdiction against apartheid criminals. In 1980, consideration was given by the UN to the establishment of a special international court to try persons for the crime of apartheid¹¹¹. No international tribunal was ever created for the prosecution of apartheid criminals. But the crime of apartheid continued to be denounced in international criminal law. John Dugard reports that,

In 1977, Additional Protocol 1 of the Geneva Conventions of 1949 recognized apartheid as a “grave breach” of the Protocol (art.85, paragraph 4(c) without any geographical limitation. Apartheid features as a crime in the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission on first reading in 1991 without any reference to South Africa and in 1996 the Draft Code adopted on second reading recognized institutionalized racial discrimination as

¹¹¹ E/CN.4/1426(1981) quoted in John Dugard, “Convention on the Suppression and Punishment of the Crime of Apartheid” United Nations Audiovisual Library of International Law (United Nations, 2008) at 2, www.un.org/law/aw/ (accessed Sept. 21st, 2009).

species of crime against humanity in article 18 (f) and explained in its commentary that this “is in fact the crime of apartheid under a more general denomination” (Report of the International Law Commission on the work of its forty-eighth session (A/51/10), p.49). In 1998, the Rome Statute of the International Criminal Court included the “crime of apartheid as a form of crime against humanity” (art.7)¹¹².

The crime of apartheid was not a new phenomenon in international criminal law. The world had already seen the worst forms of this crime in the form of the holocaust, genocide, war crimes, crimes against peace and crimes against humanity committed by Nazi Germany. The next section deals with Nazi war crimes that preceded the crime of apartheid. The world was thus alive and alert to the possibilities that what was happening in South Africa could be a repeat of what happened in Nazi Germany.

2.4 Nazi War Crimes

It is thus necessary to dwell at some length on how Nazi War Crimes were dealt with in order to draw a few lessons regarding how apartheid criminals might be dealt with or might have been dealt with from 1948 up to the present.. Before the end of the Second World War, major powers were already meeting to formulate ideas about prosecuting individuals responsible for committing war crimes. Four major powers (the U.S.A., Britain, U.S.S.R. and France) met on August 8, 1945 at London and reached what become known as the London Agreement. This Agreement was the blue print for the prosecution of war criminals and criminals against humanity. These delegates drew up a Charter for an International Military Tribunal (IMT). The tribunal tried the Nazi War

¹¹² John Dugard *Ibid* at 2.

Criminals at Nuremberg beginning on November 20, 1945. The International Military Tribunal evolved a set of principles that became known as the *Nuremberg Principles*.

Principles VI and VII of the *Nuremberg Principles* state:

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

- (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
- (b) War crimes: Violations of the law or customs, of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
- (c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII: Complicity in the commission of a crime against peace, a war crime or a crime against humanity as set forth in Principle VI is a crime under international law.

The International Military Tribunal named 24 individuals as defendants to the charges defined in Principle VI of the *Nuremberg Principles*. All the individuals named had occupied high ranking positions in the Nazi party, military, police and security apparatuses. In addition, the following were named as groups or organizations which should be declared criminal: the Reich cabinet; the Leadership Corps of the Nazi Party; the Schutzstaffeln, known as the SS; the Sicherheitsdienst, known as the SD; the Geheime Staatspolizei, known as the Gestapo; the Sturmabteilungen, known as the SA;

the General Staff and High Command of the German Armed Forces¹¹³. The South African State Security Council resembled the individuals, groups and institutions that were prosecuted in Germany by the I.M.T.

The *Nuremberg Principles* established the principle of individual, group and institutional penal responsibility for committing an international crime. The named individuals and organizations were indicted for committing international crimes already referred to.

The indictment consisted of the following four parts: Count One: The common plan or conspiracy against peace - the planning, preparation, initiation and waging of a war of aggression; Count two: Crimes against peace - the seizure of Austria and Czechoslovakia, aggression against Poland, France, Great Britain, Luxembourg, Denmark, Norway, Belgium, Netherlands, Yugoslavia, Greece, U.S.S.R. and U.S.A.; the occupation of Poland, France, Denmark, Norway, Luxembourg, Yugoslavia, Greece and part of U.S.S.R.; the violation in 64 cases of a total of 36 international treaties and conventions; Count three: War crimes, genocide and the barbarous treatment of civilian population in the occupied territories and of the prisoners of war; Count four: Crimes against humanity perpetrated in the German occupied territories from Sept. 1, 1939 until May 8, 1945: persecution for political, racial or religious reasons in the form of killing, enslaving, deportation, etc.¹¹⁴

¹¹³ Edmund Jan Osmańczyk "Nuremberg War Criminals Trial, 1945-1946" in his *Encyclopedia of the United Nations and International Agreements* (London and Philadelphia: Taylor and Francis, 1985) at 575-6.

¹¹⁴ *Ibid.* See also Telford Taylor, *The Anatomy of the Nuremberg Trials, A Personal Memoir* (New York; Knopf 1992).

The tribunal handed down the following sentences on October 1, 1946: three individuals were acquitted, three organizations were found to be criminal, seven individuals were found guilty and were sentenced to prison terms ranging from ten years to life imprisonment, and twelve individuals were sentenced to death by hanging.

The *Nuremberg Principles* also established universal jurisdiction under international law for trying those accused of committing international crimes. This is not explicitly stated but is implicit judged by the invocation of "responsibility under international law" in several of the principles. This will be discussed in the chapter on Universal Jurisdiction. The other innovation of *Nuremberg* is the fact that if internal law does not impose a penalty for an act which constituted a crime under international law, this did not relieve the person committing the act of responsibility under international law (Principles I and II). Further, that somebody had acted as head of government or acted pursuant to the order of his government or a superior were no excuses under international law.

I have discussed at length the question of the *Nuremberg Principles* in order to suggest that crimes of apartheid should meet the same judgement this time under the internal laws of South Africa, laws in and of Canada or any other country.

2.5 The Recharged International Criminal Law

Contrary to the claims that the *Apartheid Convention* is in disuse, one finds that it has assumed new life in the ICC statute and domestic legislation of states parties to the statute of the ICC.

The last two decades have witnessed an unprecedented energizing of international criminal law.¹¹⁵ These developments raise the possibility that the *Apartheid Convention* could also be implemented even now by the setting of an international tribunal a topic to be discussed later. The most important new or latest development in international criminal law was the creation of the Statute of the International Criminal Court (ICC)¹¹⁶ in 1998 whose statute lists “apartheid” as one of the international crimes amenable for prosecution under the statute. The incorporation of apartheid as a crime against humanity in the *Rome Statute* that created the International Criminal Court (ICC)¹¹⁷ in 2002 is quite significant in the development of international criminal law and the application of universal jurisdiction. Firstly, it is significant because apartheid had already been demobilized but it signalled that the prosecutions against those exhibiting old or new forms of apartheid could continue as a result of the *Rome Statute* in the countries that had incorporated the *Rome Statute* into domestic law. Secondly, it is significant that the majority of nations have ratified the *Rome Statute* incorporating the principles of universal jurisdiction in the prosecution of war criminals including the crime of apartheid.

¹¹⁵ Bassiouni, “Introduction,” in *International Criminal Law, supra* at xiii; Paust, J. Jordan; Bassiouni, M. Cherif; Scarf, Michael; Gurulé, Jimmy; Sadat, Leila; & Zagaris, Bruce, *International Criminal Law: Cases and Materials* 3rd (ed.) (Durham: Carolina Academic Press, 2007)

¹¹⁶ See The International Centre for Criminal Law Reform and Criminal Law Reform and Criminal Justice Policy, *International Criminal Court: Manual for Ratification and Implementation of the Rome Statute*, 3rd. (ed.) (Vancouver: UBC, 2008) www.iccir.law.UBC.ca; Schabas, William, (ed.) *Essays on the Rome Statute of an International Court* (IL Sirente, 1999).

¹¹⁷ UN *Treaty Series* vol.2187 at 3.

The last two decades have also seen the creation of adhoc and specialized tribunals like those examining former Yugoslavia,¹¹⁸ Rwanda,¹¹⁹ Sierra Leone,¹²⁰ East Timor,¹²¹ and Cambodia.¹²² These specific tribunals have generated impressive jurisprudence.¹²³ This dissertation discusses whether the gap existing with respect to the prosecution of apartheid criminals could be closed by the creation of a specific international apartheid tribunal.

Equally as important has been the explosion in the exercise of universal jurisdiction in as diverse national jurisdictions as Belgium, Spain, the UK, Australia, Canada, the Netherlands, Switzerland, the USA and other countries.¹²⁴ Could universal jurisdiction be exercised against apartheid criminals.

2.6 Conclusion

Apartheid began to emerge as a serious issue of international concern immediately after the Second World War. The United Nations began to be seized by this issue in 1946. The national liberation movements started calling for the prosecution of apartheid criminals in the 1960s. This concern by the United Nations and the victims of apartheid culminated in the 1973 UN's designation of apartheid as a crime against humanity in the

¹¹⁸ Bartram S. Brown, "The International Criminal Tribunal for the Former Yugoslavia" in Bassiouni Vol. 3, at 69-103

¹¹⁹ Roman Boed, "The International Tribunal for Rwanda" *ibid* Vol. 3, at 103-117

¹²⁰ David Crane, "The Special Court for Sierra Leone" *ibid* Vol.3, at 195-219

¹²¹ East Timor is not very much studied as Tribunal

¹²² David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia," in *supra* note 7, at 219-257

¹²³ See Paust et al, *supra*.

¹²⁴ Lattimer, Mark and Philippe, Sands (eds.) *Justice for Crimes Against Humanity* (Oxford et al: Hart Publishing, preprint, 2007); American College of Trial Lawyers, *Report to the International Committee of the American College of Trial Lawyers on the Prosecution of War Crimes, Crimes Against Humanity and Genocide* (Irvine, 2004).

International Convention on the Suppression and Punishment of the Crime of Apartheid which provided for the universal jurisdiction for the prosecution of apartheid criminals.

Apartheid was also a crime under customary international law and a national state need not have ratified the *Apartheid Convention* in order to prosecute apartheid criminals. The next chapter deals with the state of Canada's war crimes prosecutions policy in the aftermath of the Second World War in order to set the stage as to whether Canada had the legal apparatus to prosecute apartheid criminals from 1948 to 1994.

CHAPTER THREE

**THE TRUTH AND RECONCILIATION COMMISSION AND THE
PROSECUTION OF APARTHEID CRIMINALS IN SOUTH AFRICA**

3.1 Introduction

This chapter deals with the South African Truth and Reconciliation Commission (TRC) as a form of accountability for the crime of apartheid. Iris Ameida has commented that “it is undeniable that the political compromise reached in South Africa with respect to accountability for crimes under the former tyrannical regime allowed for the transition to a democratic regime, the fact remains that domestic law makes this regime, in many cases, unable to punish perpetrators of crimes that are clearly illegal under international law.”¹²⁵ In the case of South Africa, this is regrettable because domestic prosecution of international crimes offers the potential to prosecute a greater proportion of offenders because domestic trials are apt to cost less than their international counterparts.¹²⁶ International crimes, however, whether prosecuted domestically or internationally are complex and difficult to prove¹²⁷ and will nevertheless also be costly no matter where they are prosecuted. To prosecute murder as a crime against humanity, for instance, the prosecution must prove not only that the

¹²⁵ Iris Almeida, “Accountability for Crimes: The Role of International Criminal Tribunals in Effectively Addressing Impunity” (August 1998) 17-3 *Refugee* 14 Oct 17).

¹²⁶ Nancy Armoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford: Stanford University Press, 2007) at 41.

¹²⁷ *Ibid.*

defendant killed the victim but that the murder took place as part of a widespread or systematic attack against a civilian population.¹²⁸

South Africa could not go to a full extent to prosecute apartheid criminals . The TRC route was a compromise solution. The initial and only trials for related human rights violations in South Africa were very expensive following which South Africa abandoned the prosecution strategy. It could be argued that the costs of trials could be balanced with transfer of resources from other projects, for example arms purchases of which South Africa is known to engage in. Arms are very expensive, much more so than criminal trials. It is a matter of priorities.

The question is, should apartheid criminals be allowed to continue their impunity? There are currently no victims' groups engaged in litigation to compel the South African government to prosecute apartheid criminals, neither are apartheid criminals being prosecuted by the state. There is no regional African Union Court created for the purpose of prosecuting apartheid criminals, nor is the ICC engaged, since the crime of apartheid took place before the creation of the ICC, this body is not competent to prosecute apartheid criminals. Do any mechanisms exist at the international level to ensure that regardless of domestic legal and political particularities and inadequacies, perpetrators of heinous crimes are still made to answer for them?¹²⁹

The actions or inactions of the post-apartheid government may dictate whether or not universal jurisdiction on apartheid criminals is warranted. This chapter discusses the

¹²⁸ *Ibid* at 41.

¹²⁹ Almeida, *supra* at 17.

measures, the new South African government that took over after the demise of apartheid in 1994, implemented in order to address the crime of apartheid

The last forty years has seen a number of models being used to address human rights violations that have been committed by authoritarian regimes, military juntas, ethnic warlords and colonial dictators. The term that has come to dominate this phenomenon is called “transitional justice” also sometimes known as “post-conflict justice”¹³⁰.

The following include the various models that have been identified as addressing post-conflict justice. The distinguishing characteristics of these post-conflict justice models are (1) whether they are aimed at prosecutions or amnesties, and (2) the national or international composition of the judiciary:

- The international judicial model (Yugoslavia and Rwanda) are aimed at strict prosecutions of the perpetrators of the international crimes for which they were charged;
- the mixed judicial model (East Timor, Kosovo, Sierra Leone, Cambodia) are composed of national and international judges in the prosecution of the culprits;
- the national judicial model (Ethiopia, Chechnya and others) are aimed at strict prosecutions and are composed of the national judiciary;

¹³⁰ See for a sample of works N. J. Kritz (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington D.C.: United States Institute of Peace, 1995) 3 volumes. N. J. Kritz, *The Dilemma of Transitional Justice* (Washington D.C.: U.S. Institute of Peace, 1995); M. Cherif Bassiouni (ed.) *Post-Conflict Justice* (New York: Transnational Publishers, 2001) and Chandra Lekha Sriram and Suren Pillay, (eds.) *Peace Versus Justice: the Dilemma of Transitional Justice in Africa* (Scottsville: University of Kwazulu-Natal Press, 2009).

- the quasi-judicial model (South Africa) involves both amnesty and prosecutions as recommended by the quasi-judicial Truth and Reconciliation Commission and is purely national;
- the non-judicial model (Chile, Argentina and others) is a pure amnesty exercise imposed on society by military juntas to protect themselves from prosecution after handing over power to successor regimes, and
- the universal model (the International Criminal Court) deals with prosecutions by the International Criminal Court of any international criminal from any country and the composition of the judiciary is international.¹³¹

This chapter is only concerned with the quasi-judicial model of South Africa. A brief descriptive history and function of the South African Truth and Reconciliation Commission is presented followed by some critical analysis of its role and performance in post-conflict apartheid South Africa.

3.2 The Truth and Reconciliation Commission

After over four decades of the practice of apartheid in South Africa as described in chapter one, the apartheid government due to internal and international pressure to reform, embarked on negotiations in 1990 to end the practice of apartheid. An interim constitution was agreed upon in 1993. It envisaged the setting up of a Truth and Reconciliation Commission to address the human rights violations of the past. Richard

¹³¹ See Bassiouni, (ed.) *Post-Conflict Justice*, *supra* chapter III case studies.

Goldstone who had been appointed to conduct various human rights violations practices during the early 1990s in South Africa reports in his book *For Humanity: Reflections of a War Crimes Investigator*¹³² on the state of the negotiations between the National Party government and the African National Congress (ANC), a liberation movement:

While the leaders of the ANC and people like Alex Boraine were becoming more convinced that South Africa should have an official truth commission, de Klerk and his government and the ruling National Party were becoming more convinced that the less investigation into the past, the better. If they had had their way, a blanket amnesty would have been granted for all crimes committed prior to 1994. Of course, if Mandela and the ANC leaders could have had their way, they would have opted for Nuremberg-style trials for the former apartheid leaders. The eventual agreement to establish the Truth and Reconciliation Commission (TRC), therefore, was a political compromise. It is generally accepted that the revelations of the Goldstone Commission, particularly those implicating the leaders of the South African Police and the military, made it more difficult for de Klerk to resist the ANC demand for some form of accounting.¹³³

The context of this compromise between 1990 and 1994 was the unprecedented violence in South Africa. It could have derailed these negotiations for a peaceful South Africa. Thousands of people were killed during this period with the participation or complicity of the apartheid government.¹³⁴

Some of those who had in the past advocated for the prosecution of apartheid criminals, changed their minds about prosecutions. For example, Albie Sachs is quoted as saying: “If the price of peace in South Africa is that those involved in these terrible

¹³² (Johannesburg: Wits Press, 2000.)

¹³³ *Ibid* at 66.

¹³⁴ Goldstone, *ibid*.

murders go unpunished, it is worth it.”¹³⁵ Nelson Mandela was of the opinion, as early as June 1990, that “indulging in self-righteous indignation and finger pointing serve no useful purpose ... Today we wish to concentrate on the future [adding later on] that our attitude is to let bygones be bygones”.¹³⁶

According to Matas, writing in 1994, “there [was] a fear within the ANC (African National Congress) that a prosecution, after a peaceful transition, launched against the main architects of apartheid, would be viewed as political vindictiveness rather than the pursuit of justice. Any intention to prosecute that the ANC manifests will make the transition more difficult to accept”.¹³⁷

This sentiment appeared to have perpetrated the transitional post-transition process. There were hardly any prosecutions of apartheid criminals despite the TRC comprise.

The postamble to the interim constitution established the philosophy that informed the subsequent tone of the commission proceedings and as will be shown later, to the less than fullsome prosecutions policy which led to impunity by apartheid criminals:

This constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of

¹³⁵ Quoted in David Matas, *No More: The Battle Against Human Rights Violations* (Toronto: Dundurn, 1994 at 105).

¹³⁶ Quoted in Matas, *Ibid* at 113.

¹³⁷ Matas, *Ibid* at 113-114.

humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* [humanity] but not victimization.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date ... and providing for 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.¹³⁸

The new parliament in 1995 enacted the *Promotion of National Unity and Reconciliation Act* 34 of 1995 which set up the Truth and Reconciliation Commission:

Three committees of the TRC were established under the statute: the Committee on Human Rights Abuses, charged with investigating gross violations of human rights during the relevant period; the Committee on Amnesty, charged with considering and ruling on amnesty application made to the TRC; and the Reparations Committee, charged with considering appropriate reparations for the victims of the human rights violations.¹³⁹

It became clear that the nerve centre for the Truth and Reconciliation Commission was the amnesty process. The Amnesty Committee could facilitate “the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective.”¹⁴⁰

The amnesty provision was conditional. This provision was challenged in court but as the Constitutional Court had stated:

¹³⁸ Goldstone *supra* at 67 and 68

¹³⁹ *Ibid* at 68.

¹⁴⁰ Section 3(1)(6) of the *Act*.

The Amnesty Committee may grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts. If the offender does not, and in consequence thereof the victim or his or her family is not able to discover the truth, the application for amnesty will fail. Moreover, it will not suffice for the offender merely to say that his or her act was associated with a political objective. That issue must independently be determined by the Amnesty Committee pursuant to the criteria set out in section 20(3) ...¹⁴¹

The amnesty provision had been challenged by AZAPO and other victims in courts all the way to the Constitutional Court of South Africa – the highest Court in the land¹⁴². The attack on the amnesty provision was dismissed by the constitutional court which deferred to the legislative branch. Had that challenge succeeded, the Truth and Reconciliation Commission and the subsequent exposition of the truth about the atrocities of the past, such as is, would have been still-born.

In dismissing the amnesty challenge, the Constitutional Court ruled that it was the considered and reasonable decision of the legislature of South Africa to provide for amnesty for those who came forward to tell the truth about their participation in political crimes during the apartheid era and that this truth-telling was necessary for reconciliation in order to heal the wounds of the past. The failure of the amnesty challenge eliminated the opportunity and future of any prosecution strategy against apartheid criminals even for those who did not confess and apply for an amnesty. The failure of this legal challenge elicited an avalanche of criticisms on several fronts, two of which were pre-eminent; (a) that of the judiciary as having perhaps not been

¹⁴¹ *Azapo infra* paragraph 20.

¹⁴² *Azanian Peoples Organization v The President of the Republic of South Africa* (1996) 8 B.C.L.R. 1015 (Constitutional Court); (1996) (4) SA 562.

transformed from its apartheid roots despite the new presence of a racially and gender diverse judiciary,¹⁴³ and as Howard Varney states “the composition of the judiciary will always be a big factor in sensitive prosecutions.”¹⁴⁴ and (b) more poignantly, that an amnesty programme would be a violation of international law.¹⁴⁵ As Matas pointed out in 1994 “if South Africa were not to prosecute torturers, murderers, and criminals against humanity [and war criminals] as the price of peace, it would be violating international human rights law ...”¹⁴⁶ The reason for this prescription is that “the duty to prosecute crimes against humanity is a peremptory norm of international law or *jus cogens*. According the Vienna Convention on the Law of Treaties, peremptory norms of international law take precedence over treaty obligations. By refusing to prosecute, South Africa would not just be violating a rule of international law, it would be violating a rule of international law of the most basic and fundamental character.”¹⁴⁷

As will be discussed later, South Africa was not prohibited by court order to not prosecute apartheid criminals. The TRC recommended prosecution. The Constitutional

¹⁴³ See David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart publishing, 1998) Jackie Dugard, “Judging the Judges: Towards an Appropriate Rule for the Judiciary in South Africa’s transformation”, (2007) 20 *Leiden J Int’l L* 965; Penelope Andrews, *The Judiciary in South Africa: Independence or Illusion*, in papers *ssrn.com.sol3/papers.cfm?* accessed 31/08/2009.

¹⁴⁴ Howard Varney, “The Politics and Problems of International Criminal Justice in Africa: The South African Experience” *Infra* at 76.

¹⁴⁵ The vast scholarly literature on this includes, Phenyio Rakate, *The Duty to Prosecute and the Status of Amnesties Granted for Gross and Systematic Human Rights Violations in International Law: Towards a Balanced Approach Model*, Doctor of Laws Dissertation in Public International Law, University of South Africa (November, 2004); John Dugard “Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question: AZAPO v. President of the Republic of South Africa” (1997) 13 *SAJHR* 258; Gunnar Theissen, *Amnesty For Apartheid Crimes? The South African Truth and Reconciliation Commission and International Law*, LLM Thesis, University of Western Cape, 1998.

¹⁴⁶ Matas, *supra* at 105.

¹⁴⁷ Matas, *ibid* at 105-106.

Court encouraged prosecutions. By not prosecuting, South Africa is in violation of international law.

Ole Bubenzer, in his book, *Post-TRC Prosecutions in South Africa*¹⁴⁸ has summarised amnesty applications and their dispositions before the TRC as follows and concludes that it is clear from the picture that emerges that “there are potentially hundreds of cases for which amnesty was not applied for that could be relevant for future criminal prosecutions.”¹⁴⁹ Further, considering the scale of human rights violations in the period of South Africa’s history which was relevant for the TRC’s inquiries, the number of amnesty applications must be considered rather low.¹⁵⁰ Here are the statistics quoted by Bubenzer respecting the amnesty applications and dispositions:

7115 applications were registered by the TCR. Of this total, 5143 applications were refused administratively without a public hearing, mostly since no political objective was found to exist in the events referenced. 1973 applications were dealt with in public hearings in terms of section 19(3)(a) and (b) of the TRC Act, meaning that the applications conveyed a prima facie politically related offence and a gross human rights violation in terms of the TRC mandate. This number of applications relates to 1701 individual applicants. 1100 amnesty decisions were published in respect thereof. 857 applicants of those were aligned to the ANC, 85 to the IFP, 116 to the PAC or the Azanian Peoples Liberation Army (hereinafter APLA) and 289 to the security forces. Very few applications were received from the South African Defence Force (hereinafter SADF). 1499 of those applicants submitted applications which concerned offences falling in the ambit of the committee’s jurisdiction in terms of section 20(1) of the TRC Act. Of the remainder, 105 applicants were highly ranking ANC members, whose applications generally related to political activities, but were refused since they did not specify a specific violation

¹⁴⁸ Ole Bubenzer, *Post-TRC Prosecutions in South Africa* (Leiden et al.: Martinus Nijhoff, 2009), p.16.

¹⁴⁹ *Ibid*, at 17.

¹⁵⁰ Quoting J. Sarkin, “ The amnesty hearings in South Africa revisited” in G. Werle (Ed.) *Justice in Transition-Prosecution and Amnesty in Germany and South Africa* (2006) at 17.

or circumstance to be considered. Of the applications that were dealt with in public hearings, 1164 were granted, 806 were denied.¹⁵¹

In 2001, the TRC recommended the following, which has not been zealously implemented by the South African government:

Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals (including privileged information such as that contained in amnesty applications). Consideration must be given to imposing a time limit on such prosecutions. Attorneys-general must pay rigorous attention to the prosecution of members of the South African Police Service (SAPS) who are found to have assaulted, tortured and/or killed persons in their care. In order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted.¹⁵²

As early as 2003, Amnesty International and Human Rights Watch in their publication entitled, *Truth and Justice: Unfinished Business in South Africa*¹⁵³ stated that the two organizations were alarmed that the recommendations of the TRC were not being seriously and fully implemented: “in particular, that reparations had not been paid to victims of past human rights violations; and that prosecutions have not been mounted against individuals about whom there was credible evidence of involvement in gross abuses; that there was discussion of legislation providing for a further amnesty...” In 1999, Amnesty International had issued a public statement entitled “South Africa: No Impunity for Perpetrators of Human Rights Abuses” in which it stated:

¹⁵¹ *Ibid.*, at 16 – 17.

¹⁵² TRC, vol.5 chapter 8, at para. 14, quoted as well in *Ibid.* at 15.

¹⁵³ Asiapacific.amnesty.org/library/p2m7/engafi530012003 at 1.

Amnesty International supports the call for perpetrators of human rights violations and abuses to be brought justice, which was made by civil society organizations on reaction to recent comments by the South African Human Rights Commission's chairperson, Dr. Barney Pitso. ¹⁵⁴

Amnesty International continues to receive information about new human rights abuses in South Africa allegedly perpetrated by those linked to past human rights crimes. Some of these perpetrators are still in positions of authority.

The Promotion of National Unity and Reconciliation Act, which established the Truth and Reconciliation Commission (TRC), generously provided for amnesties which, in certain respects, conflicted with the country's obligations under international human rights treaties to which South Africa is party. The amnesties were justified as necessary for the securing of political peace. The deadlines also were generously extended and the TRC's Amnesty Committee continues to adjudicate applications. Amnesty International accepts that the conditionality and specificity of the amnesty process allowed the TRC to make factual discoveries and that open proceedings have allowed survivors of human rights abuses or their relatives to attend and oppose the applications. However, the survivors and relatives often felt aggrieved at the latitude granted to self-confessed perpetrators.

Amnesty International is concerned that a legislated general amnesty, or a blanket amnesty by default, whether from Kwazulu Natal or at a national level, continues to remain an open option. The TRC, in its October 1998 report, rightly and emphatically took a stand against such an option "in order to avoid a culture of impunity and to entrench the rule of law."¹⁵⁴

According to the Centre for the Study of Violence and Reconciliation (CSV), the government could actually prosecute a narrow class of apartheid criminals including the following:

- a) Persons who did not qualify for amnesty at the Truth and Reconciliation Commission (TRC);
- b) Persons who publicly advised the TRC that they would not abide by the jurisdiction and for whom available evidence against them amounts to a *prima facie* proof of guilt;

¹⁵⁴ Asiapacific.amnesty.org/library/ENGAFR530101999.

- c) Persons whose names arose in TRC proceedings as committing crimes, who did not apply for amnesty, and for whom the TRC evidence amounted to a *prima facie* proof of guilt;
- d) Persons who have been identified by third parties in ‘plea and sentence’ and/or ‘indemnity agreements’ and for whom the evidence against them amounts to a *prima facie* proof of guilt; and
- e) Persons who have been identified by the National Intelligence Agency, the NPA and/or SAPS and for whom the evidence against them amounts to a *prima facie* proof of guilt.¹⁵⁵

As of 2008, according to CSVR, “the *National Prosecution Authority Strategy 2020* does not mention post-TRC prosecutions [even] as a departmental obligation or action in need of medium to long term planning”.¹⁵⁶ There are no ongoing prosecutions of apartheid era crimes in the 2010s. As Howard Varney says, there has been “no strategic plan to investigate and prosecute crimes of the past in South Africa notwithstanding the truth for amnesty formula which demanded that there be a coordinated criminal justice response”.¹⁵⁷

The government seemed content and satisfied with the lack of prosecution. In initially opposing the South African victims’ litigation in the U.S., for example, the South African government filed a brief in which it stated that in establishing the TRC, “government deliberately avoided a ‘victors’ justice’ approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill”. It further stated that the TRC

¹⁵⁵ CSVR *Transitional Justice Programme, Post Truth and Reconciliation Commission (TRC) Alternative Prosecution Policy Framework For Political Violence of the Past* (8th July, 2008).

¹⁵⁶ *Ibid* at 3 note 3.

¹⁵⁷ Howard Varney, “The Politics and Problems of International Criminal Justice in Africa: The South African Experience” in Max Du Plessis and Antoinette Louw (eds) Report from a symposium on *The Investigation and Prosecution of ‘Core International Crimes’ and the Role of the International Criminal Court in Africa* (Cape Town: Zevenwacht, 2006) at 76.

strategy “was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation”.¹⁵⁸

3.3 Limitation on Ambit of Accountability

The Truth and Reconciliation Commission played a small part in the lack of holistic prosecutions. While finding apartheid to be a crime against humanity, the TRC decided not to give its mandate a broader scope but to interpret “human rights violations committed as specific [individual] acts, resulting in killing, abduction and severe physical or mental injury, in the course of the past conflict”.¹⁵⁹ This meant that the crimes of apartheid that were committed as a result of forced mass removals, mass detentions, mass torture and generalised state violence and war crimes that were committed in South Africa and in neighbouring countries could not be investigated and no one could be held accountable.¹⁶⁰ In essence what was a crime of apartheid which was a crime against humanity in international criminal law was reduced to specific individual criminal acts under South African criminal law. It can be argued in fact that the crime of apartheid as a crime against humanity vanished under the aegis of the Truth and Reconciliation Commission. Failure to deal with apartheid state policies meant the “directing mind” could not be held accountable.

¹⁵⁸ *Brief of Amicus Curiae Republic of South Africa In Support Of Affirmance*, in *Khulumani – and – AEG Daimler-Benz*, 05-2141-CU and 05-2326-CU (U.S. Court of Appeals, 2nd Circuit).

¹⁵⁹ TRC Report Volume 6, Section 5 Chapter 1, at 594.

¹⁶⁰ See critique of Mahmood Mamdani, “‘Amnesty or Impunity’. A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa” (TRC) (2002) 32 (3-4) *Diacritics* 33-59. See also Jeremy Sarking *Carrots and Sticks: The TRC and South African Amnesty Process* (Oxford: Intersentia, 2004).

In a 2001 book entitled *Unfinished Business: South Africa, Apartheid and Truth*¹⁶¹ Terry Bell and Dumisa Ntsebeza offer a biting indictment of the unfinished business of post apartheid South Africa. According to Bell and Ntsebeza the major weakness of the Truth and Reconciliation Commission was that it was frequently curtailed by time constraints, lack of capacity and an absence of political will to delve too deeply or to expose responsibility at too high a level in the chain of command in the criminality of apartheid. The result was that complete exposure of the horrifying extent of apartheid was lacking leading to the continuing impunity in the high ranks of the perpetrators of apartheid: the politicians and the generals. “The guilty are still there, many still in positions of power.”, they argued¹⁶² “There is still a huge amount of evidence to be uncovered.”¹⁶³

According to Bell and Ntsebeza, apartheid bequeathed a “poisoned chalice”¹⁶⁴. They write that as long as this past was not dealt with, it would return to haunt the South African body politic. Bell and Ntsebeza were not advocating for relentless prosecutions, but for more thorough accountability for those who never came clean with their crimes under apartheid. They were concerned with those who had been shielded by a government which regarded the compromise as the price for reconciliation.

Coming to the South African government, Bell and Ntsebeza state that the government even opposed foreign reparations in that it is “unacceptable that matters that

¹⁶¹ Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth*, 3rd ed. (London: Verso, 2003).

¹⁶² Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth*, 3rd ed. (London: Verso, 2003), at 345.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

are central to the future of our country should be adjudicated in foreign courts”¹⁶⁵ and that “even if the victims of apartheid were successful in the foreign courts, the South African government would not enforce the judgments of those courts.”¹⁶⁶ Bell and Ntsebeza lament that fact that “it is the leadership of a democratic government that seeks to protect the perpetrators in the crime of apartheid from their day of reckoning”¹⁶⁷. But in the process the government of South Africa was not making recommended reparations at home nor prosecuting the apartheid criminals zealously.

Bell and Ntsebeza report a seething anger in the victim community in South Africa.

Among the examples for the anger include:

The fact that General Johan Coetzee, having made hardly any disclosures, was practising law in his hometown of Graaff-Reinet at the turn of the twenty first century was another source of anger. Even more flagrant was the conversion of another police general, Johan van der Merwe, involved in bombing and in ordering a murderous cross-border raid, into a leading figure in the Association for Equality before the Law, established to defend apartheid era human rights offenders. The list of such leading figures, directly involved in the commissioning and execution of everything from murders to blackmail, bombings and torture in the apartheid cause, is lengthy: the number runs into thousands. These are people who have often literally – got away with murder¹⁶⁸.

Other critics have raised similar issues as Bell and Ntsebeza.

¹⁶⁵ Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth*, 3rd ed. (London: Verso, 2003), at 350.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid* at 350. The South African government later supported apartheid litigation in U.S courts: letter of South African Minister of Justice to Judge Sheindlin, 1 September, 2009.

¹⁶⁸ Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth*, 3rd ed. (London: Verso, 2003). At 344.

The subsequent loss of two high profile and arguably “show trial” cases in which General Magnus Malan,¹⁶⁹ the chief of the army during the latter part of the apartheid era, and Dr. Wouter Basson,¹⁷⁰ the chemical scientist, who had been charged with numerous counts of crimes of apartheid engendered significant setbacks to those who were seeking truth and justice for the crime of apartheid. The Constitutional Court of South Africa later ruled that Basson could be tried for war crimes and crimes against humanity which he committed in foreign countries, but the state never charged him again, for unknown reasons.¹⁷¹ It may have something to do with the cost of the trial. The state has wide discretion to charge or not charge a person for a criminal offence. That discretion is generally not judicially reviewable.

Malan was not tried for anything resembling war crimes or crimes against humanity. He and other military leaders were charged with murder but not murder as part of the crimes against humanity. Malan and others were acquitted and subsequently refused to apply for amnesty.¹⁷² The prosecution and acquittal of Malan and his fellow generals revealed the disinterest and incompetence of the state in the prosecution of the crimes associated with apartheid. Howard Varney and Jeremy Sarkin accuse the prosecution of deliberately failing “to utilize available evidence, the failure to present the documentary evidence coherently and systematically, the failure to raise the key aspect of the

¹⁶⁹ *State v Peter Msane and 19 others*, case number cc196 (Malan case); See also for analysis, J.H. Varney “Case Study: The Malan trial (South Africa)” paper presented at Domestic prosecutions and Transitional justice conference, Magaliesburg South Africa 16-19 May 2005.

¹⁷⁰ *S v Basson* (2001) (1) SACR 235 (trial). The Court of Appeal upheld the court’s acquittal. Decisions are in the Afrikaans language.

¹⁷¹ *S v Basson* (2007) (3) SA 582 (CC).

¹⁷² “The TRC Appeals to Malan to Seek Amnesty” *Mail and Guardian* 9th May 1997.

accused's foresight in the killings."¹⁷³ The failure of the Malan trial contributed to the refusal or reluctance by the military and police and other law enforcement agencies to seek amnesty. There was no incentive. There were no more sticks and carrots.

The biggest trial and the one closest to the Nuremberg style war crimes prosecution was the Basson trial to which I now turn.¹⁷⁴

3.4 The Basson Case

In 1999, Dr. Basson was charged with 67 counts which included murder, conspiracy, fraud and drug offences. Six of these counts included murder committed outside South Africa. Basson was discharged of the foreign-related charges on a motion by the defence at the outset of the trial on the grounds that South African criminal law did not reach beyond the borders of South Africa. In any case all those who committed offences in Namibia had been indemnified before Namibia obtained its independence from South Africa in 1989. Basson was acquitted also of all the other remaining counts at the end of the 30-month trial in 2001.¹⁷⁵

The Supreme Court of Appeal upheld the acquittal, and refused to reinstate the charges for which Basson had been discharged without answering to these foreign-based charges.¹⁷⁶ The Constitutional Court of South Africa set aside the quashing of the

¹⁷³ Howard Varney and Jeremy Sarkin, "Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial" (1997) 10 SACJ 141, referenced in Mia Swart, "The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg". (2008) 68 ZAORV 2009 at 224 Notes 101 and 102.

¹⁷⁴ Mia Swart, *ibid.*

¹⁷⁵ Marlene Burger and Chandre Gould, *Secrets and Lies: Wouter Basson and South Africa's Chemical and Biological Warfare Programme* (Cape Town: Zebra, 2002). See also Buhenzer, *Post -TRC Prosecutions*, *supra*.

¹⁷⁶ *S. v Basson* 2004 (1) SA 246 (SCA).

charges by the trial judge, which included the use of poison to kill hundreds of South-West Africa People's Organization (SWAPO) captives who were battling against the apartheid criminal state in South West Africa as Namibia was then called. In setting aside the quashing of charges, the Constitutional Court reasoned that "no country ought to allow its soil to be used as a basis for planning cross-border criminal activities... [the courts below] failed to put into the scale the extreme gravity of the charges, or to give consideration to the need to take account of South Africa's international obligations in respect of upholding principles of international humanitarian law."¹⁷⁷ The Court ruled that international law obliged South Africa to prosecute crimes against humanity and war crimes. The Constitutional Court specifically admonished the state as follows:

The 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.¹⁷⁸

The highest court in South Africa thus gave the state the imprimatur to prosecute some apartheid war crimes and criminals against humanity. The state demurred for unexplained reasons. Not only on the *Basson* case but on many others for which there was evidence, including some of those forwarded for prosecution by the Truth and Reconciliation Commission. "There has never been a prosecution of a crime against humanity or any other international crime in South Africa".¹⁷⁹ *Basson* has been criss-

¹⁷⁷ *The State and Basson* CCT 30/03 at paragraphs 170 and 171.

¹⁷⁸ Howard Varney, *supra* at 79.

¹⁷⁹ Varney, *ibid* at 79.

crossing the globe since he was acquitted but has not been recharged for offences for which he was not tried, albeit initially charged. No nation has exercised or attempted to exercise universal jurisdiction over him. Other apartheid war criminals and criminals against humanity have similarly not been subject to the application of universal jurisdiction.

The failure to secure convictions involving the high profile apartheid criminals has also meant that not only is South Africa not prosecuting clear-cut cases of war criminals, it is also saddled with abject failure in the cases in which it has tried to prosecute them. It is urged that universal jurisdiction must be pressed into service to fill this gap.

3.5 The P.W. Botha Case¹⁸⁰

The failure to prosecute P.W. Botha, the second to last apartheid president speaks volumes about the South African government's unwillingness, inability or incapacity to abide by both the dictates of the TRC and its obligations under international law. P.W. Botha was a prominent, worthy and deserving candidate for prosecution.

Botha became a Member of Parliament in the election that ushered in apartheid in 1948. From 1958 to 1966, he occupied various ministerial portfolios, some of which oversaw the massive forced removals of blacks from their ancestral lands to ghettos and so-called homelands. In 1966, Botha was appointed Minister of Defence. In 1975 he was responsible for South Africa's incursion into Angola where South African troops

¹⁸⁰ This is a summary from Alex Boraine, "P.W. Botha Before South Africa's Truth And Reconciliation Process" in *Justice for Crimes Against Humanity* by Mark Lattimer and Philippe Sands, (eds) (Portland: Hart Publishing, 2003) at 336-347.

committed massive war crimes and crimes against humanity and torture against civilian populations there.

Later, P.W. Botha replaced John Vorster as Prime Minister, a portfolio that was later transformed into the Presidency. While still a State Prime Minister he continued to hold the post of Minister of Defence until he appointed General Magnus Malan. He was simultaneously the head of the State Security Council (SSC) which was the body that decided and approved all security operations as how to respond to the growing opposition to the criminality of apartheid. Most massive human rights violations including torture, extra- judicial killings, disappearances, killings, foreign invasions etc. happened in the 1980s when P.W. Botha was at the helm of power¹⁸¹. The 1980s were known as the period of “total strategy” in which the South African apartheid government swore to maintain and hold onto apartheid by any means necessary.

Botha refused to obey the subpoena issued by the TRC to give evidence about what he knew about the crime of apartheid during his exercise of power in South Africa. There was testimony by numerous individuals including Johan van der Merwe, former Commissioner of Police and Adrian Vlok, former Minister of Law and Order, that the orders to commit certain offences, for example the bombing of Khotso House, which was the headquarters of many organizations including the South African Council of Churches, came directly from Botha. So it is not quite correct to state as Rakate writes in his doctoral dissertation that the major problem in prosecuting apartheid criminals

¹⁸¹ The Truth and Reconciliation Commission Reports document the human rights violations that occurred under Apartheid more than any other publication before or hence.

would have been the lack of evidence.¹⁸² Ministers who were part of the conspiracy to commit the crimes of apartheid directly implicated P.W. Botha in their commissions. (The same went for Wouter Basson, although he was acquitted, over 150 witnesses testified against him.)

When Botha refused to obey the subpoena, he was prosecuted in the courts and was convicted for contempt of court. The South African Supreme Court of Appeal (SCA) set aside the conviction on a technicality.

Despite the clear and direct evidence of Botha having engaged in war crimes and crimes against humanity, and the availability of witnesses to testify against him and indeed some already having testified against him during the contempt of court proceedings, Botha was never prosecuted for the crime of apartheid. He died peacefully many years later in 2006. Before he died, the TRC found with respect to Botha, the following:

Mr. Botha was responsible for ordering former Minister of Law and Order Adriaan Vlok and former Police Commissioner Johan van der Merwe unlawfully to destroy Khotso House in Johannesburg (a building occupied by organizations considered by Botha to be a threat to the security of the government), thereby endangering the lives of people in and around the building. This decision, greatly enhanced the prevailing culture of impunity and facilitated the further gross violation of human rights by senior members of the security force.¹⁸³

¹⁸² The vast scholarly literature on this includes, Phenyó Rakate, *The Duty to Prosecute and the Status of Amnesties Granted for Gross and Systematic Human Rights Violations in International Law: Towards a Balanced Approach Model*, Doctor of Laws Dissertation in Public International Law, University of South Africa (November, 2004); John Dugard "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question: AZAPO v President of the Republic of South Africa" (1997) 13 SAJHR 258.

¹⁸³ TRC, Final Report , Vol.5, at 223-225.

The Commission concluded:

For the reasons set out above and by virtue of the position as head of the state and chairman of the SSC, Botha contributed to and facilitated a climate in which the above gross violations of human rights could and did occur, and as such is accountable for such violations.¹⁸⁴

The dismal performance of the state in prosecuting or lack thereof of apartheid engendered continuing reverberating consequences in South Africa.

The acquittal of Magnus Malan, for example, resulted in the majority of the military and police not asking for amnesty and therefore never being put in a position of telling the truth and acknowledging their commission of crimes of apartheid.¹⁸⁵ Those who came forward partly came as a result of having been implicated by Eugene de Kock, a paramilitary policeman who was responsible for one of the most murderous police units at Vlakplaas towards the end of the era of apartheid¹⁸⁶. Eugene de Kock was one of the only few visible successful prosecutions of significant personalities involved in the crimes of apartheid¹⁸⁷. Others like Adrian Vlok, the Minister of Law and Order under apartheid, pleaded guilty and were given a suspended sentences.¹⁸⁸ Public reaction to the suspended sentence involving Vlok was highly negative on the dispensation of justice for apartheid era criminals.¹⁸⁹

¹⁸⁴ *Ibid.*

¹⁸⁵ See Louise Mallinder, *Indemnity, Amnesty, Pardon and Prosecution guidelines in South Africa* Working Paper no. 2 From Beyond Legalism, Amnesties, Transition and Conflict Transformation, Queens University, Belfast February 2009 at 107.

¹⁸⁶ *Ibid.*

¹⁸⁷ There were a few other lesser officials. *Ibid* at 106.

¹⁸⁸ See discussion in Carnita Earnes (Ed) *Reconciliatory Justice: Amnesties, Indemnities and Prosecutions in South's Transition* (C.SVR, 2007) at 14.

¹⁸⁹ *Ibid.*

The government was also severely criticized and sued for its neglect of paying reparations, another centre piece of the Truth and Reconciliation Commission process.¹⁹⁰ The government has also been legally challenged, with success, for trying to convoke another avenue for an amnesty process, outside of and long after the expiry of the mandate of the Truth and Reconciliation Commission.¹⁹¹ The government has further been placed between a rock and a hard place in that it has been successfully challenged both for not providing pardons in a timely manner for apartheid-era criminals who had been imprisoned for admittedly committing crimes of apartheid and for considering pardoning the criminals without consulting with the victims.¹⁹²

What is more, government inexplicably opposed victim support groups and individuals who sought the invocation of universal civil jurisdiction in US courts for redress and reparations by global corporations who had aided and abetted the crimes of apartheid in South Africa.¹⁹³ The South African government opposition to victims' civil litigation for reparations in the US was followed by the US opposition to the exercise of universal civil jurisdiction by US courts.¹⁹⁴ While there is a precedent for the exercise of universal civil jurisdiction with respect to aiding and abetting the crime of apartheid, i.e. the *Apartheid Litigation* in the US under the *Alien Torts Claims Act* of 1789, there is

¹⁹⁰ Barbara Slaughter, "South Africa: Apartheid victims sue ANC government for compensation" <http://www.wsws.org/articles/2002/jul2002/saaf-j19.shtml> accessed 08/10/2009.

¹⁹¹ *Nkadimeng v NDPP* case number 32709/07 (Transvaal Provincial Division).

¹⁹² See string of cases ignited by a challenge to pardons policy; for example, see *Centre for the Study of Violence and Reconciliation et al v the President of the Republic of South Africa et al* case no. 15320/09 (NGHC).

¹⁹³ Letter of South African Minister of Justice to Judge Sprizzo, July 11th 2003, www.info.gov.za/otherdocs/2003/apartheid.

¹⁹⁴ Brief of U.S Department of Justice as Amicus in *Re: Apartheid Litigation* (2003).

no precedent for the exercise of universal criminal jurisdiction with respect to apartheid criminals in the USA or anywhere else.

3.6 Conclusion

The post-apartheid transitional government utilized the Truth and Reconciliation Commission to try to uncover the extent of the human rights violations of the previous government. Those who would confess and tell the whole truth about their participation in human rights violations would be absolved of all criminal and civil liability. It was recommended that those who did not qualify for amnesty or did not request for one would be prosecuted.

The government did not engage in any meaningful or mass prosecutions of those who did not qualify for amnesty or those who did not request amnesty.

The high profile cases that were pursued ended disastrously. South Africa therefore presents itself as a country in which general amnesty for apartheid criminals was obtained by default: by apartheid criminals deliberately failing to apply for amnesty and the government not prosecuting them.

The government did also not engage in meaningful reparations policies as recommended by the Reparations Committee of the Truth and Reconciliation Commission. There are therefore victims who have been short-changed in terms of justice. Post-conflict justice in South Africa is an unfinished business. How could justice be secured for victims of apartheid? The next several chapters try to answer this question.

CHAPTER FOUR

COULD THERE BE AN INTERNATIONAL TRIBUNAL FOR THE CRIME OF APARTHEID?

4.1 Introduction

This chapter will explore the option of setting up an International Tribunal for the Prosecution of the Crime of Apartheid (ITPCA). This chapter will also discuss the pros and cons of international prosecution of war crimes and crimes against humanity that an international tribunal would engender.

The failure to prosecute Botha led the vice-chair of the TRC, Alex Boraine to write that, “if an International Criminal Court were in existence it would have been a different story... there were many others who served with [Botha], in particular the high-ranking officers in the security forces, who could well have been called to account. Clearly the South African experiment, with all its benefits, illustrates vividly the need for an International Criminal Court”¹⁹⁵. This echoes, to a degree, with the thesis of this study. The International Criminal Court however, has no jurisdiction for offences that took place before its existence. Richard Goldstone, a former Justice of the Constitutional Court of South Africa and the first Prosecutor of the International Criminal Tribunal for

¹⁹⁵ Boraine, *supra* at 347.

the former Yugoslavia (ICTY) and Rwanda (ICTR) queries whether the prosecutor of the ICC would have second-guessed the decision of a democratically elected parliament by deciding to prosecute apartheid criminals at the ICC.¹⁹⁶ This evokes one of the most vexing problems in international criminal law. What is to be done to criminals whose nation state is not prosecuting them? Is it now a question of the exercise of universal jurisdiction by other nations, like Canada? The creation of an international tribunal has been given as an alternative as well.

4.2 The International Convention on the Suppression and Punishment of the Crime of Apartheid¹⁹⁷

Article IV of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* contemplates that states parties will enact legislative and judicial and other measures to prosecute the crime of apartheid. Article V contemplates the exercise of UJ and the creation of an international tribunal¹⁹⁸ for the prosecution of apartheid criminals. Yet, as M. Cherif Bassiouni and Roger Clark have stated, neither apartheid-convention-related mandates has been implemented. None anywhere has ever been prosecuted for the crime of apartheid,¹⁹⁹ a point also made eloquently by John

¹⁹⁶ Richard Goldstone, "Revenge or Forgiveness: Truth and Reconciliation in the Aftermath of Human Rights Violations" John Bray Oration (Elder Hall, Australia) 11 March 2009, at 6.

¹⁹⁷ See Chapter Two for a full discussion of ICSPCA.

¹⁹⁸ See M. Cherif Bassiouni and Daniel Derby, "Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments," (1980-1981) 9 Hofstra LR 523.

¹⁹⁹ Roger Clark, "Apartheid" in M. Cherif Bassiouni (ed.) *International Criminal Law* (3rd ed.) Vol. 1 (Leiden: Martinus Nijhoff, 2008), at 620.

Dugard.²⁰⁰ Further, no international tribunal has been created to prosecute apartheid criminals, despite the fact that M. Cherif Bassiouni had been commissioned to start a study and design the framework for the creation of such a tribunal.²⁰¹

The collapse of apartheid effective in 1994 has led to the predictions and debates that the apartheid convention has resulted in disuse.²⁰² Even at its beginning in 1973, the *Apartheid Convention* appeared to be an orphan in international criminal law at least as perceived by Western countries. No Western, European or North American democracy ratified it.²⁰³ The South African apartheid government, as well as the post-apartheid regime, never ratified the convention and never used it to prosecute those who committed the crime of apartheid.²⁰⁴ In 1973 the United States justified its non-ratification of the Apartheid Convention in the following terms: “We cannot accept that apartheid can in this manner be made a crime against humanity. Crimes against humanity are so grave in nature that they must be meticulously elaborated and strictly construed under existing international law.”²⁰⁵ In 1977, Additional Protocol 1 to the Geneva Conventions designated apartheid as a grave breach of the Protocol and a war crime. There are about 170 state parties to the Protocol. In 1998, the Statute of the International Criminal Court designated “apartheid” as a crime against humanity and this Statute has been ratified by the majority of the world’s countries most of whom have specifically incorporated the statute into their domestic laws. Almost all western

²⁰⁰ John Dugard, *International Law: A South African Perspective* (Cape Town: Juta, 1994).

²⁰¹ *Supra*, “Final Report”.

²⁰² Clark, *supra* at 620.

²⁰³ *Ibid* at 620.

²⁰⁴ *Ibid*.

²⁰⁵ “Crime of Apartheid” in Wikipedia accessed September 29th, 2012.

countries have ratified the ICC Statute, thus apartheid is recognized by incorporation as a crime against humanity by the majority of human kind.²⁰⁶

Could the Apartheid Convention now be used as a basis for the creation of an international tribunal? This question is worth exploring as an alternative to the failure to prosecute apartheid criminals in South Africa.

4.3 An International Tribunal for the Crime of Apartheid

The failure, inability or unwillingness to continue to pursue apartheid-era crimes calls for the convocation of an international tribunal if certain prerequisites are met. These prerequisites are drawn from how the existing international tribunals came into existence. The most relevant one is the International Criminal Tribunal for Rwanda (ICTR). This tribunal seems to respond to the analogous dynamics that were envisaged in the *Apartheid Convention* with respect to apartheid criminals.

It is important to stress that the only other criminal tribunals that existed before the modern tribunals of Rwanda and former Yugoslavia, i.e. the Nuremberg and Tokyo Tribunals were created to judge defeated enemies. The defeated enemies played no role in the establishment of those tribunals. It was victor's justice at play. In South Africa there were no victors.

²⁰⁶ Article 7.1(j) of the Rome Statute of the International Criminal Court.

4.4 The International Criminal Tribunal for Rwanda

The ICTR was created in 1994 by the United Nations Security Council at the initial request of the immediate post-genocide government of Rwanda.²⁰⁷ The tribunal was charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during the year of 1994.²⁰⁸ An important prerequisite for the creation of an international tribunal to deal with post-conflict justice is the invitation or agreement of the government in power in the subject country. The new Rwandese government was the victor government. Similar invitations to the Security council were made by the former Yugoslavia, Sierra Leone, Cambodia, East Timor and others. The invitation or agreement of the subject government is an acknowledgment that the subject government cannot manage the colossal dynamics of the post-conflict prosecutions.

The United Nations Security Council on its own motion can recommend the investigation and prosecution of war crimes and crimes against humanity as it did in the case of the Darfour region of the Sudan.

²⁰⁷ See among numerous writings on this tribunal, Roman Boed, "The International Criminal Tribunal for Rwanda" in M. Cherif Bassiouni, (ed) *International Criminal Law*, 3rd edition (Kluwer: Martinus Nijhoff publishers, 2008) at 103-117; Robert J Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law: 2010) at 171; Roman Boed, "The International Criminal Tribunal for Rwanda" in M. Cherif Bassiouni (ed) *Post-Conflict Justice* (New York: Transnational Publishers Inc. 202) at 487-498; William Schabas, "The Rwanda Case: Sometimes It's Impossible" in Bassiouni (ed) *Post-Conflict Justice* at 449-522; Lars Waldorf, " 'A Mere Pretence of Justice' : Complementarity, Sham Trials, and Victors' Justice at the Rwanda Tribunal" (2011 33-4 *Fordham Int'l LJ* 220.

²⁰⁸ William A. Schabas, *An Introduction to the International Criminal Court*, 4th Edition (Cambridge: Cambridge University Press, 2011) at 12.

Rwanda eventually voted against the creation of the Tribunal because it would only get the top suspects and it was prevented from imposing the death penalty.²⁰⁹ Rwanda wanted all suspects prosecuted and the death penalty imposed. Internally Rwanda created the *Gacaca* local courts system to prosecute war criminals. *Gacaca* local courts were ancient traditional Rwandese courts.

The two major international tribunals of former Yugoslavia and Rwanda are located outside the boundaries of the post-conflict society. This need not be the case, however. Such tribunals can be located within the jurisdictions of these societies. However, issues of security of the judges, prosecutors, defence and prosecution witnesses, counsel, and the independence from interference by the governments of the post-conflict countries, necessitate the location of these particular tribunals outside these countries.²¹⁰

The Yugoslav and Rwandan Tribunals are identical in terms of statutory and institutional set-ups. They even initially shared the same prosecutor. They have also produced identical persuasive jurisprudence on genocide, war crimes and crimes against humanity.²¹¹

These tribunals have specific temporal mandates: to investigate and prosecute international crimes that occurred in the specific country. In the case of Rwanda, the mandate was limited to the crimes committed during 1994 only. The other characteristic of these tribunals is that the judiciary constituting them is international and race and

²⁰⁹ Gary Jonathan Bass, *Stay the Hand of Vengeance* (Princeton and Oxford: Princeton University Press, 2000) at 307.

²¹⁰ See Goldstone, *For Humanity*, *supra*.

²¹¹ Schabas, *supra* at 13.

gender-diverse.²¹² The Rwanda Tribunal is based in Arusha, Tanzania and the Yugoslav one is based in the Hague.

4.5 Jurisprudence of International Tribunals

Specialized tribunals have asserted the principle of universal jurisdiction most vigorously. For example, in the oft-quoted decision, the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case found that torture was subject to universal jurisdiction by any state, as one of the consequences arising out of the peremptory character of the prohibition of that crime under international law. The Trial Chamber stated that:

Furthermore, at the tribunal level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the other hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other had bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.²¹³

²¹² See Munyonzwe Hamalengwa, *The Politics of Judicial Diversity and Transformation: Canada; U.S.A.; U.K.; Australia; South Africa; Israel; Colonial and Post-Colonial World and International Tribunals* (Toronto: Africa in Canada Press, 2012).

²¹³ *Prosecutor v Anto Furundzija*, Judgment, Case No.: IT-95-17/1-T, ICTY Trial Chamber, 10 December 1998, at para. 156.

In 2004, the International Criminal Tribunal for the Former Yugoslavia and Rwanda amended their rules to permit transfer of cases to any state with jurisdiction over genocide, crimes against humanity and war crimes.²¹⁴ The Special Court for Sierra Leone (SCSL), in the *Prosecutor against Augustine Gbao* case stated the following: “The crimes mentioned in Articles 2-4 of the Statute of the Special Court (crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional protocol II, and other serious violations of humanitarian law) are international crimes entailing universal jurisdiction.”²¹⁵ International tribunals, however, will continue to supplement national jurisdictions, they are not meant to be the main vehicles for the prosecution of war crimes and crimes against humanity.

The modern international tribunals of the ICC, ICTY and ICTR have been admired for their impressive jurisprudence. Although the jurisprudence of these tribunals is not binding on national courts, they are regarded as having significant persuasive value. Their influence in the interpretation of domestic statutes involving trials for genocide, war crimes and crimes against humanity have been staggering.²¹⁶

²¹⁴ Rule 11 bis, Referral of the Indictment to Another Court. The Rule provides as follows: “(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial chamber for the purpose of referring a case to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.”

²¹⁵ SCSL, Appeals Chamber, 25 May 2004, *Prosecutor against Augustine Gbao* (case No.SCSL-2004-15-AR72(E), at para. 8.

²¹⁶ See *Mugesera, supra*.

The Supreme Court of Canada, for example, stated that tribunal case law was “highly relevant to the analysis” of the element of the offence of advocating genocide and relied heavily on the jurisprudence of the ICTR.²¹⁷

The Quebec Superior Court Judge, Justice Dennis also relied heavily on the Rwanda Tribunal’s definitions of the elements of genocide, war crimes, rape and crimes against humanity in *Munyaneza* for these crimes.²¹⁸ *Akayesu* was the first decision in international criminal law where an individual was convicted for rape which was defined as a crime against humanity.²¹⁹ The Yugoslav tribunal set a very important precedent in *Tadic* by establishing the principle of “joint criminal enterprise” whereby individuals could “be convicted of crimes where they participate with others in criminal activities having as a common purpose and that purpose is carried out, even if the individual in question does not participate in the actual commission of the crime or has no knowledge of its commission.”²²⁰ Generally, leaders of repressive states including the apartheid state have pleaded that they did not know what their subordinates were doing; that they themselves never committed the actual war crimes, rape, torture or genocide even when they set the overall policies that led to these offences. The subordinates claimed that they were following superiors’ orders.

4.6 Problems with International Tribunals

²¹⁷ See *Mugesera, supra*. See also *Currie, supra* at 261.

²¹⁸ *Currie, ibid* at 261. *Munyaneza* will be discussed fully later.

²¹⁹ See *Akayesu* in *Schabas supra* at 130-131; *Akayesu* (ICTR-96-4-T).

²²⁰ *Currie, supra* at 168.

Despite their laudable achievements in relieving post conflict societies of pressures to administer justice under severe constraints and limitations, as well as in developing forward looking jurisprudence in international criminal law, international tribunals have faced some criticism and they evince some shortcomings. Corruption, inefficiency and perpetrating victor's justice are some of the criticisms that have been levelled against, for example, the Rwanda Tribunal.²²¹ No member of the post-genocide government, for example, was ever charged or tried for having committed war crimes in Rwanda, even though there was credible evidence that the government committed war crimes while in opposition.²²² It is inconceivable that the Rwandan government would have handed their own to the Rwanda Tribunal for prosecution.

It has also been pointed out that prosecution before an international tribunal is an inadequate mechanism for promoting reconciliation. The state government may refuse to cooperate. Witnesses, fearful of reprisal from state governments may refuse to cooperate and therefore derail these prosecutions. Further, a tribunal that is located outside the country where the atrocities took place may have legitimacy problems at home. "The holding of trials in Arusha, Tanzania, far away from the theatre of genocide distances the people of Rwanda from a process designed to render justice to its people.

²²¹ Lars Waldorf, " 'A Mere Pretense of Justice': Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal" (2011) 33-4 Fordham Int'l LJ 1221.

²²² Lars Waldorf, *ibid* p. 1222 referencing Alison Des Forges, *Leave None To Tell The Story: Genocide In Rwanda*.

For the people to feel that justice was being done, the criminal justice system ought ideally to operate within sight and hearing of the victims themselves”.²²³

4.7 Application to the Crime of Apartheid

Could South Africa propose the establishment of an International Tribunal for the Prosecution of the Crime of Apartheid (ITPCA) or cooperate in its creation by either the African Union or the United Nations?

Richard Goldstone has posed the following questions and recommendations in addressing somewhat indirectly the question I have posed above:

Would an apartheid criminal who has been granted an amnesty by the Truth and Reconciliation Commission be liable to be prosecuted for crimes against humanity in a non-South African court? Would South Africa be obliged, on request from Britain, to extradite the bombers of the ANC headquarters in London if they have been granted an amnesty by the Truth and Reconciliation Commission?²²⁴

In answering these questions, Goldstone states:

I have no doubt that such a prosecutor should not be inhibited by national amnesties. In international law they clearly have no standing and would not afford a defense to criminal or civil proceedings before an international court or a national court other than that of the country which grants the amnesty. That does not mean that in deciding on an investigation or prosecution, the prosecutor will not take into account amnesty processes. Where states take upon themselves the task of addressing their past, international observers must consider the motives impelling them to do so.

²²³ Justice Hassan Jallow, the Chief Prosecutor for the ICTR quoted in Okechukwu Oko, “The Challenges of International Criminal Prosecution in Africa” (2007) 31-2 *Fordham International Law Journal* 343 at 372. This article extensively surveys the problems of international criminal prosecutions.

²²⁴ Goldstone, *For Humanity (supra)* at 121.

Societies in transition often choose to forgo systematic prosecutions for fear of destabilizing the new democracy. Nevertheless I would suggest that an international prosecutor ignore self-amnesties of the kind granted to General Pinochet. On the other hand, in South Africa amnesties have been granted by the Truth and Reconciliation Commission in consequence of legislation approved by a democratically elected legislature – a legislature that is representative of the victims of apartheid. It would be appropriate for an international prosecutor to consider the wishes of such victims and to take into account the moral justification for amnesty proceedings and whether in the context it enables the society (as it did in South Africa) to end repression in a relatively peaceful manner.²²⁵

This reasoning is closely related to those statements made by the South African government in rejecting victims' litigation in U.S. courts that were indicated elsewhere. South Africa has adopted the position that the TRC provided accountability satisfactory to national reconciliation and it appears no more needs to be done other than economic development for the benefit of the rest of the population. It follows that it is improbable that South Africa would suggest the creation of an International Tribunal for the Prosecution of the Crime of Apartheid on its own or cooperate in its creation or to extradite perpetrators, or hand-over witnesses and evidence if such a tribunal is set up by the African Union or the United Nations. If South Africa has not prosecuted on its own any apartheid criminals, how can it cooperate in the creation of an international tribunal to prosecute the very criminals it is reluctant to prosecute?

Goldstone is misguided in that he is referring to individuals who have been granted amnesty but the TRC referred for prosecution, individuals who were

²²⁵ *Ibid* at 122.

not granted amnesty and those who never sought it. The South African government never prosecuted these individuals and it is not probable that it would hand over these perpetrators of the crime of apartheid to an international tribunal. There is also no international pressure or pressure from victims to create an international tribunal. Apartheid criminals will continue to enjoy their impunity for the foreseeable future. There is, however, still a role that can be played by an international tribunal for the prosecution of apartheid criminals if one were created.

4.8 Conclusion

This chapter has discussed the possibilities of the creation of an international tribunal to prosecute apartheid criminals. Although current international tribunals like the ICTY and ICTR have earned credibility through the creation of persuasive jurisprudence, the creation of an international tribunal on apartheid modelled on these other tribunals is highly unlikely because South Africa has taken the position that accountability for the crime of apartheid has already been achieved through the TRC process.

The next chapter discusses the application of the concept of universal jurisdiction.

CHAPTER FIVE
UNIVERSAL JURISDICTION AND PROSECUTION OF INTERNATIONAL
CRIMES

5.1 Introduction

This study is an assessment of the prospects for the implementation of the *International Convention on the Suppression and Punishment of the Crime of Apartheid*²²⁶ through the application of the concept of universal jurisdiction.²²⁷ The prospects or lack thereof for the creation of an international tribunal²²⁸ to prosecute apartheid criminals has been discussed in the previous chapter.²²⁹ This chapter is a literature review of the concept of universal jurisdiction (UJ). It includes an assessment of whether UJ could provide a framework for the resolution of the impasse of the crime of apartheid. The previous chapter concluded that the creation of an International Tribunal for the Prosecution of the Crime of Apartheid is not feasible in the present.

Roger Clark²³⁰ argues that the applicability of universal jurisdiction to the crime of apartheid itself has received scant attention.²³¹ The same is the case with respect to the creation of the apartheid tribunal contemplated in the *Apartheid Convention*. The

²²⁶ 1015 (U.N.T.S. 243, Nov. 30, 1973, herein referred to also as *Apartheid Convention*).

²²⁷ Article V of the *Apartheid Convention*. The concept will be defined below.

²²⁸ As also envisaged in Article V.

²²⁹ Those who committed the crime of apartheid are referred to as Apartheid Criminals.

²³⁰ Roger Clark, "Apartheid," in M. Sherif Bassiouni, ed., *International Criminal Law*, 3d. ed. (Leiden: Mertinus Nijhoff, 2008) Vol. 1, 799.

²³¹ See Mia Swart, "The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg." [www.za.erau.de/\(2008\)](http://www.za.erau.de/(2008)).

discussion on this aspect of the *Apartheid Convention*²³² is especially non-existent in comparison to other conventions that have been studied minutely by scholars. Currie states that “it is not clear whether, as a matter of customary international law, states may exercise full universal jurisdiction over the crime [of apartheid]”²³³ but “given its status as a crime against humanity, and that it is uncontroversial that universal jurisdiction may be exercised over crimes against humanity, then universal jurisdiction would seem to pertain as a matter of logic, if not state practice.”²³⁴, to the crime of apartheid. In practice this has not happened.

5.2 Introduction to the Concept of Universal Jurisdiction

The literature on universal jurisdiction is vast, complex and contradictory. The chapter will include evaluating the tenor the concept has currently taken in Africa.²³⁵

Universal jurisdiction is a principle of both conventional and customary international law²³⁶

²³² Roger Clark, *supra* note 1: see Graefrath, “Convention against the Crime of Apartheid,” (1972) 11 German Foreign Pol’y 395 Graefrath, “The Crime of Apartheid: Responsibilities and Reparations”, (1981) Rev Contempt L 31; Blishchenko, *Study of the International Convention on the Suppression and Punishment of the Crime of Apartheid*, United Nations, Notes and Documents 3/74 (March 1974) (with special references to questions of implementation and responsibility under international law); Booysen, “Convention on the Crime of Apartheid”, (1976) 2 S. Afr YB Int’l L 56; Brehme, *Crime of Apartheid under International Law* (Paper circulated at the Seminar on the Legal Status of the Apartheid Regime in South Africa and other Legal Aspects of the Struggle Against Apartheid, Lagos, Nigeria, Aug. 13-16, 1984); Asmal, *International law and the Liquidation of Apartheid*, (Paper circulated at the 1984 Lagos Seminar). See also R. Bissell, *Apartheid and International Organizations* 159-60 (1977); United Nations, *The United Nations and Apartheid 1948-1994* (United Nations Bluebook Series, Vol. 1, 1994; Weissbrodt & Mahoney, “International Legal Action against Apartheid”, 4 Law & Inequality 485 (1986)

²³³ Currie, *supra* at 294.

²³⁴ *Ibid.*, at 295.

²³⁵ *AU-EU Export Report on the Principle of universal jurisdiction* (Sharm El-Sheik, Egypt, 2008) ; www.africa-union.org (assessed January 2nd, 2010).

²³⁶ See e.g. F. Jessberger, “universal jurisdiction”, in A. Cassese et.al (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2008), at 555; C. Ryngaert, *Jurisdiction in International*

Any text book on international criminal law will contain a definition of various elements of universal jurisdiction discussed below.²³⁷

The principle of universal jurisdiction stems from the postulate that some crimes are so serious that they harm the international community as a whole and that, as a consequence, States are entitled, if not required, to bring proceedings against the perpetrators, regardless of the location of the crime and the nationality of the perpetrator or of the victims. Among those serious crimes are genocide, crimes against humanity, torture, some war crimes, apartheid and slavery.

The principle of universal jurisdiction derogates from the usual rules of jurisdiction as recognized by international law and according to which there are four main criteria to establish jurisdiction:

- Territorial jurisdiction: the State has legal jurisdiction to judge crimes committed on its territory;
- Active personality jurisdiction: the State has legal jurisdiction to judge crimes committed by its nationals;
- Passive personality jurisdiction: the State has legal jurisdiction to judge crimes committed against its nationals;
- *Compétence réelle* (protective principle): the State has legal jurisdiction to judge crimes deemed to constitute a threat to some fundamental national interests.

Law (Oxford: OUP, 2008), at 101; G. Werle, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005) at 171; Principle 1.1 of the Princeton Principles on universal jurisdiction, reprinted in S. Macedo (ed.) *universal jurisdiction: National Courts and the Prosecution of serious Crimes* (Philadelphia, PA: University of Pennsylvania Press, 2004; *Trial: universal jurisdiction*, <http://www.trial-ch.org/en/int-law/universal-jurisdiction.htm>.

²³⁷ *Ibid.*

In a world where borders tend to blur, universal jurisdiction circumvents the classic criteria used by states to have jurisdiction by giving ground to the prosecution of the author of a crime, wherever he might be, following a fortuitous arrest, a complaint or a denunciation.

In practice however, several conditions have to be fulfilled for the principle of universal jurisdiction to apply:

- a specific ground for universal jurisdiction;
- a clear and precise definition of the crime and of its constitutive elements;
- national means of enforcement allowing the judiciary to exercise their jurisdiction over these crimes.

Thus, the principle of universal jurisdiction is not an abstract entity. In its implementation, States have developed two distinct views:

- a narrow concept according to which a minimum link between the State and the author of the crime is required, i.e. the author of the crime must be on the territory of the State seeking to prosecute him;
- a broader concept according to which a claim can be lodged without the accused or prisoner sought being actually present (*in absentia*).

The world's foremost authority in international criminal law and the application or otherwise of universal jurisdiction is perhaps M. Cherif Bassiouni of De Paul University Faculty of Law in Chicago. He has also written on the crime of apartheid.²³⁸ Unlike numerous Non-Governmental Organizations like Human Rights Watch, Amnesty

²³⁸ See Bassiouni, M. Cherif, *Crimes Against Humanity in International Criminal Law* 2nd Rev. ed. (The Hague: Kluwer, 1999).

International, Redress and others, who take a purely legal and non-political perspective in their advocacy of the need for the application of universal jurisdiction,²³⁹ M. Cherif Bassiouni's writings on universal jurisdiction are more nuanced, complex, historical and take into account political realities obstructing the exercise of universal jurisdiction.²⁴⁰

M. Cherif Bassiouni²⁴¹ states that international criminal law through treaty and other obligations, impose on nation states the duty to prosecute or extradite those suspected of having committed international crimes and to co-operate with other member states in the investigation, apprehension, trial and punishment of suspects who have committed an international crime. According to Bassiouni, the duty arises because these international crimes, such as crimes against humanity, have arisen to the level of "jus cogens". Jus cogens means "compelling law" or law deemed to be "peremptory" and "nonderogable", crimes for which impunity cannot be granted. These crimes are not subject to a statute of limitation; do not qualify for immunities of superiors up to the head of state. "Jus cogens" crimes carry further the universality of jurisdiction over such crimes irrespective of where they were committed, by whom they were committed,

²³⁹ Amnesty International, *Ending Impunity: Developing and Implementing a Global Action Plan Using universal jurisdiction* (London: Amnesty International Publications, 2009); Amnesty International "universal jurisdiction – The duty of states to enact and implement legislation," September 2001, available online at <http://www.amnesty.org/en/library/asset/OR53/002/2001/en/dom-IOR530022001en.pdf>; Human Rights Watch, *universal jurisdiction in Europe: The State of the Art* (2006); Redress, *Challenging Impunity for Torture: A manual for bringing criminal and civil proceedings in England and Wales for torture committed abroad*, July 2000. Available at: <http://www.redress.org/smartweb/reports/reports>; Redress, *universal jurisdiction in Europe*, <http://www.redress.org/documents/whatis.html>.

²⁴⁰ See, Bassiouni, "universal jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" in Bassiouni, *International Criminal Law, supra*, Vol. 11, at 153-201; Bassiouni, "The Need for International Accountability," in Bassiouni, *International Criminal Law, supra*, Vol. III, at 3-29.

²⁴¹ Bassiouni, M. Cherif, (ed) *International Criminal Law* 3rd ed. 3 Volumes (New York: Transnational Publishers, 2008). See introduction and particularly chapter 4.7 "Crimes Against Humanity" at 437-492 for elaboration.

against what category of victims and irrespective of the context of their occurrence whether in war or peace. Bassiouni's is a succinct definition of universal jurisdiction.

Despite the broad principles underlying the "jus cogens" nature of these crimes, Bassiouni, recognises that proclaiming broad principles is one thing and implementing them is a totally different thing. Bassiouni goes on to say that despite the duty to prosecute or extradite and the duty to co-operate, imposed on nation states, there have been very few prosecutions since the end of the Second World War when considered against the backdrop of millions of victims of wars and internal repression. Central to Bassiouni's voluminous publications is finding an answer to this recurring question: "why have there been so few instances of prosecutions and other accountability mechanisms?" In his quest to find answers to that question, Bassiouni has come up with three explanations for the paucity of prosecutions or other accountability mechanisms: (1) "justice is all too frequently bartered away for political settlements". He further states (2) "the practice of political impunity has become the political price paid to secure an end to the violence of ongoing conflicts, or as a means to ensure tyrannical regime changes", and (3) "the limited recognition and application of the theory of universal jurisdiction." Universal jurisdiction is an exception rather than the rule in the contemporary world.

Universal jurisdiction embodied in international conventions like the *Geneva Conventions* and *Protocols*; the *Convention on Non-applicability of the Statutory Limits*, the *Apartheid Convention* and the *Torture Convention* and customary international law were ineffectively exercised prior to the mid-1990s when the International Tribunal for

Former Yugoslavia and Rwanda were established. The International Criminal Court Statute was founded in 1998 and has provided for the application of universal jurisdiction. Universal jurisdiction was only exercised when particularly notorious perpetrators came to light. “The occasional nature of these trials often called into question the objectivity of the proceedings or determination. In addition, the decision to investigate and prosecute is often largely driven by political considerations, rather than due to the recognition of moral or legal obligations.”²⁴²

In his book *Amnesty For Crime in International Law and Practice*,²⁴³ Andreas O’Shea advances nine constraints that hamper the nation states in their duties to prosecute or provide accountability mechanisms. These constraints speak to the weaknesses of exercising universal jurisdiction. The constraints are as follows: (1) the law of the state may place hurdles in implementing international criminal law. There may or may not be domestic implementation; (2) there may be political constraints such as an amnesty or diplomatic relations between countries; (3) there may be political constraints to extraditing war criminals, the other state may be tyrannical or have a broken-down legal system; (4) there may be financial constraints in domestic prosecutions; (5) the partiality or perceived bias of the judiciary may be a problem; (6) local public opinion may be against prosecution of war criminals; (7) there may be resistance to one state prosecuting an international crime which is a concern of the international community which must prosecute that crime rather than the particular state

²⁴² John McManus, “A New Era of Accountability Through Domestic Enforcement of International Law” in Dumont, Helene and Anne-Marie Boisvert eds. *The Highway To The International Criminal Court: All Roads Lead To Rome* (Montreal: Les Editions Themis, 2003) at 503 – 543 at 506.

²⁴³ (The Hague: Kluwer, 2002) at 98-101.

attempting to fulfill an international role; (8) there is no uniformity of prosecutions and punishments, therefore reducing or rendering impotent the objectives of punishment which is deterrence, and (9) there may be difficulties in effective prosecution of an international crime in the state in which the crime did not take place, for example the gathering of evidence and the availability of witnesses. I call these constraints, practical modalities.

O'Shea proposes that there are advantages to national prosecutions over international prosecutions.²⁴⁴ He suggests that a domestic prosecution has the certainty of a particular state's criminal law and procedure. He also suggests that, unlike universal jurisdiction, there is no concern over sovereignty, which can be a stumbling block in international relations of states. He goes on to suggest further that it would be easier to prosecute in the state in which the crime occurred because of the availability of evidence and witnesses. There would be financial advantage because of the pre-existing system of courts, judiciary, lawyers and prison system. The international criminal law system would not be able to cope with an influx of international criminal trials. The scales tip in favour of domestic prosecutions where the crimes took place rather than international/universal prosecutions.

Ultimately universal jurisdiction is a function of politics. Universal jurisdiction has often floundered at the altar of political considerations. Professor Gregory Gordon in his article, "Averting Abuse of Universal Jurisdiction,"²⁴⁵ gives several examples of the

²⁴⁴ *Ibid*, at 102-103.

²⁴⁵ Gregory Gordon, "Averting Abuse of universal jurisdiction," University of North Dakota Law School; available online at <http://globallawforum.org/UserFiles/AvertingAbuseofUniversal.ppt>.

political uses to which universal jurisdiction has been advanced. The most famous example is the running political battle between France and Rwanda where France has exercised universal jurisdiction over alleged Rwandan war criminals and had accused Rwandan President Paul Kagame of committing war crimes, while Rwanda in turn has counter-charged that France was complicity in the commission of war crimes and genocide in Rwanda in 1994.²⁴⁶

In Principle Number Eight of the *Cairo-Arusha Principles*, African countries have declared the following in recognition of one of the fundamental problems of universal jurisdiction: “In applying universal jurisdiction, prosecuting authorities shall avoid bias and selectivity based on race, gender, sexual orientation, ethnicity, colour, language, age, religion, political or other opinion, national or social origin, birth or other status of the suspect. In particular, the application of the principle of universal jurisdiction shall not be used as a pretext to pursue politically motivated prosecutions.”²⁴⁷ Universal jurisdiction is as much a legal concept as it is a dynamic political concept.

In his book, *Global Justice: The Politics of War Crimes Trials*²⁴⁸ Kingsley Chiedu Moghalu lays bare the politics involved in the application of universal jurisdiction in the prosecution of war crimes, be it at the international criminal tribunal or in national courts. Moghalu states that the application of universal jurisdiction is based on the politics of the situation at hand.

²⁴⁶ *Ibid.*, at 11-15.

²⁴⁷ *Cairo-Arusha Principles*, *supra*.

²⁴⁸ Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (London: Praeger, 2006)

Robert Bork, in his book²⁴⁹ opposes the application of universal jurisdiction on ideological and sovereignty grounds. Bork challenges the exercise of universal jurisdiction, and what he sees as judicial activism of the judiciary, respectively internationally and nationally. Bork has chosen three countries for study: The U.S, Canada and Israel. He has also looked at international tribunals. Bork states that these three countries and the International tribunals are exercising “judicial imperialism”--“the continuing usurpation by the courts of the authority lodged in democratic government, pushing along the movement of societies to the cultural left”²⁵⁰. According to Bork, judicial imperialism at home and abroad is fuelled by many forces: the cultural left relying on the existence of rights that were never provided for in the various constitutions; the internationalization of law by the existence of international organizations which purport to develop new rights; the existence of international tribunals with their insistence on national courts applying notions of international law, law which is more politics than law; increasing judicial preference to cite foreign laws and judgments and the corruption of international law influenced by the misinterpretation of the *US Alien Torts Claims Act* (ATCA). Bork concludes his book by stating that “universalistic rhetoric which is what rights talk is teaches disrespect for the actual institutions of any nation, perhaps particularly democratic nations”²⁵¹. Bork identifies a formidable danger brought about by judicial imperialism, “rights become

²⁴⁹ *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002).

²⁵⁰ *Ibid* at 20.

²⁵¹ *Ibid* at 194-195.

weapons in political, cultural, and legal struggles for superiority accompanied by the redistribution, in the claimants' favour of wealth and privilege'²⁵².

Another critic of universal jurisdiction, although from a different perspective than Bork, is Osgoode Hall Law School Professor Michael Mandel²⁵³. Whereas Bork is opposed to the exercise of universal jurisdiction, Michael Mandel is sceptical about the claim by the supporters of the international prosecution movement, i.e. those who urge for prosecution of war criminals, that war crimes prosecutions engender justice or accountability or forestall impunity. Mandel's book is perhaps the most comprehensive and critical of the books against the international prosecution/ criminal law movement. Mandel seeks to expose the hypocritical character of the modern war crimes movement which he regards as perhaps an unconscious proxy for US imperialism and not judicial imperialism as per Bork. "In practice, international criminal law has been very good at legitimating war and very bad at promoting peace" or justice²⁵⁴. The US has labelled its enemies as war criminals in order to justify wars against the enemies, for example Yugoslavia and Iraq. The international prosecution movement has followed suit. The people who have been prosecuted are all or mostly the enemies of the US and their allies while the real war criminals, the US in Iraq and other places, NATO and their allies have escaped any investigations or prosecutions. The US has shielded itself from the jurisdiction of international criminal law and the application of universal jurisdiction. In his view the international criminal tribunals are creatures of the US with

²⁵² *Ibid* at 194.

²⁵³ *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (London: Pluto Press, 2004).

²⁵⁴ *Ibid* at 249.

hidden US agendas. The majority of judges in these tribunals are US - approved and are mainly from NATO countries or other US allies. Victims do not secure justice in these tribunals or in the national tribunals. "The usual suspects will continue to be rounded up while America gets away with murder".²⁵⁵ Universal jurisdiction is not about the exercise of just international law principles, it is the exercise of political hegemony, particularly of the U.S.

Mandel's book is sobering. He points out that Africans are now tried in Europe, a Europe that had colonized Africa. "They put these events, and these trials of Africans by European Courts, right in their context of 100 years of colonial rule, 80 of them by these same Belgians who now presumed to try their colonial subjects for crimes that they did plenty to encourage and nothing to prevent"²⁵⁶.

Mandel argues that the U.S. has also imposed the institution of specially constituted tribunals. He has taken the examples of the Nuremberg and Tokyo criminal tribunals after the Second World War and the international criminal tribunals for Rwanda and former Yugoslavia. These four tribunals that were created to try war criminals, were engineered he says, by the U.S. after imposing its will on the international community. Convictions of the accused were and are the order of the day in these tribunals, he concludes.

The tribunals that were supported by the U.S. had a specific mandate and mission, with limited jurisdictions. These were not international criminal tribunals with universal jurisdictions. Mandel argues that they were limited to trying respectively Nazi,

²⁵⁵ *Ibid* at 233.

²⁵⁶ *Ibid* at 231.

Japanese, Rwandese and Yugoslavian war criminals and that the U.S. had resisted the creation of international criminal courts with universal jurisdiction to try all war criminals including terrorists.

The judiciary has also been pointed out as one of the obstacles to the exercise of universal jurisdiction. For example, Michael Kirby in his article “universal jurisdiction and Judicial Reluctance: A new “Fourteen Points”²⁵⁷ discusses the attitude of the judiciary in matters of universal jurisdiction. Michael Kirby, is a world renowned Australian jurist who sat on the highest court of appeal there, lists the reasons in general terms why judges everywhere are reluctant to exercise universal jurisdiction over war criminals. Only a few will be mentioned: judges do not want to usurp the political power of the legislatures; war crimes cases are more political than legal and they tread on sovereign and diplomatic prerogatives; Judges prefer to defer to political organs on issues involving crimes that happened elsewhere; Judges are suspicious that war crimes laws are retroactive applications of later laws, an anathema to the established principles of criminal law; judges detest adjudicating crimes that happened elsewhere when all crime is traditionally local; Judges regard war crimes as new crimes and of uncertain applications; Judges have trouble adjudicating on criminals that may have benefited from amnesties and accorded immunities from their home country; Judges are reluctant to impose judicial imperialism on other countries or judiciaries; war crimes cases are usually politically controversial; Judges prefer that these cases be referred to international tribunals; and there are hardly any precedents for such cases; there is

²⁵⁷ In Stephen Macedo, Ed. *universal jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania, 2004) at 240 to 260.

already enough workload to be bothered with cases involving other nations and foreign crimes.

If all judiciaries were to base their reluctance on these reasons, then there would be no universal jurisdiction.

5.3 The Law and Politics of Universal Jurisdiction

It has been alluded above that the exercise and concept of universal jurisdiction is mirrored in politics. But it goes deeper than that. There is no definition or agreement and consensus in international law as to what constitutes universal jurisdiction. When is universal jurisdiction to be exercised? There is no international convention cataloguing what universal jurisdiction means other than some specific sections of various conventions that state and provide for the exercise of universal jurisdiction.²⁵⁸ To overcome the lack of definition and international convention denoting what universal jurisdiction is, and to correct the confusion, some scholars of international standing met at Princeton University in 2004 and developed what they called the *Princeton Principles on universal jurisdiction* which could be used as a basis for a unitary international convention.²⁵⁹ As of 2013 there is no convention specifying what universal jurisdiction means. In the meantime most nation states have incorporated into their domestic laws

²⁵⁸ See discussion in C. Cherif Bassiouni, “The History of universal jurisdiction and its Place in International Law” in *universal jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (ed.) Stephen Macedo, (Philadelphia: University of Pennsylvania Press, 2004), at 39 to 64.

²⁵⁹ The “Princeton Principles” are reproduced in Ibid at 18 to 26.

sections of international conventions allowing these states to exercise universal jurisdiction.

The following subsections discuss various international attempts at refining the concept of universal jurisdiction.

5.4 The United Nations and Universal Jurisdiction

Apart from conventions developed by the United Nations that provide for universal jurisdiction, there has also been UN Declarations and resolutions on universal jurisdiction. The UN Security Council has similarly done the same. As Amnesty International indicates, “for nearly four decades, the General Assembly has been adopting resolutions which permit states to exercise universal jurisdiction.”²⁶⁰ The following section deals with some of the Declarations. The 1973 *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity* provides that:

War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial, and, if found guilty, to punishment, as a general rule in the countries in which they are committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.²⁶¹

²⁶⁰ Amnesty International, *universal jurisdiction: UN General Assembly Should Support this Essential International Justice Tool* (London: Alpublications, 2010), at 55. This and following sections rely on the Amnesty International publication.

²⁶¹ Adopted by General Assembly Resolution 3074 (XXVIII) of 3 December 1973, at paras. 1 and 5.

In 1989 *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* states:

Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary and summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or co-operate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.²⁶²

The 1992 *Declaration on the Protection of All Persons from Enforced Disappearance* provides: “All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.”²⁶³

The 2005 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law* also provide:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecuting the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, co-operate with one another and assist international judicial organs competent in the investigation and prosecution of these

²⁶² Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989, Principle 18.

²⁶³ Adopted by General Assembly resolution 47/133 of 18 December 1992, art. 14.

violations. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction.²⁶⁴

5.5 Studies by the UN Secretariat and Expert Bodies

In May 2010, the Office of Legal Affairs submitted a survey of state practice concerning the extradition or prosecution obligation to the International Law Commission.²⁶⁵ On October 1, 2010 the Office of the Commissioner for Human Rights published a report on crimes under international law committed in the Democratic Republic of the Congo (DRC) between 1993 and 2003.²⁶⁶ With regard to the role that states outside the DRC could play in ending impunity in that state using extraterritorial and universal jurisdiction, it stated:

1027. While there are prosecution mechanisms that could be implemented in the DRC to bring action against the many crimes committed, each State still has an immediate role to play in the fight against impunity. Certain States can also play a crucial role in the success of judicial proceedings, whether they are conducted by jurisdictions in another country or by an international or mixed jurisdiction.

1029. The exercise of extraterritorial or universal jurisdiction is made obligatory by international law in certain international conventions on the grounds that the most serious crimes under international criminal law,

²⁶⁴ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, at paras. 4 and 5.

²⁶⁵ Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)": Study of the Secretariat, 26 May 2010 (http://untreaty.un.org/ilc/documentation/a_cn4_630.pdf).

²⁶⁶ *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003* (June 2010) (http://www.ohchr.org/Documents/Countries/ZR/DRC_Mapping_Report_Final_En.pdf).

namely war crimes, crimes against humanity, genocide and torture, must not go unpunished. This principle authorizes the prosecution of perpetrators of these crimes even if there is no link between the offence and the State which brings proceedings. This form of jurisdiction is based on the nature and gravity of the crimes committed. Thus, a large proportion of the crimes committed between 1993 and 2003 on DRC territory can be prosecuted in accordance with universal jurisdiction.

1031. All States should therefore apply these texts and their own laws, on the basis of either extraterritorial or universal competence, to prosecute those who bear the greatest responsibility for the crimes documented in this report, complying fully with the provisions of international law in effect. They should also co-operate with the implementations of procedures operating outside of their own judicial systems, by responding, for example, to the needs of their national or international jurisdictions carrying out investigations and agreeing to extradite the perpetrators to States that request it.²⁶⁷

5.6 Commissions of Inquiry

The Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report) concluded:

127. in the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of the grave breach of provisions of the Geneva Conventions of 1949, prevent impunity and promote international accountability (Chapter XXVIII)

1654. It is the view of the Mission that universal jurisdiction is a potentially efficient tool for enforcing international humanitarian law and international human rights law, preventing impunity and promoting international accountability. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards and establish judicial accountability over its military actions in Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether ICC will exercise jurisdiction over

²⁶⁷ *Ibid*, at paras. 1027 and 1031 (footnotes omitted).

allegedly crimes committed in the Occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Conventions of 1949, prevent impunity and promote international accountability.

1975. The Mission recommends that States' Parties to the Geneva Conventions of 1949 start criminal investigations in national courts, using universal jurisdiction where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognized standards of justice.²⁶⁸

Universal jurisdiction as a principle is thus widely accepted and disseminated by the United Nations and its organs and in international criminal law and tribunal jurisprudence.

5.7 Africa and Universal Jurisdiction

African countries and scholars have engaged in a debate while supportive of “the principle of universal jurisdiction within the context of fighting impunity as well as the need to punish perpetrators of genocides, crimes against humanity and war crimes,”²⁶⁹ as to whether Africa is a guinea pig of the ICC and the experimental field in the exercise of universal jurisdiction.²⁷⁰ As of September 2012, the ICC had so far only charged

²⁶⁸ U.N Doc. A/HRC/12/48, 25 September 2009, at paras. 127, 1654 and 1975 (<http://www.ohcr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>). The Goldstone Report was highly and heavily condemned in many quarters but it is not our aim to discuss this issue here. See Alan Dershowitz, “The Case Against The Goldstone Report” accessed on December 30th, 2010.

²⁶⁹ 12th Africa-EU Ministerial Troika meeting, *Summary*; 28 April 2009, Luxembourg, at paras. 38 and 39 (http://www.europa-eu-un.net/articles_86.htm).

²⁷⁰ *Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys-General*, Executive Council, 13th Ord.. See 24-28

Africans with international crimes and most if not all of the investigations of international crimes pertained to Africa. The ICC has not only investigated low level alleged criminals, it has also issued warrants against a sitting Head of state. European countries have used or attempted to use their universal jurisdiction mandates against sitting African foreign ministers or diplomats. As a result of these developments,

African states take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European states is politically selective against them. This raises a concern over double standards, and the concern is heightened by multiple charges being brought against officials of African states in the jurisdictions of different European states. The African perception is that the majority of indictees are sitting officials of African states, and the indictments against such officials have profound implications for relations between African and European states, including the legal responsibility of the relevant European states.²⁷¹

June 2008, Sharm El-Sheikh, Egypt, EX.CL/411(XIII)
([http://internationaljusticeafrica.org/documents/EX.CL%20411\(XIII\)%20-%20study%20on%20Universal%20Jurisdiction.doc](http://internationaljusticeafrica.org/documents/EX.CL%20411(XIII)%20-%20study%20on%20Universal%20Jurisdiction.doc)); Charles Jalloh, "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction"; Legal Studies Research Paper Series No. 2009-38, University of Pittsburgh, March 2010; Makau Mutua, "The International Criminal Court in Africa: Challenges and Opportunities" Legal Studies Research Paper Series No. 2011-003, University of Buffalo, Law school, September 2010; Alexis Arieff et. Al., *International Criminal Court Cases in Africa: Status and Policy Issues*, Congressional Research Service, Washington, D.C, April 2, 2010; Louise Arimatsu, *Universal jurisdiction for International Crimes: Africa's Hope for Justice?* Chatham House Briefing Paper, April 2010. www.chathamhouse.org.uk; Julia Geneuss, "Universal Jurisdiction Reloaded? Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction" (2009) 7 JICJ 945.
²⁷¹ *Report of the Commission on the Use of the Principle of universal jurisdiction, supra* at para. 34

The African Union has openly challenged “the political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders.”²⁷²

The African Union perspective addressed some of the questions raised by Mandel. Who developed international criminal law principles? Who benefits from their usage? The African Union perspective is useful in analysing the application of universal jurisdiction to prosecute apartheid criminals.²⁷³ Once a question is posed as did Garth Meintjes in his paper, “If Apartheid is a Crime, Why Has No-one Been Prosecuted,”²⁷⁴ the inquirer is raising the African Union perspective question. This is the underlying basis of this study: How and why have apartheid criminals gotten away with impunity and how can this development be arrested?

African countries have observed the dearth of concern accorded to the crime of apartheid. In developing the *Cairo-Arusha Principles of Universal Jurisdiction* (referred to as the African Perspective), African countries had in mind, among others, that: “The principles are prompted, among other things, by a concern that certain offences which have particular resonance in Africa, such as the crime of apartheid, have so far not

²⁷² Louise Amaritsu, *supra*, at 14; for a sustained discussion of the ICC’s case load in Africa, see Alina Ioana Apreatesie, *The International Criminal Court: Starting with Africa?* PhD Dissertation, Péter Pázmány Catholic University Budapest (2008).

²⁷³ For a discussion of TWAIL, see Makau Mutua, “What is TWAIL?” ASIL Proceedings April 5-8, 2000, Washington, D.C; Obiora Chinedu Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective,” [2005] 43: 1&2 Osgoode Hall LJ, 171; Makau Mutua, “Critical Race Theory and International Law: The View of an Insider-Outsider” [2000] 45 Villanova LR 840.

²⁷⁴ Garth Meintjes, “If Apartheid is a Crime, Why Has No-one Been Prosecuted,” (October-December 2002) AFLA Q 19.

attracted prosecution under the principle of universal jurisdiction.”²⁷⁵, or the setting up of an international tribunal to prosecute the crime of apartheid. The crime of apartheid is thus a significant concern in the international politics of African countries.

Apartheid is a concern of this dissertation in the context of the application of universal jurisdiction. The African countries recognized that, “While it is generally preferable to try gross human rights offences in the State where they occurred, it is sometimes necessary, in order to avoid impunity, to make use of international tribunals or other national jurisdictions.”²⁷⁶ In the preamble, the Cairo-Arusha Principles on Universal Jurisdiction state that: “Most African States have accepted the principle of universal jurisdiction by becoming parties to instruments which provide for universal jurisdiction over certain crimes under international law, including under the 1949 Geneva Conventions, the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* and the 1984 *Convention Against Torture*. Many of those States, however, have not ensured that their courts can exercise jurisdiction in respect of gross human rights offences on the basis of universal jurisdiction.”²⁷⁷, and African countries have not made any efforts to establish an International Tribunal on Apartheid.

Although South Africa never ratified the *Apartheid Convention*, it has accepted the principle of universal jurisdiction through the ratification of other treaties or their incorporation into South African domestic law. South Africa has ratified the Rome

²⁷⁵ *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective* (Africa Legal Aid, 2002).

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

Statute of the ICC which stipulated that apartheid is a crime against humanity. Customary international law is also regarded as domestic law when it does not conflict with South African domestic law. Thus the crime of apartheid is part of domestic law in South Africa and is prosecutable.

The next sections deal with a few cases where truly universal jurisdiction has been claimed to have been applied.

5.7.1 *The Demjanjuk Case*

The legal issues that have come up in literature opposing universal jurisdiction include the prospect for violating the “double jeopardy” principle of due process where one accused could be charged in various jurisdictions for the same offences. A clear-cut case for this is the *Demjanjuk* case.²⁷⁸ In the early 1980s in the US, Demjanjuk was accused of having been Ivan the Terrible, the person who terrorized Jewish prisoners in German concentration camps. Since the US had no prosecution policy involving war criminals at that time, Demjanjuk was deported to Israel at Israel’s request. Demjanjuk had no connection to Israel. Israel was exercising universal jurisdiction. He was convicted at trial and the appeal was upheld at the second level. Later, the Supreme Court of Israel acquitted him on the basis of “new evidence”. Demjanjuk spent several years in Israeli prisons while the decision on appeal was being awaited before he was allowed to leave for the US where he had been a citizen since 1958. Demjanjuk was

²⁷⁸ For a comprehensive look at John Demjanjuk, see Yoram Sheftel, *Show Trial: The Conspiracy to Convict John Demjanjuk As Ivan The Terrible* (London: Weidenfeld and Nicholson, 1995).

again extradited to Germany in 2009 to stand trial for his crimes during the Second World War. He was again convicted in Germany and sent to prison.

The *Demjanjuk* case gives ammunition to those who are opposed to the exercise of universal jurisdiction as it could tend to trample on the prohibition against “double jeopardy” rights as well as those who are opposed to the trials taking place decades after the alleged offences had taken place given the eventuality that witnesses and evidence would long be buried. To prevent this happening, universal jurisdiction should be exercised immediately after the atrocities have taken place and prosecutions should only be undertaken by one country. Extraditions, if any, should also be requested as early as possible.

To the supporters of the exercise of universal jurisdiction, the *Demjanjuk* affair is a dire warning to war criminals and criminals against humanity: that they will not run and hide forever, that they would be pursued relentlessly no matter how long it takes and no matter how old they are. Thus *Demjanjuk* offers lessons for both supporters and opponents of universal jurisdiction.

5.7.2 *The Eichmann Case*

Adolf Eichmann was a leader in the Nazi regime. He fled to Argentina afterwards where he lived incognito for years. He was abducted by Israel in 1961 and flown to Israel for trial as a war criminal.²⁷⁹ Questions that arose in this case include whether it

²⁷⁹ For a comprehensive study of the Eichmann trial and case of universal jurisdiction, see Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin, 1994). See also Gary Bass,

was morally justified for Israel to abduct Eichmann from Argentina and what signal was that sending in terms of international relations and the sovereignty of nation states? Did the ends justify the means? On what jurisdictional basis did Israel which had not existed when Eichmann committed the offences, try him? On jurisdiction, the Jerusalem District Court upheld Israel's jurisdiction to try Eichmann and perhaps set the trend for future assumption of jurisdiction world-wide:

The abhorrent crimes defined in this Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself...Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is...in need of judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.²⁸⁰

Was that post-*facto justice*? The case also raised the issue of whether Eichmann could get a fair trial in Israel given the accusations facing him, the composition of the society and judiciary within which he was tried and the laws under which he was prosecuted, i.e. specifically, laws criminalizing the treatment of Jews by the Nazis. Was this a show trial? According to Ed Morgan, a then University of Toronto Faculty of Law professor in his book, *The Aesthetics of International Law*²⁸¹ there is nothing in the annals of war crimes jurisprudence that competes with the *Eichmann* case in terms of theatrical or legal message. It is the most compelling war crimes drama of all. This is despite the observation that the *Demjanjuk* case has the most closely associated public

"The Adolf Eichmann Case: Universal and National Jurisdiction" in Macedo, (Ed.) *universal jurisdiction*, *supra.* at 77 to 90.

²⁸⁰ Quoted in Gregory Gordon, "Averting Abuse of universal jurisdiction," *supra.*, at 6.

²⁸¹ (Toronto et al: U of T Press, 2007) at 19.

theatrics with public prosecutions²⁸² of war criminals. *Eichmann* is one of the clearest examples of the application of the principle of universal jurisdiction.

This case, like the *Demjanjuk* case also has something for both supporters and opponents of the application of universal jurisdiction.

5.7.3 *The Pinochet Case*

Augusto Pinochet's arrest in London on a Spanish warrant in 1998 both dismayed the opponents of universal jurisdiction²⁸³ and pleased the supporters of universal jurisdiction.²⁸⁴ The Pinochet case has been used by both camps to support their arguments about the dangers or virtues of the principles of universal jurisdiction. Kissinger and all those opposed to the exercise of universal jurisdiction have stated that the Pinochet case has destroyed the peaceful intercourse of nation states by transforming international politics into legal questions and the emergence of judicial imperialism, and that the practice interferes with national solutions to historic problems, for example the engagement into reconciliatory gestures and the granting of amnesties. Those in support of universal jurisdiction state that the Pinochet case is a powerful signal that impunity for war criminals and criminals against humanity is over and that more nations need to flex their muscles more through the frequent exercise of universal jurisdiction.

²⁸² *Ibid.*

²⁸³ See for example Henry Kissinger, "The Pitfalls of Universal jurisdiction" (July/August 2001) Foreign Affairs.

²⁸⁴ Human Rights Watch, *universal jurisdiction in Europe: The State of the Art* (June 2006); Kenneth Roth, "The Case for universal jurisdiction" (September/October 2001) Foreign Affairs.

Central to the *Pinochet* case was the issue of immunity from prosecution for heads of states. Immunity is a defence to the application of universal jurisdiction. Rosalyn Higgins, a former judge of the International Court of Justice, has conveniently summarised the *Pinochet* case.²⁸⁵ In the first *Pinochet* case a 3:2 majority found that to the extent that Senator Pinochet enjoyed immunity with regard to conduct within the ‘functions’ of a Head of State, the commission of international crimes was not within those functions and he had no immunity for those acts. However, this ruling was set aside in the second *Pinochet* case due to the links between one of the Law Lords and Amnesty International, an intervener in the case.²⁸⁶ In the third *Pinochet* case²⁸⁷ a 6:1 majority decided that Senator Pinochet could not benefit from immunity for the specific torture claims. Torture is a crime against humanity. Lord Brown-Wilkinson thought that after the affirmation of the *Nuremberg Principles* adopted by the General Assembly in 1946 there existed the concept of crimes in international law – originally linked to war, but then decoupled from that: ‘I have no doubt that long before the *Torture Convention* of 1984 state torture was an international crime in the highest sense.’²⁸⁸ In his view, the *Torture Convention* did not create a crime but established a system to fight it, one which required states to exercise jurisdiction or extradite. Still addressing the common law situation, he thought the immunity *ratione personae* was lost by a Head of State who was no longer in office, but his immunity in respect of official acts was preserved when

²⁸⁵ “International Law” in Blom-Cooper, Louis, B. Dickson & G. Drewry, (eds.), *The Judicial House of Lords, 1876-2009* (Oxford: OUP, 2009), at 466-468. The following pages rely on the Higgins article.

²⁸⁶ *R. v Bow Street Metropolitan Stipendiary, ex p Pinochet Ugarte* [2000] 1 AC 61.

²⁸⁷ *Ibid*, (No 3) [2000] 1 AC 147.

²⁸⁸ *Ibid*, 198.

he left office. However, the situation changed with the entry into force of the *Torture Convention*, which prohibited torture whether ordered by a Head of State or committed by an underling. If the former were to retain immunity *ratione personae* after departure from office, the whole purpose of the Convention would be thwarted.

Lord Hope of Craighead dispelled the notion that it is not a function of state to commit acts which customary international law regards as crimes. It was held to be unsound in principle: '[T]he purpose for which [the acts] were performed protects these acts from any further analysis.'²⁸⁹ He was of the view that there was no general agreement as to whether crimes contrary to *jus cogens* were removed from immunity under customary international law. There thus remained for Lord Hope the question of whether a former Head of State had immunity in the courts of the state which had jurisdiction to try the crime.²⁹⁰ He came to the conclusion that it could not be implied that the *Torture Convention* had removed immunity *ratione personae* from former Heads of State for international crimes, but he then held that the immunity of Senator Pinochet could not survive Chile's agreement to the *Torture Convention* 'if the torture...was of such a kind or on such a scale as to amount to an international crime.'²⁹¹ Developments in international law were 'in place' by 1988 and the 'obligations which were recognized by international customary law in the case of such serious crimes by [the date of Chile's ratification of the Torture Convention] are so strong as to override

²⁸⁹ *Ibid*, at 242.

²⁹⁰ *Ibid*, at 243.

²⁹¹ *Ibid*, at 246.

any objection on the grounds of *ratione personae* over crimes committed after that day.²⁹²

Lord Saville of Newdigate agreed with Lord Nicholls in believing that immunities for parties to the Convention could not exist consistently with the terms of the Convention.

To him there was no question of seeing if there had been an express or implied waiver:

Indeed it seems to me it is those who seek to remove such alleged official torturers from the machinery of the Convention who in truth have to assert that by some process of implication or otherwise, the clear words of the Convention should be treated as inapplicable to a former head of state, notwithstanding he is properly described as a 'person who was acting in an official capacity.'²⁹³

Lord Millett stood alone on certain points in his reasoning. His view that no statutory authority was required for the courts to exercise jurisdiction over international crimes (of which torture was one even before the *Torture Convention* was agreed) stood in contrast to that of his colleagues, who believed that such authority was conferred for the first time by section 134 of the *Criminal Justice Act* 1988. He also agreed with Lords Nicholls, Hope and Saville that the definition of torture in the Convention was entirely inconsistent with the plea of *ratione personae*: 'the official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.'²⁹⁴

²⁹² *Ibid*, at 248.

²⁹³ *Ibid*, at 267.

²⁹⁴ *Ibid*, at 277.

For Lord Millett, once a state was party to the Convention, there was no immunity to be waived. The implication would seem to be that that is so even so far as a current Head of State is concerned. By contrast, Lord Phillips of Worth Mantravers thought the argument would only concern what immunity Senator Pinochet might have had under the *Torture Convention* as a former Head of State. He thought it was still an open question whether international law recognized universal jurisdiction in respect of international crimes, but he held that ‘no established rule of international law requires state immunity *ratione personae* to be accorded in respect of prosecution for an international crime.’²⁹⁵ He added: ‘international crimes and extraterritorial jurisdiction are both new arrivals in the field of public international law... I do not believe that state immunity *ratione personae* can co-exist with them.’²⁹⁶

Lord Goff was the sole dissenter, sharing the views of Lords Slynn and Lloyd in the first appeal that no universal jurisdiction in respect of international crimes existed under customary international law. He found that, under section 20(1) of the *State Immunity Act* 1978, a former Head of State retained immunity for official acts and that the 1984 Convention had not altered that. Lord Goff’s analysis is not the prevailing perspective.

5.7.4 Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*, also known as the *Yerodia Case*)²⁹⁷

²⁹⁵ *Ibid.*, at 289.

²⁹⁶ *Ibid.*

²⁹⁷ *Democratic Republic of the Congo v Belgium* (2002) I.C.J Reports 3.

In the exercise of its universal jurisdiction mandate, Belgium charged and issued a warrant for the arrest of Abdulaye Yerodia Ndobasi, a sitting Congolese Foreign Affairs Minister for torture and war crimes. The Democratic Republic of Congo brought a claim against Belgium for its unwarranted use of universal jurisdiction and for violating the immunity rights of a sitting Foreign Affairs Minister. The charge and warrant were issued in absentia. Belgium at the time was applying a “broad” concept of universal jurisdiction as opposed to a “narrow” application used by most countries that assert universal jurisdiction which requires the alleged criminal to be present in the jurisdiction of the forum country.

The International Court of Justice ruling that “rung around the world” stated, in contradiction to the *Pinochet* case, that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a state, such as Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other states, both civil and criminal.” But “it is only immunity from criminal jurisdiction and the inviolability of an incumbent Minister of Foreign Affairs.”²⁹⁸

The I.C.J. however went on to decide that after an immunised person has left the position for which they had immunity, that person could be prosecuted. The court also held that an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

²⁹⁸ *Ibid.*, at 21.

The prohibition of criminal prosecution of a sitting Head of State or Minister only applies to foreign national courts, but not to international tribunals like the ICC.

This decision confers universal jurisdiction on specifically created international tribunals that have been mandated for the application of such jurisdiction. The default position is national jurisdictions applying universal jurisdiction.

5.8 Civil Actions Against Corporations and Universal Civil Jurisdiction

Victims of apartheid have brought a gigantic suit in the U.S. against various corporations for “aiding and abetting” apartheid. The reason why apartheid victims sought civil reparations elsewhere is because of the inadequate response to the provision of reparations to the victims at home. The first attempt of the victims of apartheid to access universal civil jurisdiction in US courts was nearly derailed when the District Court Judge, Justice Sprizzo dismissed the suit on a motion for summary judgement by the corporations.²⁹⁹ In re *South African Apartheid Litigation* the Court had agreed with the representations of the US and South African governments that acceding to the suit would be intruding into foreign relations and policies of these countries. It was also argued that the suit would harm foreign investment in South Africa. Further it was pointed out that the suit would harm the purpose of the Truth and Reconciliation Commission. One of the central elements posited for the opposition to universal jurisdiction is on this point: political question doctrine or the imperatives of foreign

²⁹⁹ 346 F. Supp 2nd 538 (S.D.N.Y. 2004). See also Andrew Farrelly, “Foreign Policy in the Court – The ATCA and *In Re: South African Apartheid Litigation*: What Sosa Makes Courts Do” [2006] 30:2 Seton Hall Legis J 437.

policy. The sovereignty of the South African government to dictate its own policies regarding reparations would be injured by the exercise of power of a foreign court.

Indeed in the *South African Apartheid Litigation* case, the presiding judge, despite the fact that 108 nations had ratified the *Apartheid Convention*, more nations than all the western countries put together, claimed the following strange logic: “Despite near-universal condemnation of apartheid, Western European and North American countries have neither signed nor ratified the *Apartheid Convention*. This illustrates substantial international conflict concerning acceptance of the precise norms articulated in the text of the *Apartheid Convention*”³⁰⁰. There is no analysis as to why western states never supported the *Apartheid Convention* or why the western standard of international criminal law must override the rest of the world’s stance. It would have been due to economic interests, the fear of communism, and further that these countries had troubled racial histories themselves. Instead of questioning the morality of western countries, the judge is questioning the morals of the majority countries that ratified the *Apartheid Convention*.

Although some other scholars as reviewed in an earlier chapter condemned apartheid as a crime against humanity, the kind of reasoning displayed by Sprizzo clearly suggest that apartheid criminals stand a good chance of acquittal in western courts. They could conceivably convince a judge that since the *Apartheid Convention* was not signed or ratified by any western government, it would not be safe to found a conviction upon it,

³⁰⁰ Sprizzo, *Ibid*.

despite its incorporation into the Rome Statute and dismissively into Canada's *Crimes Against Humanity and War Crimes Act*.

The victims appealed the decision to the US Court of Appeals, Second Circuit where the case was reversed and remanded³⁰¹. An appeal to the US Supreme Court by the defendants was dismissed on a technicality because the court could not constitute a quorum³⁰². The case went back to the District Court before a new judge³⁰³ where Justice Sheindlin upheld the suit that aiding and abetting the crime of apartheid could be founded in the ATCA, i.e. the Federal Court had jurisdiction to entertain the suit³⁰⁴.

In defending the suit, the corporations have deployed an arsenal of defences including the following in their Briefs:³⁰⁵

- the plaintiffs fail to 'state a claim cognisable under the (tort statute) grant of jurisdiction' violating the laws of nations or a treaty of the US;
- 'aiding and abetting international law violations are not actionable under the statute';
- 'allegations of aiding and abetting the apartheid government do not state a claim because doing business with apartheid South Africa did not violate international law';
- 'no defendant is alleged to have been involved in the promulgation or enforcement of the laws by which apartheid was administered (or) alleged to have committed torture, genocide or extrajudicial killing';
- 'complaints are composed almost exclusively of allegations concerning the sale of automotive vehicles and computers, and the loans of funds to parties in South Africa – conduct that is not and has never been violation of international law';

³⁰¹ *Khulumani v Barclay* 504, F. 3d 254 (2nd Cir.2007).

³⁰² "Justices won't hear apartheid suit" *New York Times* 12 May 2008.

³⁰³ Justice Sprizzo had died in the interim.

³⁰⁴ Case 1:02-md-01499-SAS, Document 141, 04/08/2009, USDC, SDNY.

³⁰⁵ See summary in Patrick Bond and Khadija Sharife "Apartheid Reparations and the Contestation of Corporate Power in Africa" (2009) ROAPE 109.

- International law ‘never imposed obligation on defendants to divest’;
- ‘none of the defendants’ home countries ever prohibited South African commerce altogether’;
- the UN Resolutions were limited to ‘intense debates over whether to prohibit commerce with South Africa’;
- the UN General Assembly is not a ‘law-making body’ but exists instead for purposes of ‘political discussion’ which is at best ‘merely advisory’;
- various resolutions, e.g. UN Security Council Res. 569 (1985), were not binding on member states or corporations;
- the tort statute is interpreted (and constrained) by ‘specificities comparable to 18th century paradigms related to piracy etc.’;
- the tort statute’s jurisdiction does not extend to the extraterritorial nature/conduct of multinationals in foreign nations, and that it was never intended to be used applied outside US borders;
- international law does not recognise corporate liability with jurisdiction extending to natural persons only, further highlighting that no international court has ever found a corporation guilty of ‘violating a norm of international law’;
- the tort statute does not contain a statute of limitations, hence the defendants borrow the ten year limitation of the *Torture Victim’s Protection Act*, to dismiss the claims;
- there is ‘no basis for tolling the limitations period ... to overcome their failing to bring suit so many years after Mandela’s election ...’;
- Khulumani’s claims do not relate back as initially, the suit was materially different (deliberate on the part of Khulumani’s counsel), who have only this year switched to ‘class action’;
- Khulumani lacks associational standing, for ‘the presence of the individual members – the real parties in interest – is required ... importantly to avoid the risk of duplicative litigation’;
- ‘Khulumani (KSG) lacks standing to sue on its own behalf’;
- ‘cases are non-justiciable under the political question doctrine ... the adjudication of these cases before the Court would conflict with clearly articulated foreign policy and interfere with international diplomacy’;
- South Africa views adjudications as intrusion upon its sovereignty: ‘SA has at every turn urged the US courts not to adjudicate plaintiff’s claims’; ‘plaintiffs seek massive monetary penalties on behalf of the classes they purport to represent ... SA considers it to be a direct challenge to the reparations programme carefully designed by the post-apartheid government to confront the legacy of apartheid’; and hence

- The successful prosecution of the case would disrupt the growth of the South African economy, undermining economic stability and deterring foreign direct investment

In February 2012, one of the corporations, General Motors Company, settled the suit with the victims for 1.5 million worth of shares in the company.³⁰⁶ The other corporations are still litigating. The conclusion of the apartheid litigation cannot be foretold.

The scholarly commentary on the apartheid litigation in the United States that opposes the litigation adopts the position of the companies summarized above, while those in support of the litigation like Jeffrey Davies form part of the other burgeoning literature³⁰⁷ and claim that foreign litigation ensures that corporations that aid and abet war criminals do also not get away with impunity. One remedy to the impunity of apartheid criminals may lie in replicating these suits on natural individual apartheid criminals, abroad.

5.9 Conclusion

This chapter has examined a few cases where the concept of universal jurisdiction had purportedly been used. These are cases where the prosecuting state had no connection to the territory in which the crime took place. This is the paradigm that could

³⁰⁶ Bill Corcoran “Apartheid Victims Secure GM Compensation Deal” *Irish Times* 3 March 2012.

³⁰⁷ See; among others, Jeffrey Davis, *Justice Across Borders: The Struggle for Human Rights in US Courts* (Cambridge et al: Cambridge University Press, 2008); Kirsten Hutchens “International Law in the American Courts – *Khulumani v Barclay National Bank Ltd.*: The Decision Heard “Round the Corporate World”(2005) 9:5 German LJ 639.

be used in the prosecution of apartheid criminals in Canada or in any other country for that matter.

The next chapters discuss the possibility of the prosecution of apartheid criminals in Canada. A long historical chronology of this legal possibility is developed in the next several chapters.

CHAPTER SIX
THE HISTORY AND POLITICS OF WAR CRIMES LEGISLATION AND
PROSECUTION IN CANADA, 1945-2005

6.1 Introduction

This chapter discusses the genesis of Canada's implementation and exercise of the instrument of universal jurisdiction that began with the pursuit of Nazi war criminals. Canada's possible role in addressing the crime of apartheid during and after the apartheid era has to be placed in context of Canada's war crimes policy in general and historically. This discussion has to precede the specific policies Canada could have adopted with respect to South Africa during the apartheid era. Canada fought against Nazi Germany during the Second World War and could be justified in prosecuting and pursuing Nazi war criminals in Canada. Nazi Germany killed Canadian soldiers. There is no such connection with respect to apartheid South Africa. However, as will be seen later, Canada had no connection with respect to the genocide in Rwanda but Canada has prosecuted those accused of genocide in Rwanda who happened to live in Canada. How Canada dealt with Nazi war criminals found in Canada from 1946 to the 1980s can be instructive as to how it could have dealt with apartheid criminals found in Canada between 1948 and 1994 and after. This chapter deals with Canada's war crimes legislations and prosecutions following the Second World War, particularly with respect to Nazi War criminals. This chapter demonstrates the lengthy and convoluted politics of war crimes prosecutions in Canada.

6.2 The Moral Panic

It took an article in the *Ottawa Citizen* in 1985,³⁰⁸ by a *New York Times* reporter, who claimed that Joseph Mengele, a Nazi Doctor (popularly called the “Angel of Death”), was in Canada or had applied to enter Canada, to cause a “moral panic”³⁰⁹ in the Canadian Government of the day to convoke a Commission of Inquiry on War Criminals in Canada³¹⁰. That the mention of Mengele triggered the panic is evident from the minute that set up the Commission of Inquiry in motion³¹¹:

WHEREAS concern has been expressed about the possibility that Joseph Mengele, an alleged Nazi war criminal, may have entered or attempted to enter Canada;

WHEREAS there is also concern that other persons responsible for war crimes related to the activities of Nazi Germany during World War II (hereinafter referred to as war criminals) are currently resident in Canada:

AND WHEREAS the Government of Canada wishes to adopt all appropriate measures necessary to ensure that any such war criminals currently resident in Canada, or hereafter found in Canada, are brought to justice.

THEREFORE, the Committee of the Privy Council on the recommendation of the Prime Minister, advises that, pursuant to the Inquiries Act, a Commission do issue under the Great Seal of Canada, appointing the Honourable Mr. Justice Jules Deschênes, of the Superior Court of Quebec, to be Commissioner under Part I of the Inquiries Act to conduct such investigations regarding alleged war criminals in Canada, including whether any such persons are now resident in Canada and when and how they obtained entry to Canada as in the opinion of the Commissioner are necessary in order to enable him to report the Governor in Council his recommendations and advice relating to what further action might be taken in Canada to bring to justice such alleged war criminals

³⁰⁸ Ralph Blumenthal, *New York Times*, 23 Jan. 1985, at A4.

³⁰⁹ See *Infra* discussion of “Moral Panic”.

³¹⁰ *Commission of Inquiry on War Criminals* (Ottawa, 1996) (The Jules Deschênes Report).

³¹¹ *Ibid*, at 17.

who might be residing within Canada, including recommendations as to what legal means are now available to bring justice any such persons in Canada or whether and what legislation might be adopted by the Parliament of Canada to ensure that war criminals are brought to justice and made to answer for their crimes.

The Commission understood clearly why it was convoked and Jules Deschênes was aware of the high stakes involved. He states on page 245 of the Report that “the sensational allegations concerning Dr. Mengele’s connection with Canada were the straw that broke the camel’s back: the matter had to be clarified once and for all.”

The government had not responded to the call for a study into war crimes made by the much respected Law Reform Commission of Canada just the previous year. In its 1984 study entitled “Extraterritorial Jurisdiction”³¹² the Commission recommended:

That the Government of Canada authorized a study of the complex subject of war crimes including relevant aspects of international law, comparative law, constitutional law, criminal law and military law with a view to determining what war crimes legislation should be enacted by Canada to replace our present outdated legislation. Until that study is done, any other recommendations would be premature. Regardless of who undertakes the study, the Ministry of the Solicitor General of Canada and the Departments of Justice, National Defence and External Affairs should be included as participants in it.

In fact the government already had several pieces of legislation on the books, pertaining to war crimes, which legislation was never used, but at the same time, it was never repealed³¹³. These pieces of legislation comprised of, the *War Crimes Act*³¹⁴ of

³¹² Working paper 37, (Ottawa, 1984).

³¹³ *Ibid*, at 83.

³¹⁴ S.C. 1946, C. 73.

1946 and the *Geneva Conventions Act* of 1965.³¹⁵ The *War Crimes Act* of 1946 enabled Canada to continue to prosecute German soldiers accused of killing Canadian soldiers during the Second World War and the *Geneva Convention Act* of 1965 was Canada's implementation of the four Geneva Conventions of 1949 that dealt with the treatment of the captured or wounded soldiers in international armed conflicts.

More significant however, is that previous references to Joseph Mengele did not cause a "moral panic" in the government to cause it to request for a Commission to recommend requisite legislation. The presence or attempted entry into Canada of Joseph Mengele was extensively investigated between 1961 and 1962³¹⁶. This never led to calls for war crimes legislation. Nor did the massive albeit intermittent pressure on the governments of Canada since the end of the Second World War to do something about war crimes result in any concerted response by the government to enact war crimes legislation. This time around, Prime Minister Brian Mulroney called the presence of Nazi war criminals in Canada, "a moral outrage."³¹⁷ Suddenly reports in the press appeared suggesting that there were as many as 6,000 Nazi war criminals in Canada.³¹⁸ Moral panic was triggered.

This chapter is an attempt to understand why in 1985, the government of Canada succumbed to the pressure to deal with Nazi war criminals in Canada by new and specific legislation. It is argued utilizing the concept of "moral panic" that the

³¹⁵ R.S.C. 1970, C. G-3.

³¹⁶ *Supra*, at 67-82.

³¹⁷ Quoted in Irwin Cotler, "Response to the Deschênes Commission of Inquiry on War Criminals" in Cotler (ed.) *Nuremberg: Forty Years Later* (Kingston: McGill-Queen's Printer, 1987) at 74.

³¹⁸ Ramon Hnatyshyn, "Domesticating the *Nuremberg Principles*: The Canadian "War Crimes" Legislation" in Cotler, *ibid*, at 35.

invocation of the image of Joseph Mengele in 1985, after the image had been absent for more than 20 years, became a convenient governmental precipitant to respond, especially after an accumulation of unprecedented pressure by very well organized and articulate “moral entrepreneurs” and pressure groups. A lengthy historical background going back to 1945 is necessary in order to understand the developments of 1985.

The war crimes legislation is a good example and case study of how modern pieces of criminal legislation are brought on the scene by pressure groups utilizing “moral panic” of the moment or period. Depending on the timing, opportunity, pressure and duration of the “moral panic” incident, legislatures typically respond accordingly. It is argued that the finished product of criminal legislation is the product of a political process driven by pressure groups or victim groups.

To understand the politics of war crimes legislation³¹⁹, it is necessary to examine the history of the treatment of the issue of war crimes in Canada from 1945 to the present.

6.3 The Definition of Moral Panic

The concept of moral panic³²⁰ was coined by Stanley Cohen to explain societal reactions to and labelling of certain incidents that must be controlled because they pose real or perceived threat to society. According to Cohen:

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to

³¹⁹ Incorporated in Section 7 of the *Criminal Code* of Canada.

³²⁰ Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, (London: Basil Blackwell, 1972, 1990 Edition).

become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself.³²¹

Stuart Hall and others³²² have amplified the definition of moral panic:

When the official reaction to a person, groups of persons or series of events is *out of all proportion* to the actual threat offered when “experts,” in the form of police chiefs, the judiciary, politicians and editors *perceive* the threat in all but identical terms, and appear to talk “with one voice” of rates, diagnoses, prognoses and solutions, when the media representations universally stress “sudden and dramatic” increases (in number involved or events) and “novelty” about and beyond that which a sober, realistic appraisal could sustain, then we believe it is appropriate to speak of the beginnings of a *moral panic*.³²³

The moral panic caused by the invoked spectre of the possibility of Joseph Mengele being in Canada in 1985 can only be comprehended by the confluence of events, individuals and politics of the immediate period as well as the history of the concern for war criminals in Canada. The panic itself was unleashed by one Sol Littman, who had devoted his life to ventilating the issue of war criminals in the world and in Canada in

³²¹ *Ibid*, at 9.

³²² Stuart Hall et al. *Policing The Crisis: Mugging, The State, and Law and Order*, (London: Methuen, 1978, 1979 Edition).

³²³ *Ibid*, at 16.

particular. Sol Littman was a representative of Simon Wiesenthal. During the Commission of Inquiry hearings, Sol Littman indicated that he supplied the information to Ralph Blumenthal of the *New York Times* in his article on Joseph Mengele. Sol Littman said that his assertions were based on “speculation”, “impression”, “possibility” and “hypotheses”³²⁴. The general media picked this information up and splashed it in bold headlines. Suddenly Canada came to be portrayed as a “haven for war criminals,” a distinction Canada did not want to have. Moral panic had set in. Did Canada become a leader in war crimes legislation and attempted prosecutions in order to shed the label it had acquired of being a haven for war criminals? Canada later became one of the moving forces in advocating for the Rome Statute that led to the creation of the International Criminal Court (ICC).

According to the Commission, Littman’s indication of the hoax of his creation came too little too late: “the commission could not, of course, foresee that turn of events, and it devoted some substantial time inquiring into the Mengele affairs”³²⁵. The Commission concluded that on the basis of the available evidence, it is established beyond a reasonable doubt that Dr. Joseph Mengele has never entered Canada”.³²⁶

The Mengele panic assumed a life of its own which still reverberates in Canada through the war crimes legislation in the *Criminal Code* as amended, and associated offshoots in the *Immigration Act* as amended, and the *Citizenship Act* as amended. Joseph Mengele is a name associated with some of the worst atrocities of Nazi Germany.

³²⁴ Deschênes Report, at 68.

³²⁵ *Ibid.*

³²⁶ *Ibid.*, at 76.

Dr. Mengele was assigned to the concentration camp of Auschwitz (a death camp) where he conducted the cruel experiments which history, according to the commission, has recorded.³²⁷ According to Irwin Cotler, a McGill Law professor at the time, the allegation about Mengele may have been a catalyst in prompting the government to do something that ought to have been done some forty years ago. But Mengele was not just another Nazi war criminal. “He was a metaphor for evil, for those monstrous crimes of which the Prime Minister spoke”³²⁸. The combination of the images of “Mengele” and “Auschwitz” was explosive. It was the worst possible combination of evil, combustible enough to trigger a moral panic, the panic that caused the Mulroney government to convoke a Commission of Inquiry.

Legislation was needed to ensure that justice must be done to war criminals, even if the crimes they committed were committed a long time ago and in a foreign land and even if these old war criminals had never posed any danger to the public in Canada. This was the uniqueness of the war crimes legislation as it was initially designed, it was moral panic invoked by unrequited distant occurrences. Almost all moral panics are caused by contemporary events.³²⁹

In South America the moral panic associated with Nazi war criminals could be justified on the basis that the escaped war criminals joined, supported or led repressive and genocidal regimes in South America. A study by Yossi Schwartz,³³⁰ indicates that

³²⁷ *Ibid*, at 68.

³²⁸ Cotler, *Supra*, at 74.

³²⁹ *Supra*.

³³⁰ “Nazi War Criminals and The Death Penalty” in Munyonzwe Hamalengwa, (ed.) *Political Halley’s Comet, The Death Penalty in Global Comparative Perspective* (manuscript with author), at 222-234.

former Nazis found useful employment in South American regimes. In Chile, for example, Walter Ruaff who was responsible for the death of 250,000 prisoners in the Ukraine during the war, was appointed by Augusto Pinochet as Chief Advisor for the Board investigating communist activities. Pinochet was later found to be a war criminal by the House of Lords in England and therefore extraditable³³¹. Klaus Barbie, a notorious Nazi escaped to Bolivia via and with the assistance of the U.S. government. There, under his leadership the storm troopers were trained in secret camps at Sanda Cruz de la Sierra, later to take part in the military coup conducted by General Garcia Meza in July 1980. In Paraguay, Alfredo Stroessner, the military dictator of several decades, hosted Joseph Mengele, former Gestapo Chief Heinrich Muller Pavelic, the leader of Nazi Croatia, among others. In Brazil, Alfred Boettcher who as an SS Officer served in Holland, and whom The Hague war crimes tribunal sentenced in absentia, became a Director of the Atomic Board and a Coordinator of the Nuclear Treaty with South Africa. Thus war crimes legislation would have been necessary to curtail the continuing danger posed by former Nazi war criminals.³³²

Irwin Cotler justified the enactment of war crimes legislation on the basis of five principles: (1) fidelity to the rule of law; (2) respect for Canadian Citizenship; (3) fidelity to our international obligations; (4) fidelity to Holocaust remembrance, and (5) fidelity to our children³³³. I need not elaborate on these principles.

³³¹ *Ex parte Pinochet* (No.3) (House of Lords), March 1999.

³³² Schwartz, *supra*.

³³³ *supra*, at 86.

On the other hand, calls for war crimes legislation have historically been on a number of grounds dismissed as “foreign baggage” by Prime Minister Pierre Trudeau;³³⁴ that it would not “be advisable to start having trials in Canada on actions that occurred in other nations” according to Justice Minister Jean Chretien;³³⁵ that legislation was not necessary because it would “upset people”;³³⁶ the United Kingdom developed a program in 1948 which Canada implemented, stipulating that “it was now necessary to dispose of the past”;³³⁷ that it was pandering to “Jewish revenge” to deal with Nazi war criminals;³³⁸ that the issue of Nazi war criminals was an “ethnic quarrel between Jews and Ukrainians”³³⁹ and that Canada should do what is in the interests of Canada. It was also argued that war crimes legislation was “an exercise in selective discrimination” because it appeared to deal only with Nazi war criminals and not others.³⁴⁰

David Matas, a prolific writer on Nazi war criminals and a prominent lawyer and international human rights activist wrote in his paper, “The struggle for Justice: Nazi War Criminals in Canada” (2000)³⁴¹ what I consider to be a summary of the history of Canada’s policies and treatment of war criminals to the present:

First Canada gave a haven to the murderers of Jews. But the state did nothing because Canada is not a Jewish state. Then Canada allowed the entry of Khmer Rouge and Vietnamese war criminals. But officials did nothing because Canada is not an Asian state. Then Canada found itself

³³⁴ Svend Robinson, “Nuremberg Forty Years Later: Bringing War’s Criminals to Justice In Our Time”, in Cotler, *supra*, at 48.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ Deschênes Report, at 27.

³³⁸ Cotler, *supra*, at 75.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*, at 77.

³⁴¹ In *From Immigration to Integration: The Canadian Jewish Experience: A Millenium Edition* (B’nai Brith Canada: 2000).

with Ugandan, Rwandan and Somali war criminals. But again nothing was done because Canada is not a Ugandan, Rwandan or Somali state. Then Canada granted admission to Chilean, Central American and Argentinean perpetrators of crimes against humanity. Again nothing was done, because Canada is not a Chilean, Central American or Argentine state. Then Canada allowed entry of Soviet and Balkan criminals against humanity. Still nothing was done because Canada is not a European state. By the time the immunity Canada gave to Nazis was drawn to its logical and inevitable conclusion, Canada had become the dumping ground for the world's worst criminals, a rogue's gallery of those who have committed the world's most heinous crimes. The roadblocks that prevented Nazi mass murderers from being brought to justice ended up benefiting perpetrators of atrocities.

6.4 Historic Opportunities and International Climate

Shane Kelleher provides a quote from an Irish Minister of Justice, Nora Owen which is also apt to our study here. She stated that “there are moods and there are times when certain proposals will gain credence with the public. It is not a case of politicians not doing it”.³⁴²

There have been historic opportunities and the international climate has been repeatedly ripe since at least 1942 for the enactment of war crimes legislation in Canada. In the 1940s alone the international community developed and engaged in war crimes legislation and prosecution of Nazi war criminals and also designed international human rights instruments and treaties in response to the atrocities of the Nazi-inspired war. The following were the most significant developments which could have influenced Canadian legislation on war criminals:³⁴³

³⁴² Shane Kelleher, “Moral Panic: Crisis in Civil Liberty” paper prepared for a course for LLM, Osgoode Hall Law School, contained in Criminal Law course materials by Professor Hay and Beare 1999, at 579.

³⁴³ See Deschênes Report, at 101.

The Declaration on the Punishment for Crimes Committed during the War: St. James, 13 January 1942;

The Declaration on German Atrocities: Moscow, 30 October 1943;

The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis: London, 8 August 1945;

United Nations General Assembly Resolution 3 (I): 13 February 1946;

United Nations General Assembly Resolution 170 (III): 31 October 1947.

Canada took the following position:

Canada is not a party to the “Declaration of Hitlerites” [*Sic*] or the “Regulations of the International Military Tribunal” and is not bound by them. Canada views U.N. Resolutions as recommendations only and not binding legal obligations.³⁴⁴

The 1942 St. James’ Declaration was issued by nine governments whose countries were occupied by Nazi Germany. Canada was an observer. The Declaration took note of Nazi violence against civilian populations, declared as one of the principal war aims the punishment of those guilty for such crimes and expressed the international determination that judgements be passed and sentences be carried out.

The 1943 Moscow Declaration was a declaration of policy on the part of the United Kingdom, the U.S.A. and the U.S.S.R. It provided for the return and trial of war criminals. The 1945 London Agreement was the basis for the Nuremberg trials and was signed by the U.K., the U.S.A., the U.S.S.R. and France. Nineteen countries became members. It is important to mention here that Canada never signed the London Agreement which formed the basis of the IMT and the *Nuremberg Principles*. It could

³⁴⁴ *Ibid.*

be said, however, that its subsequent legislation is recognition of the *Nuremberg Principles* as well as general norms of international law on the issue under discussion.

The United Nations resolutions called for the punishment of war criminals. Canada did seize the opportunity and enacted the *War Crimes Act* in 1946. This Act was limited to trying war criminals who had engaged in atrocities against Canadian personnel. These trials were conducted in Europe between 1945 and 1948. Thereafter, Canada abided by the advice of the United Kingdom in 1948 that “it is now necessary to dispose of the past as soon as possible”. Minister of Justice Ramon Hnatyshyn explained Canada’s subsequent inactivity in the field of war criminals, “during the fifties and subsequently as individuals and nations moved to put the trauma and horror of the Second World War behind them, the pursuit of war criminals became less of a priority in many countries”.³⁴⁵

Did however individuals and nations move to put the trauma and horror behind? Or was it Canada and a few nations that did this for other reasons?

The efforts to pursue war criminals waned in all the major western countries immediately after the war to compel the Commission of Inquiry to note that “Canadian policy on war crimes during that long period was not worse than that of several Western countries which displayed an equal lack of interest”.³⁴⁶ The most prevalent activity took place from 1945 to 1949 and lessened or ceased in all major countries by 1952. Only socialist countries and the Federal Republic of Germany continued the effort against war

³⁴⁵ *Supra*, at 46.

³⁴⁶ Deschênes Report, at 33.

criminals. The Socialist Countries included Poland, the German Democratic Republic and the Soviet Union.

Paradoxically at the level of the international community, especially at the United Nations, the rhetoric against war criminals never stopped. This was reflected by a phalanx of conventions and resolutions. In 1948, the United Nations passed the *Convention on the Prevention and Punishment of the Crime of Genocide* and in 1949 the *Geneva Conventions* Relative to the Treatment of Prisoners of War and Relative to the Protection of Civilian Persons in Time of War were adopted. They all provided for the prevention and punishment of war crimes.

In 1966, after a lengthy gestation period, the UN adopted the *International Covenant on Civil and Political Rights*. This covenant set the stage for passing retroactive laws to punish previous wrongs like war crimes. The *European Convention on Human Rights* was adopted in 1958 with similar retroactive legislative features. In 1968, the UN adopted the *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* which required state parties not to limit the period within which war criminals could be tried. And over the period, particularly from 1969 to 1973, the UN passed numerous resolutions in which the need was reiterated to punish those persons responsible for both war crimes and crimes against humanity.

Canada never signed the convention on the *Non-Applicability of Statutory Limitations*. Its objections during the preparations for the *Civil and Political Rights*

Covenant led the Deschênes Commission to remark that “Canada’s position was not glorious at all”.³⁴⁷

Canada did also not sign the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973). It provided for universal jurisdiction in the investigation and prosecution of war criminals. Canada did not have to wait for the incorporation of war crimes elements into its domestic law before investigating or prosecuting war criminals. Customary international law was pregnant with permissive principles of universal jurisdiction. The courts may have held otherwise but Canada did not even try.

However, it cannot be stated that there was no international atmosphere for the apprehension and punishment of war criminals. The international atmosphere was conducive but another “panic” had broken out the spectre of communism.

6.5 The Cold War Panic

In February 1946, it was made known to the unsuspecting public that a Russian spy ring had been operating in Ottawa. It was only exposed as a result of the defection of a Russian cipher clerk, Igor Gouzenko. The RCMP raided several homes in Ottawa on the morning of February 15th, 1946. The media headlines during and the following days, weeks, months and years were unrelenting. The panic of a Russian spy ring with the potential of stealing atomic secrets and spreading soviet communism resulted in the

³⁴⁷ Deschênes Report, at 143.

convocation of a Commission of Inquiry. Posters graced Parliament Hill, “we want no Iron Curtain here”.³⁴⁸

Had it not been for the enormity of the just concluded war in Europe, the cold war panic may have eclipsed the pursuit of war criminals. In many respects, in the long run, the cold war relegated the pursuit of war criminals to the back burner. The Commission of Inquiry into war criminals accepted the conclusion from a study:³⁴⁹

The central factor to consider in understanding why most countries have not sought out, prosecuted and punished Nazi war criminals to their full ability throughout the past forty years is the other issues have taken precedence (e.g., national rebuilding or the “Cold War”) over bringing war criminals to justice which has been shifted, deliberately (as in France) or inadvertently to a lesser priority in their national agendas. The immediate post-war search for justice found and punished a considerable number of obvious big-name war criminals. This crusading spirit has been difficult to sustain for a long period of time especially as most of the remaining war criminals were low in rank and importance.

The panic over communism in the post war era was immediately reflected in the flurry of legislation, particularly in the field of immigration law. After decades of dormancy, the *Immigration Act* was overhauled in 1952. Most of the changes dealt with preventing communists or perceived communists from entering Canada. The concern over the entry of suspected war criminals waned. The security net against war criminals was lowered, while that against communists was heightened.

³⁴⁸ See Reg Whitaker, *Cold War Canada. The Making of a National Insecurity State, 1945 – 1957* (Toronto: University of Toronto Press, 1994) cover and at 27-81.

³⁴⁹ Deschênes Report, at 32-33.

Between 1945 and 1953, the *Immigration Act* as amended prohibited the following classes from entering Canada:

- d) persons guilty of crimes involving moral turpitude;
- n) persons advocating the overthrow by force of the Government of Canada or the assassination of public officials;
- o) persons affiliated with organizations which preach such doctrines;
- p) enemy aliens or persons who have been alien enemies and who were or may be interned on or after the 11th day of November 1918;
- q) persons guilty of espionage;
- r) persons guilty of high treason or who assisted His Majesty's enemies in time of war.

In June 1953, spies and saboteurs were added. "Enemy aliens" became synonymous with "communists". Remarkably in September 1950 prohibition against nationals of Germany was lifted but maintained against the nationals of Japan and others.

The shift in concern for communists as against war criminals becomes meaningful if one considers that on October 14, 1946, the Allied Control Council in Directive Number 38 sought to track down the following individuals: 1) major offenders, 2) offenders (activists, militarists, and profiteers, 3) lesser offenders, 4) followers, 5) persons exonerated. Major offenders included "war criminals".³⁵⁰

The following categories of individuals continued to be rejected by Canada in 1949:

³⁵⁰ Deschênes Report, at 181.

- 1) member of SS or German Wehrmacht or a person found to bear mark of SS blood group (non-Germans);
- 2) member of Nazi party;
- 3) evasive and untruthful under interrogation;
- 4) Failure to produce recognizable and acceptable documents as to time of entry and residence in Germany;
- 5) false presentation or use of false or fictitious name.

Canada issued a series of Cabinet Directives in 1949, 1950, 1951 and 1952 classifying and reclassifying individuals who could be rejected for entry. The Cabinet Directive of October 28th, 1949 stated that a visa is to be refused to “communists, members of the Nazi or Fascist parties or of any revolutionary organization, ‘collaborators’ and users of false or fictitious names or documents”.³⁵¹ A circular by the Department of Citizenship and Immigration issued as No. 72A pursuant to Order-in-Council 4364 of September 14th, 1950 stated that “German nationals could now be dealt with on the same basis as any other European nationality”.³⁵² “Membership of the Nazi Party will not in itself be a cause for exclusion.”³⁵³ Members of the Nazi Party or Waffen SS who were assessed to pose security risks continued to be denied entry in Canada. But Canadian resolve against Nazism was waning. The moral panic of communism caused the Canadian government to act in a way that might seem contradictory to its previous established principle of denying Nazis entry into Canada.

³⁵¹ *Ibid*, at 182.

³⁵² *Ibid*.

³⁵³ *Ibid*.

The Cold War made acceptable people who might otherwise have been considered unacceptable because of their role in Nazism.

There was a clear shift from concern for war criminals to concern for individuals who would cause a security threat to Canada. All individuals who came to Canada passed through a security check system, including members of the infamous Galicia Division, who were alleged to be war criminals.

The Galicia Division joined the Nazis in order to fight against the Communists in Russia. After the war, members of this division feared communist persecution.³⁵⁴ This group of individuals, was thoroughly examined for security and criminality reasons and was found not to pose any security risks to Canada and was cleared of any commission of war crimes during their service in the German army. The Commission of Inquiry concluded that “charges of war crimes against members of the Galicia Division have never been substantiated, either in 1950 when they were first preferred, or in 1984 when they were renewed, or before this commission.”³⁵⁵

6.6 The Second Wave: Continuing Political Pressure

The Haralds Puntulis case exemplified the inactivity of the Canadian government in assisting with the apprehension of known war criminals in Canada. Puntulis was convicted in absentia in Latvia in 1965 for treason. But he was already in Canada, having entered Canada in 1948. The Soviet Union tracked him down to Canada and

³⁵⁴ John Sopinka, Submission to the Deschênes Commission on behalf of the Ukrainian Canadian Committee. 5 May 1986.

³⁵⁵ *Ibid*, at 261.

asked for his extradition in 1965. Canada refused on the grounds that the countries did not share an extradition treaty. Canada made no effort to initiate an extradition treaty with the Soviet Union in order to ensure that Puntulis would be extradited. Nor did Canada initiate domestic legislation so that Puntulis could be tried from within Canada. Puntulis died of natural causes in Toronto in 1982, “undisturbed by a Canadian government that preferred to turn the other cheek to the allegations against him”.³⁵⁶

However, when Germany made a request for the extradition of war criminal Hemult Rauca in 1973, Canada could not refuse the request on account of lack of an extradition treaty with Germany. There was one. The only problem was that there was no documentation with which Rauca could be apprehended. There were no documents attacking the person to his documentary identity. He was eventually arrested for extradition in June 1982, almost ten years after Germany had requested for his extradition. The *Rauca* case aroused a lot of interest and possibilities as to how to deal finally with war criminals in Canada.³⁵⁷

By the time Rauca was arrested and tried for extradition, the political and legal climate had begun to somewhat shift and intensify. After 1982, the political and legal pressure to do something about war criminals shifted completely. The following table shows the reports on numbers from various individuals of war criminals in Canada. The issue could no longer be ducked by Canada, starting in the early 1970s.

³⁵⁶ On the Puntulis case and Canada’s general disinterest, see David Matas and Susan Charendoff, *Justice Delayed: Nazi War Criminals in Canada* (Toronto: Summerhill Press, 1987), at 143.

³⁵⁷ *Federal Republic of Germany v Rauca* (1982), 41 O.R. (2nd) 225.

6.7 Statements in Chronological Order³⁵⁸

This table is reproduced to show that for a government to act in cases where it is unwilling to do so, that government may require consistent and sustained pressure by the affected constituencies. The Canadian Jewish Congress and its supporters continued to press the Canadian government over a long period of time to prosecute Nazi War Criminals. Pressure was mounted along with the researched evidence on why prosecutions were called for. Governments do not always act just because it is the right or legal or moral thing to do.

Alleged number of war criminals living in Canada

1971, 19 May	Simon Wiesenthal	<i>Toronto Star</i>	Several hundred
1975, 26 Dec.	Unidentified groups	<i>Montreal Gazette</i>	Over 50
1976, 1 Dec.	Michael Hanusiak	<i>Toronto Star</i>	At least 50
1977, 11 Nov.	Ian Adams	<i>Weekend Magazine</i>	800
1979, 6 March	Robert Kaplan	House of Commons	Over one dozen
1979, 6 March	Maurice Dupras	House of Commons	Some 15
1979, 25 March	Olivia Ward	<i>Toronto Star</i>	Over 1,000
1980, 28 April	Meir Halevi	<i>Globe and Mail</i>	200
1981, January	Interdepartmental Committee	Report to Government	500-100
1981, 24 Feb.	Sabina Citron	<i>Globe and Mail</i>	1,000
1981, 29 May	Abraham Cooper	<i>Regina Leader-Post</i>	1,000
1981, 13 July	Irwin Cotler	<i>Ottawa Citizen</i>	At least 100
1981, 15 Sept	Adalbert Rueckerl	<i>Vancouver Sun</i>	500-1,000
1982, 18 June	David Matas	<i>Toronto Star</i>	50-60
1982, 12 Oct.	Charles Kremer	<i>Windsor Star</i>	Over 2,000
1982, 6 Nov.	Dept. Of Justice	<i>Toronto Star</i>	Handful
1982, 6 Nov.	RCMP	<i>Toronto Star</i>	80-100
1982, 6 Nov.	Irwin Cotler	<i>Toronto Star</i>	75-100
1983, 13 March	Robert Kaplan	<i>Toronto Sun</i>	Over 100
1983, 13 April	Irwin Cotler	<i>La Presse</i>	Maybe 1,000
1983, 5 July	Jewish Defence League	<i>Globe and Mail</i>	Maybe 1,000

³⁵⁸ Reprinted from Deschênes Report at 246-7.

Several events and issues towards the end of the 1970s and early 1980s conspired to drive the issue of Nazi war criminals in Canada to the forefront of the political agenda. The events and issues are not presented in any order of importance or chronology. The German statute of limitations became effective. This meant an end to further war crimes prosecutions in Germany. A world-wide protest convinced West Germany to extend its deadline indefinitely. Canada's ambassador to West Germany spoke vociferously on the issue.³⁵⁹

The second event was the Elizabeth Holtzman Amendment in the House of Representatives in the U.S.A. It promised to strip war criminals of their U.S. citizenship and to be extradited or deported to various countries. A number of people were denaturalized and extradited or deported, including to Israel. John Demjanjuk was the most prominent first example of the U.S. legislation. The U.S. developments energized the political debate in Canada. The U.S. established a special unit within the Department of Justice with a single mission: to track down and investigate alleged Nazi war criminals in the United States and where evidence warranted it, to bring actions to expel them.

The third event was that Robert Kaplan became the Solicitor-General of Canada during the second Trudeau government which was re-elected in 1980. Robert Kaplan had been intensely lobbied by Jewish individuals and organizations, and had brought a private member's bill in 1978 to do something about Nazi war criminals. That bill did

³⁵⁹ See Matas and Charendoff, *supra*, at 79.

not pass. Now in 1980, he was Solicitor General, in charge of the R.C.M.P. which are responsible for investigation of cross-border and international crimes. According to Sol Littman, “as a representative of a Toronto riding whose constituency is one-third Jewish and includes many holocaust survivors, Kaplan found some spiritual ease and considerable political advantage in criticizing the government for allowing Canada to be a haven for war criminals.” Kaplan became the epi-centre of activity for Canada to do something about war criminals.³⁶⁰ However, despite Kaplan’s strong personal commitment to taking measures against Nazi war criminals, and a surge of optimism on the part of the public, the Trudeau cabinet remained indifferent.³⁶¹ It was left to the Brian Mulroney government which assumed office in 1984 to do something about Nazi war criminals.

In his *Memoirs*, Prime Minister Brian Mulroney explained why he caused the Government of Canada to change policy on Nazi war criminals:

to me the idea of people who had participated in the extermination of Jews living in my country was odious and unacceptable. They had to be exposed, and then they had to be expelled from Canada.

Prime Minister Mulroney then went on to blame Prime Minister Trudeau for inaction:

The decision by Pierre Trudeau to leave, untroubled, Nazi war criminals living in Canada surely must rank with the greatest sins of omission in the history of this nation. After serving as justice minister and 16 years as PM, Pierre Trudeau was – or should have been – aware of the fact that people guilty of the most heinous of crimes involving the slaughter of Jews were living in Canada. They lived here under false pretences and were never charged because it appears that Mr. Trudeau did not want “to trouble” the social fabric of Canada. I appointed the Deschênes

³⁶⁰ Sol Littman, *War Criminal on Trial: Rauca of Kaunas* (Toronto: Key Porter Books, 2nd ed. 1998), at 140-142.

³⁶¹ Matas and Charendoff, *supra*, at 80.

Commission specifically because I believe that Mr. Trudeau had opted for “social tranquility” rather than simple justice. It is repugnant to me in the extreme to think that criminals and murderers were allowed to enter Canada and prosper here, thereby sullyng our citizenship, without challenge or accountability. For all those years criminals of the worst sort found sanctuary in Canada, when evidence of their guilt or their complicity was available for the minister of justice or PM if he was interested in finding out.³⁶²

The fourth event was the debates surrounding the repatriation of the Canadian constitution to Canada in 1982. An amendment was passed to the *Charter of Rights and Freedoms* which facilitated retroactive legislation to deal with those guilty of crimes against humanity. The *Criminal Code* was accordingly amended to provide for the prosecution of war criminals.

Mulroney’s beliefs and politics compelled him to convoke a Commission of Inquiry to deal with Nazi War criminals.

6.8 The Deschênes Commission

It is the prerogative of the Prime Minister to convoke a commission of inquiry and to appoint the chief commissioner. There are no confirmation hearings or special legislative measures taken to appoint such a commissioner. Justice Deschênes just received a telephone call, inviting him to head such a commission.³⁶³

The Commission was invited to advise the Governor-in-Council as to “what further action might be taken in Canada to bring to justice such alleged war criminals who might be residing within Canada, including recommendations as to what legal means are

³⁶² Brian Mulroney, *Memoirs* (Toronto: McClelland and Stewart, 2007) at 348-9.

³⁶³ Jules Deschênes, “Toward International Criminal Justice” (1994) (2-3) *Criminal Law Forum*, 249 at 253-254.

now available to bring to justice any such person in Canada or whether and what legislation might be adopted by the Parliament of Canada to ensure that war criminals are brought to justice and made to answer for their crimes.”

The setting up of the Deschênes Commission of Inquiry into war crimes is an example of a successful case of interest group or pressure group influence on governmental formation of significant legislative and policy changes. The most significant interest or pressure group that forced the government to embark on the war crimes inquiry was the Canadian Jewish Congress. Behind the Canadian Jewish Congress was Simon Wiesenthal, a Nazi hunter since the end of the war.

On July 4, 1950, Mr. Samuel Bronfman, the then National President of the Canadian Jewish Congress sent a telegram to the Minister of Citizenship and Immigration protesting the government’s decision to admit members of the 14th Grenadier Waffen SS Division (Galicia), (Halychyna SS Division) to Canada. The government, in deference to Mr. Bronfman and the members of the Canadian Jewish Congress, delayed approval until further investigations could take place.

Requested to supply further information, the Canadian Jewish Congress submitted a list of 94 Ukrainian names accompanied by a brief description of their alleged offences. But the government did not act. Instead the government accepted the Galacia Division.

Lists of names forwarded by Simon Wiesenthal had consistently gone astray or remained unacknowledged.

According to Littman,³⁶⁴ the attempt to identify persons who had allegedly committed war crimes was scoffed at throughout the 1950s, 1960s and 1970s. The RCMP, according to evidence presented to the Deschênes Commission, did not begin systematic investigation of war criminals until 1982. From 1945 to 1962, the RCMP had no policy of any kind on the identification and apprehension of war criminals. Therefore, it did little if anything in this field. From 1962 to 1982, the force's policy was negative, namely that it had no responsibility to investigate those accused of war crimes. As a consequence, it did even less than before. Had Robert Kaplan not been appointed Solicitor General in 1980, perhaps the issue of war criminals would have lain dormant a lot longer.

Kaplan, in a February 1983 interview, said that the RCMP was examining a list of approximately 125 names to determine whether there were any cases that would lend themselves to the denaturalization and deportation procedures that had been employed by the Office of Special Investigations of the U.S. Justice Department. The results, he confided, were not very promising.

The government's ineptitude or its reluctance to pursue the war crimes issue is particularly evident in the 1979 correspondence between the Canadian Jewish Congress and the Justice Department. That year, the Congress forwarded a short list of twelve alleged war criminals to John Roberts, M.P. Roberts, in turn, passed on the list to then Solicitor General Jean-Jacques Blais, asking that the list be presented to the RCMP for investigation. The RCMP apparently checked the names against the Citizenship registry

³⁶⁴ Litman, *supra*.

to determine whether these men were, in fact living in Canada. The reply was that the Citizenship Department had been unable to find any of them. Yet, it was well-known that most, if not all the persons on the list were in Canada and there should have been no difficulty in locating them.

It is therefore not surprising that the Canadian Jewish Congress was one of the four pressure groups that were given standing to appear and make representations before the Commission. The others were the Brotherhood of Veterans of the 1st Division of the Ukrainian National Army in Canada; League for Human Rights of B'nai Brith Canada and the Ukrainian Canadian Committee.

These organizations were represented by very powerful and articulate lawyerly "organic intellectuals" to use a gramscian term. The Brotherhood was represented by Fraser Berrill, Y.R. Botiuk and Clay Powell. The Canadian Jewish Congress was represented by Irwin Cotler, Charles Dalfen, Joseph Magnet, Morris Manning and M.J. Silverstone. The League for Human Rights was represented by Susan Charendoff, Jules Kronis, Marvin Kurz, Israel Ludwig, David Matas and Bert Raphael. The Ukrainian Canadian Committee was represented by Sean Dumphy and John Sopinka, who was later appointed to the Supreme Court of Canada. All counsel were highly accomplished lawyers or professors of law. Other groups that were not granted standing were also allowed to participate in public hearings. They were also represented by highly accomplished lawyers and professors. The Government of Canada was represented by Ian Binnie, who was later appointed to the Supreme Court of Canada, Judith McCann and I.G. Whitehall.

The Commission appointed a working group of eight professors and practitioners across Canada to report to the Commission on legal problems. Sharon Williams and Ronald Bryk were asked to advise on legal questions concerning denaturalization and deportation of war criminals. Jacques Bellemare and John Laskin (who later became a Judge) were asked to study whether there existed the possibility of criminal prosecutions in Canada against war criminals under present legislation, by virtue of some international instrument or otherwise. Neil McKelvey and George Neuspiel were asked to study whether there can exist a legal basis for request for extradition when there is no treaty between Canada and the requesting state. Gowan Guest and Michel Proulx were asked to study what legislation, if any, should be adopted to allow for prosecution of Nazi war criminals in Canada.

The Commission travelled across the country conducting hearings and collecting evidence. Many witnesses from diverse groups and backgrounds gave oral testimony. Counsel made oral as well as written submissions. The Commission also benefited from extensive commissioned studies. The report is perhaps the most comprehensive report on war criminals anywhere.

After the Commission submitted its report, a special parliamentary committee debated the draft government Bill. The end product is the amendments to Section 7 of the *Criminal Code* popularly known as the “war crimes legislation” which defined what a “war crime” and a “crime against humanity” is. Subsection 7 (3.76) read in part:

“Crime against humanity” means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is

committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

“War crime” means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

Subsection 7 (3.71) conferred jurisdiction on Canada over the person if,

- a) at the time of the act or omission,
 - i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
 - ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict; or
 - iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or
- b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person’s presence in Canada, and subsequent to the time of the act or omission the person is present in Canada.

6.9 Post-Legislation Prosecution and Litigation

Once legislation was passed, the political process moved into judicial hands. A forty year political struggle did not have auspicious beginnings in the judicial system. The Deschênes Commission, including many counsel who appeared before it, favoured prosecution in Canada, rather than denaturalization, deportation, and extradition. The government itself took initially no steps to follow up the recommendations of the

Deschênes Report to improve the Canadian processes of denaturalization, deportation and extradition.

Elizabeth Holtzman³⁶⁵ of the USA had feared that the decision to prosecute Nazi war criminals in Canada for their crimes instead of deporting them while having a theoretical appeal may actually be counterproductive. Holtzman went on to explain:

In choosing not to deport but to prosecute, the original wrong may be compounded. First, there is no basis for assuming - as the policy of a "Canadian solution" does - that Canada's system of justice is better than that, say, in France, Holland, or West Germany. Second, there is no compelling reason to deny the victims of the Holocaust the right to try Nazi war criminals. The evidence and the witnesses are near at hand, and the legacy of the Holocaust is part of the victimized nations' consciousness. Third, in cases in which there is enough evidence for extradition or deportation but not enough to warrant prosecution, the made-in-Canada solution would preclude deportation and the Nazi war criminals would remain in Canada. In this category of cases, the Canadian solution would provide no solution at all, and the continued presence of these Nazi war criminals in your country would make a mockery of your efforts. Finally, the Canadian solution presumes that juries will be able to properly assess the full significance of Nazi war crimes. But if the experience in the United States is any example, there are many people, particularly younger people, who are badly informed about the Second World War and ignorant of the Holocaust. For some jurors, the war crimes may be too remote in time and place to have the full weight they deserve. On the other hand, the defendant's connections to Canada might seem more vivid and real in contrast. In a way, then, the cards may be stacked for acquittal, and juries may acquit even when there is full evidence of guilt.³⁶⁶

Indeed, the very first case of war crimes prosecution ended up negatively for the government. The Supreme Court of Canada set such a high standard for the conviction

³⁶⁵ Holtzman, "Nuremberg and its Legacy", in Cotler, *supra*, at 32.

³⁶⁶ *Ibid.*

of war criminals and criminals against humanity that it became virtually impossible to prosecute and convict a war criminal or criminal against humanity stemming from the Nazi and subsequent eras.³⁶⁷ In *Finta*,³⁶⁸ the Supreme Court ruled that the prosecution must prove beyond a reasonable doubt that the accused had *mens rea* to commit a war crime and crime against humanity and that obedience to superior orders was a defence, even though the war crimes legislation removed the defence of obedience to superior orders. The *Finta* case caused the government to abandon its prosecution route in favour of revocation and deportation, a route it still follows despite the 2000 amendments that removed some if not all of the impediments strewn about by the courts. The amendments were brought in to incorporate the Rome Statute that ushered into existence the International Criminal Court.

Denaturalization and deportation has also proved elusive at the present time. For example, in the case of *Dueck*,³⁶⁹ the Federal Court ruled that people who came after the Second World War were subjected to security checks and were asked questions pertinent to whether they were security risks to Canada and did not obtain Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. Such interpretation of the scheme of legislation places a high burden for the government to overcome.

Over the years, the government has had mixed successes and losses in the area of revocation and deportation. The establishment of the International Criminal Court in

³⁶⁷ Raman Venkata, "The Future of the Nuremberg Promise" (1994) 28 CR (4th) 392.

³⁶⁸ *R v Finta* (1994), 28 C.R. (4th) 265.

³⁶⁹ *MCI v Dueck*, T-938-95, 21 Dec. 1998.

1998 led Canada to overhaul its war crimes legislation and gave Canada a new lease on life to begin to investigate and prosecute war criminals.

6.10 Conclusion

After a forty-year political struggle, the Canadian Jewish Congress and allied organizations and individuals forced the government to bring in war crimes legislation for the prosecution of past and future war criminals in Canada. This is an example of successful, albeit lengthy struggle by a pressure group to induce a government to bring in specific legislation to address that group's specific concerns. There are currently numerous groups pressuring the government to do the same. Other groups have pressured the government not for legislation but for compensation. Japanese Canadians have been compensated after a forty-five year struggle.³⁷⁰ Japanese Canadians were interned and some deported during the Second World War. Ukrainian and Chinese Canadians who suffered past injustices also eventually convinced the government to compensate them. Aboriginals secured the convocation of a Truth and Reconciliation Commission.

However, what the political process achieves does not necessarily lead to or mean judicial success as well. The failures of the war crimes legislation to achieve the original objectives so far, is a case in point. In the context of Canada, it appeared that Canada had initially decided to concentrate on Second World War criminals, otherwise known as Nazi war criminals. Bernie Farber of the Canadian Jewish Congress has argued in

³⁷⁰ Roy Miki and Cassandra Kobayashi, *Justice In Our Time: The Japanese Canadian Redress Settlement* (Vancouver et al: Talon Books, 1991).

consonance with observed Canadian practice, that “once the remaining Nazi war criminals cases are addressed, Canada can apply the lessons learned from dealing with Nazi war criminals to hunting criminals from countries such as Rwanda, Sudan and former Yugoslavia.”³⁷¹ But awaiting the conclusion of Nazi war criminals prosecutions may be too late for justice for other victims and to deal with the impunity enjoyed by war criminals from other countries. Canada should not wait for fifty years to prosecute or deal with war criminals from other jurisdictions including South African apartheid criminals. This chapter perhaps explains why Canada could not have prosecuted apartheid criminals between 1948 and 1994 even though as it had jurisdiction to do so.

This chapter presented a case study of how Canada behaved towards war criminals and criminals against humanity from 1945 to 2005. The chapter indicates that despite the supposed newly discovered concept of universal jurisdiction, nation states were slow to implement it. Along the way apartheid criminals and others got away with impunity. The prosecution and conviction of the major Nazi War criminals at Nuremberg in 1945 and 1946 was perhaps the most singular seminal event in the history of international criminal law, which ushered in a paradigm shifting precedent on preventing impunity against war criminals and those who have committed crimes against humanity. After this historic event there were a few sputterings of prosecutions conducted at Tokyo and by individual countries, mainly the United Kingdom, the United States and Canada, for crimes committed against their nationals who were involved in the war. By 1950 there were no more prosecutions by the United Kingdom, Canada or the US. The Cold War between

³⁷¹ James Cowan, “Bring Ageing Nazi Suspects to Justice: CJC” *National Post*, 7 November 2007 at 18.

the West and the East had settled in, a number of war criminals found their way to the United States, the United Kingdom, Canada, Australia, Latin American countries and elsewhere³⁷². Some of the war criminals emigrated by invitation by the countries to which they emigrated or were undetected by the countries to which they emigrated. It has been suggested, "that between 750 and 2,000 Nazi War criminals made their way to Canada following the Second World War and only a handful were ever prosecuted."³⁷³ For all practical purposes, all major western countries behaved towards war criminals as if the brutal chapter of the criminality of these criminals was closed and would never reopen. That was a colossal miscalculation, for the victims had long memories and some of the victims who had not been killed also emigrated to these same countries: Canada, the US, Australia, the UK, Latin America and elsewhere. A new country, Israel was also born to which many victims of Nazi genocide emigrated bringing with them the scars and desire to see justice prevail against their tormentors.³⁷⁴

³⁷² See David Cesarani *Justice Delayed; How Britain Became A Refuge For Nazi War Criminals* (London: Vintage, 1994).

³⁷³ See James Cowan, "Bring Ageing Nazi Suspects To Justice: CJC" *National Post*, 7 November 2007 at A8.

³⁷⁴ See David Cesarani, *Eichman: His Life and Crimes* (London: Vintage, 2004).

CHAPTER SEVEN
THE EXERCISE OF UNIVERSAL CIVIL JURISDICTION IN CANADA
DURING THE APARTHEID ERA

7.1 Introduction

This chapter discusses a form of universal civil jurisdiction nations use to show their abhorrence of the practices of another nation. Canada had a very strong anti-apartheid constituency that pressured the government to impose several forms of economic, military, political and other sanctions against South Africa³⁷⁵. This went some ways against the economic interests of Canada. This chapter discusses Canada's attempt to legally enforce the feeble sanctions that were imposed against South Africa as some form of exercise of universal civil jurisdiction. It also discusses the political pressures that were brought to bear on Canada to impose and enforce economic sanctions. What is discussed here applied to all major Western countries in relation to the crime of apartheid in particular and to other war crimes situations in general. Corporations with government support were at the fore-front in direct or indirect support of the strengthening of apartheid by direct investments. Corporations later became targets of massive law suits by the victims of the crime of apartheid utilising for example the US *Alien Torts Claims Act* (ATCA). This was not replicated in Canada. Could a pressure group have forced Canada to prosecute apartheid criminals during the reign of apartheid? Is there such a constituency in post-apartheid South Africa to force Canada to

³⁷⁵ A world-wide anti- apartheid movement is discussed in Tom Lodge, *Sharpeville: An Apartheid Massacre and its Consequences* (Oxford: Oxford University Press, 2011).

exercise civil or criminal universal jurisdiction? The possibility of the exercise of criminal jurisdiction during the era of apartheid will be discussed in the next chapter.

7.2 The Taskforce of Churches and Corporate Responsibility

In May 1981, a Canadian non-governmental organization, The Taskforce of Churches and Corporate Responsibility (TCCR), a major Canadian non-governmental and anti-apartheid group presented a brief to the Canadian Government containing nine recommendations pertaining to South Africa and Namibia. The pertinent ones for this study are the following:³⁷⁶

6. We ask the Canadian Government to reassess the usefulness of its present Code of Conduct³⁷⁷ with the view of amending it to include:

(f) Making adherences to the code legally binding and establishing penalties for none or inadequate adherence;

(g) Requiring companies to file an annual report which would include comparative data on an itemized basis as well as all contracts with South Africa's military or police;

(h) Establishment of a public review committee to include representatives of the Canadian Labour Congress, the churches, and other concerned organizations.

7. We ask that a review of existing legislation and enforcement mechanisms relating to the arms embargo against South Africa take place with all possible speed and that tighter enforcement measures be instituted and published.

³⁷⁶ Reproduced in Sheila Kappler, *Canadian Governmental Policy, Banks, and Corporate Relations with South Africa*, (New York: United Nations Centre Against Apartheid, August, 1984) at 8.

³⁷⁷ The Code Of Conduct Concerning The Employment Practices Of Canadian Companies Operating In South Africa. Issued on the 28th of April, 1978. The purpose of this voluntary code was to set out guidelines for Canadian companies with respect to employment practices affecting black South African workers. The specific areas of concern on which the code of conduct recommended action included: fringe benefits; training and promotion; and race relations. See Canadian Policy on Human Rights in South Africa, paper presented by the Canadian Government to the North American Regional Conference on action Against Apartheid held at the United Nations Headquarters from 18 to 21 since 1984, New York: United Nations Centre Against Apartheid, August, 1984 at 2. The code is appended in Joanne Naiman, Joan Bhabha and Guy Wright, *Relations Between Canada and South Africa*, (New York: United Nations Centre Against Apartheid, August, 1984) at 57.

We further recommend that a Parliamentary Sub-committee be established and charged with the supervision of all aspects of the enforcement of mandatory arms embargo.

8. We ask the Canadian Government to reaffirm its commitment and to strengthen its adherence to Security Council Resolution 418³⁷⁸ by:
 - a. Enacting effective legislation or by announcing comparable policy directives regarding the arms embargo against South Africa which would include the establishment of stronger monitoring and enforcement mechanisms;
 - b. Interpreting the terms “arms and related material” as covering the transfer of all technology useful to the military and “dual purpose” equipment be they undertaken through bilateral, third party or through trans-shipment via third country arrangements;
 - c. Refraining scrupulously from any nuclear collaboration with South Africa.
 - d. Dissociating itself from any act on the part of the United States which would violate or weaken the mandatory arms embargo against South Africa.
 - e. Protesting any official or unofficial contact between member States or officers of NATO and South Africa.

These recommendations were made while the liberal government of Pierre Elliot Trudeau was in power. The Government rejected all of the nine recommendations of the Task Force. In 1984 the Liberal Government was replaced by the Progressive Conservative Government of Brian Mulroney. The Mulroney Government became quite vocal both nationally and internationally about its abhorrence of the Apartheid policy in South Africa. It announced a package of economic and other sanctions against South Africa.

The Progressive Conservative Government’s announcements of sanctions against South Africa had been received with scepticism, spiced with nods of approval. Linda

³⁷⁸ United Nations Security Council Resolution 418 of the 4th of November 1977. Reproduced in A/Conf. 119/15 (part 1) 8th of July 1987 at 31. This resolution imposed an arms embargo against South Africa.

Freeman, a keen observer on Canadian policy towards Southern Africa for example had observed that we must “give the devil his due. There is no question that whatever their shortcomings, the statements and policy commitments of the Mulroney Government on South Africa have gone further than any previous Canadian government”.³⁷⁹ Freeman, however, notes that Canada’s policy towards South Africa was more designed to maintain economic and political relations and to preserve the commonwealth club of nations than to aggressively push for the dismantling of apartheid from 1948 right up to the Mulroney regime in 1985-86 when Canada began to impose economic sanctions. Freeman’s study, analyzes the “domestic and external structures which produced the long continuity in policy and then the strategic conjunctures that precipitated change.”³⁸⁰ Freeman documents some changes in Canadian policy towards South Africa after the 1977 Soweto uprisings and the 1985-6 Vaal uprising. These uprisings like Sharpeville in 1960 gave rise to “moral panics” and therefore gave impetus to domestic and foreign policy changes. Freeman’s framework seeks to study what domestic and external structures were responsible for Canada’s policy or lack of policy with respect to sanctions and by extension to apartheid criminals, if any. Her view is in contrast to that of the South African Congress of Trade Unions (SACTU). It had an

³⁷⁹ Linda Freeman, "What Is Right With Mulroney? Canada and Sanctions, 1986" (1986) 2 SAR 3. For a fuller account of Canadian policy towards South Africa from a historic perspective, see Linda Freeman, *The Ambiguous Champion: Canada and South Africa in the Trudeau and Mulroney Years* (Toronto: U of T Press, 1997).

³⁸⁰ *Ambiguous Champion, Ibid* at 6.

office in Toronto and had been more sceptical of the government resolve against South Africa³⁸¹:

The new Mulroney government elected in September 1984 will offer nothing more. Two members of the new Tory cabinet, Defence Minister Robert Coates and Justice Minister John Crosbie, have been on sponsored tours to South Africa. Upon his return in 1977, Coates wrote an article in a Halifax newspaper defending the white minority regime, praising the “black homeland” programme and calling Namibia “the most refreshing experiment in black Africa today.” Crosbie, when challenged in the House of Commons on his statements sympathetic to the apartheid system, replied: “I have gone there and seen, you big loudmouth. Have you been there? You keep your mouth shut till you go and learn for yourself you professional bleeding heart.

The South African Congress of Trade Unions was certainly justified in being sceptical about the statements of the new Canadian Government. It appeared that all previous Canadian Governments had openly condemned South Africa but without taking any dramatic or radical steps to implement their policies against South Africa. This had been revealed for example in the lack of enthusiasm to implement the Canadian *Code Of Conduct* issued in 1978; the lack of enforcement of the UN Arms Embargo against South Africa; the increasing trade between Canada and South Africa among others. Thus why should the new Canadian Government be any different?

The aim of this chapter is to examine what legal regimes the Canadian government had been instituted or could have been instituted to enforce its sanctions as well as those of international organizations against South Africa. This chapter further inquires into

³⁸¹ South African Congress of Trade Unions Solidarity Committee (Canada), *Trafficking in Apartheid: The Case For Canadian Sanctions Against South Africa*, (Toronto: SACTU January, 1985). Quotation is at 5.

the obstacles both conceptual and practical of legal enforcement of sanctions. It looks at the political and economic interests that prevented any move towards practical implementation of legal enforcement. Finally it assesses the practical utility of legal mechanisms for enforcement of sanctions. Enforcement of sanctions is a form of exercise of universal civil jurisdiction.

7.3 Review of Canadian Policy Towards South Africa

As already stated, Canada had had a two-track stance on South Africa: strong rhetorical condemnation of South Africa while engaged in heavy economic relations with it. Leaving alone the rhetorical condemnation of apartheid and concentrating on the economic relations between the two countries over the years, it becomes clear why many people had been sceptical about the Canadian Government's statements on South Africa. In 1981 for example, Canadian-controlled investment in South Africa totalled more than 1.1 billion and the Canadian financial establishments continued to raise capital in Canada to finance Apartheid in South Africa.³⁸² Further, despite the rhetoric, trade between the two countries increased over the years. The following table exemplifies the true picture of trade in the years 1961-1982 measured in thousands of dollars.

	Imports	Exports
1961	12, 645	37, 819
1971	54, 590	63, 684
1979	240, 478	107, 700

³⁸² Ibid at back cover.

1980	354, 545	201, 992
1981	402, 867	239, 121
1982	218, 718	215, 098

Source: *Statistics Canada, Trade of Canada, Exports by Countries and Trade of Canada, Imports by Countries*, excerpted from Naiman et al *supra* at 28.

Despite the call for international sanctions by many countries and the numerous UN resolutions calling for comprehensive economic sanctions against South Africa, up to 1984 Canada had never supported any of these calls or UN resolutions.

Between 1981 and 1983 for example, Canada only supported one resolution on arms embargo against South Africa. In all the others, it either voted against or abstained³⁸³. This clearly shows Canada's head was elsewhere.

7.4 Canada's UN Votes on Sanctions

Title of UN Resolution	Total In Favour	Votes Against	Votes Abstain	Vote Of Canada	Vote Of USA
36 th Session of General Assembly 1981					
International Year of Mobilization for sanctions against SA	130	8	8	No	No
Comprehensive & Mandatory sanctions against SA	109	18	13	No	No
Condemnation of military & nuclear collaboration with	119	19	4	No	No

³⁸³ Table is from SACTU, *supra* at 6.

SA					
Arms Embargo against SA	138	0	7	Yes	Abs.
Oil Embargo against SA	126	7	12	No	No
Int'l Conference of Trade Unions on sanctions against SA	129	2	12	Abs.	No
Academic, Cultural and Sports Boycott of SA	124	5	14	Abs.	No
37th Session of General Assembly 1982					
South Africa's application for credit from IMF	121	3	23	Abs.	No
Concerted International Action for the elimination of apartheid	135	3	8	Abs.	No
Comprehensive & Mandatory sanctions against SA	114	10	19	Abs.	No
Condemnation of military & nuclear collaboration with SA	120	8	16	No	No
Condemnation of foreign investments in SA	134	1	9	Abs.	No
Oil Embargo against SA	125	6	13	Abs.	No
38th Session of General Assembly 1983					
Sanctions against SA	122	10	18	No	No
Condemnation of foreign investment in SA	140	1	9	Abs.	No
Oil Embargo against	130	6	14	Abs.	No

SA					
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The Canadian government like many other governments rationalized its opposition to economic sanctions by putting forward a number of arguments ³⁸⁴, that: (1) Sanctions will be to the detriment of Canada, (2) Sanctions will cause increased suffering amongst South Africa's black population, (3) Economic sanctions would cause great hardship for the front-line states, (4) Sanctions will not work, (5) other countries have human rights records just as bad as South Africa's, (6) Commercial dealings are separate from apartheid. It is not the thrust of this chapter to examine each of these arguments, suffice to point out that these arguments were supportive of economic relations between Canada (or any other country) and South Africa.

It was thus to the surprise of many people when the new Progressive Conservative Government came out strongly in favour of economic sanctions against South Africa. Within a short space of its coming to power in 1984, it announced the following measures against South Africa ³⁸⁵:

- Strengthened the voluntary "Code of Conduct" concerning the employment practices of Canadian companies operating in South Africa.
- Appointed an independent and impartial administrator.
- Introduced a standard reporting format code made applicable to all Canadian companies including those with minority interests.

³⁸⁴ See Joseph Hanlon and Roger Amond, *The Sanctions Handbook*, (Penguin Books, forthcoming, 1987) part 2. Richard Johnstone and Peter Richardson, *Australia's South African Connection: A Case For Economic Sanctions Against Apartheid*, (Canberra: Australian Council for Overseas Aid, 1986) at 46, Dave Moore, "Dominant Class Theory as a Theoretical Approach to the Study of Domestic Sources of Canadian Foreign Policy: Canadian Policy Towards South Africa", Paper for Department of Political Science, York University, 1985 at 6.

³⁸⁵ Excerpted from Linda Freeman, *supra* at 6.

- Tightened the administration of the United Nations arms embargo to end exports of sensitive equipment such as computers to the Government of South Africa and its agencies.
- Applied the voluntary UN embargo on imports of South African arms.
- Abrogated the Canada-South Africa Double Taxation Agreements.
- Terminated the use of the Programme for Export Market Development (PEMD) for the South African market.
- Terminated insurance to Canadian exporters to South Africa provided by the Export Development Corporation.
- Issued public guidelines severely limiting sporting contacts between Canada and South Africa.
- Announced termination of toll-processing of Namibian uranium.
- Introduced voluntary ban on the sale of Krugerrand gold coins.
- Monitored official contacts especially in sensitive sectors.
- Introduced voluntary ban on new loans to the Government of South Africa and its agencies or to the private sector in South Africa.
- Introduced voluntary ban on the sale of crude oil and refined products to South Africa.
- Applied embargo on air transport (cargo and passenger flights) between Canada and South Africa.
- Set up a National Register of Anti-Apartheid Measures to record voluntary actions taken by individual Canadians, other levels of government, as well as private organizations and firms.
- Allocated 7 million for an expanded programme of scholarships for the black community to be administered through private channels.
- Announced appointment of an officer at the Canadian Embassy to facilitate cooperation in the labour area.
- Condemned the use of repression, such as the imposition of a state of emergency, and called upon the Government of South Africa to enter into an equal partnership with all South Africans.
- Ended Canadian Government procurement of all South African products.
- Introduced voluntary ban on the promotion in Canada of tourism in South Africa.
- Cancelled non-resident accreditation of the four South African attaches to Canada (Science, Labour, Mining, and Agriculture).
- Closed the Canadian Embassy in Pretoria on Soweto Day, June 16th, 1986.
- Introduced a voluntary ban on new investment or reinvestment of profits earned in South Africa.
- Banned the import of agricultural products from South Africa.
- Banned Canadian government contracts with majority-owned South African companies.
- Banned the import of uranium, coal, iron and steel from South Africa.

- Withdrew all consular facilities in South Africa except for our own nationals and nationals of third countries for whom Canada rendered consular services.

The change in Canadian policy towards South Africa was fully supported by Prime Minister Brian Mulroney who stated in his *Memoirs* that

THE VERY NOTION of South Africa's apartheid was anathema to me, and while I was under no illusions about Canada's economic strength in the world, I also knew that Canada's role was not unimportant. I viewed apartheid with the same degree of disgust that I attached to the Nazis – the authors of the most odious offence in modern history. My strong and unswerving support of Israel and the Jewish community in Canada was based on this view. In both these areas, I was resolved from the moment I became prime minister that any government I headed would speak and act in the finest traditions of Canada.³⁸⁶

Canada's finest traditions that Mulroney was referring to pertained to Prime Minister John Diefenbaker. In the wake of the Sharpeville Massacre of 1960 Diefenbaker helped forge "a Commonwealth Consensus to oust South Africa because of its inhuman policies"³⁸⁷. Mulroney was aware that these policies were insufficient but he believed that they were a very solid good beginning³⁸⁸.

Indeed these were giant steps for Canada in the direction of economic sanctions. We shall examine these measures in the context of the problem of enforcement. Notice however the recurring phrases in this package of measures, "introduced a voluntary ban on ...", "banned" and the total lack of any mention of legal, administrative or political enforcement mechanisms. For while sanctions could be announced, it is a different step

³⁸⁶ Brian Mulroney, *Memoirs* (Toronto: McClelland and Stewart, 2007) at 398.

³⁸⁷ *Ibid* at 399.

³⁸⁸ *Ibid*.

to legally and politically enforce them when corporations, government agencies or individuals etc do not adhere to them.

This chapter examines the conceptual and practical problems that arise when legal enforcement is contemplated against corporations and other entities. How can economic sanctions be enforced? The crime of apartheid lasted that much longer because of economic ties between the apartheid state and Western economic interests and the failure to enforce the sanctions that had been imposed.

7.5 Sources of Enforcement

There were two sources of enforcement of sanctions against South Africa: first, the enforcement of domestic law and second, the fulfillment of international binding obligations i.e. UN Security Council Resolutions in the case of South Africa. Each of these sources posed conceptual and practical problems of enforcement. I will examine each in turn.

7.5.1 Domestic Laws

Linda Freeman has observed that Canadian companies had shown no signs that they were prepared to boycott trade with South Africa until compelled by law to do so, leaving open large questions about their voluntary compliance with bans requested by the government³⁸⁹. Indeed despite the Canadian Government's announcement of sanctions against South Africa, there was no direct sanctions law that had been enacted

³⁸⁹ *Supra* at 7.

and which could be used to enforce those sanctions. Much had been made of the Code Of Conduct but as we will show, not much had been or could be achieved by it. The Government had also purported to bring sanctions enforcement under an Act, namely the *Export and Import Permits Act*³⁹⁰. It will be discussed below.

7.5.2 Code of Conduct

The Code of Conduct was not a law. It was a set of government requests to Canadian Multinational Corporations operating in South Africa to improve working and employment conditions of Black South Africans employed in those firms. The Code of Conduct was one of the packages of measures on South Africa announced by the Canadian government in 1977. This package of measures by Canada was influenced by rapid and dramatic changes in Southern Africa as well as Canada's election to the UN Security Council in January 1977³⁹¹. Canada had to present a good face to the world and particularly to African Governments.

The Code of Conduct for companies operating in South Africa came into existence in 1979, and was sent to 28 Canadian corporations. In the study conducted by Naiman, Bhabha and Wright, it was found that in 1979 and 1980, only five companies issued public reports on their implementation of the Code. In 1981, only one company, (Alcan Ltd.) did so³⁹². Further, according to *The Economist* (March 23, 1985), since 1981, only

³⁹⁰ *Export And Import Permits Act*, R.S.C. 1970, C. 27.

³⁹¹ Naiman et al *supra*.

³⁹² *Ibid* at 4.

one Canadian corporation had made any public reports³⁹³. The problem was that the Code of Conduct was a voluntary package. Companies that did not accept or implement the Code would not suffer any penalties. Thus the Code could not be legally enforced.

Suppose codes of conduct were to become legally enforceable laws, would they have been effective? It is doubtful whether they would have been effective. As Johnstone and Richardson report in their study, *Australian Trade with South Africa*³⁹⁴, apart from the reluctance of companies in sending back reports, the Codes themselves were inadequate and further, they underestimated South Africa's security legislation. According to Johnstone and Richardson, even if multinational corporations implemented the codes, they would merely have affected the position of the tiny proportion of Black South African workers employed in such companies. The Code made no impact on the broader and more serious aspects of Apartheid such as migrant labour and influx control, citizenship and residential issues, the unequal distribution of income and resources particularly education and the severe restrictions on all civil liberties in South Africa. They further stated that the Code seemed to assume that apartheid was just a matter of discrimination and concentrated on removing the most obvious barriers in the work place. Thus the Code completely ignored the fact that apartheid was a system of structural racial exploitation backed by a severe legal regime. The recommendations of the Task Force took note of these structural conditions of Apartheid.

³⁹³ Quoted in Johnstone and Richardson, *supra* at 38.

³⁹⁴ *supra*.

Thozamile Botha, one of the leading Black trade unionists in South Africa was more blunt about codes of conduct:

The codes of conduct are just a sham - they are an excuse for the multinational corporations to operate in South Africa, so that they can continue the exploitation of the black workers. It is not the quality of life that is improving, but the method of exploitation. They propose minor reforms. We are not for reforms; we cannot at this stage afford to be fighting reforms.³⁹⁵

Even U.S. Congressmen perceived the inadequacy of the codes of conduct, while advocating for their enforcement in the absence of disinvestments and sanctions at that time in 1981:

Since divestment is not politically feasible at this time, we think all American companies should be required by U.S. law to adhere to a fair employment practices code which is strictly monitored by U.S. officials in conjunction with black union officials and other concerned South African leaders. Any corporate violator of this code should be strictly penalized for not carrying it out. However, enactment of this code should not be regarded as legitimatising the presence of American businesses in South Africa. Nor should it be viewed as a vehicle for bringing about genuine reform in South Africa as a whole. Such change can only be brought about by the people of South Africa and their Government.³⁹⁶

These observations were made after noting that the Sullivan Code of Conduct for U.S. Corporations in South Africa, the equivalent to the Canadian Code of Conduct, was honoured more in breach than in observance. Further it was noted that less than

³⁹⁵ *Ibid* at 38.

³⁹⁶ "South Africa: Change And Confrontation, Report of a Study Mission To South Africa", to the Committee on Foreign Affairs U.S. House of Representatives", (Washington: Government Printing Office, 1981) at 26, 3-11 July 1980.

half of the 350 U.S. companies operating in South Africa had formally agreed to implement the Code's voluntary principles. This shows clearly that without being mandatory, those voluntary codes were toothless as they could not be legally enforced.

A more formidable hurdle in the domestic enforcement of codes of conduct was South Africa's security legislation which also extended to multinational corporations operating in South Africa. The South African *National Supplies Procurement Act, 1970*³⁹⁷ for example gave the Minister of Defence the power "when necessary for the Security of South Africa" to order:

"any person who is capable of supplying, manufacturing, producing, processing or treating any goods, or has the power to dispose of, or has in his possession or under his control any goods, or is the supplier of any service, to manufacture, produce, process or treat and to supply or deliver or sell it to the Minister."

This Act was bolstered by the *National Key Points Act, 1980*³⁹⁸ which provided that corporation whose installations were designated "National Key Points" were obliged to organize defence facilities and to set up and pay for white "industrial commandoes". Subsidiaries were prohibited from reporting to their parent companies either that they were "key points" or that they had undertaken expenditure to comply with the Act. Thus multinational corporations operating in South Africa could be taken over by the South African Army by law, thus subverting any programmes a particular corporation would be undertaking in compliance with the code of conduct. In addition to the above laws, the *Protection of Businesses Act, 1978*³⁹⁹ of South Africa prohibited companies

³⁹⁷ Cited in Johnstone and Richardson, *supra* at 40.

³⁹⁸ Cited in *ibid* at 40.

³⁹⁹ Cited in *ibid* at 38.

operating in South Africa from sending business information out of the country without the permission of the Minister of Economic affairs. This had the effect that reports sent back would be patchy. As Vagts had put it, "it is difficult to see how a firm could encounter serious difficulties when it complied with South African laws"⁴⁰⁰, meaning it was more likely that a company operating in South Africa would obey the national law there than that of its home country. The company could give the defence of "due diligence" if it were prosecuted in Canada for not implementing the *Code*⁴⁰¹.

Thus enforcement of the Code had the effect of forcing the company into a "conflict of laws" situation. It was more likely that the company would choose to obey the laws of the country in which it would benefit most. The choice would even be easier if the home country imposed only minimal penalties, for example small fines that the company could easily absorb.

The above discussion leads me to conclude, first, that the Code of Conduct was not effective because it was voluntary and non-enforceable. Secondly, that even if it had been mandatory and enforceable, it would have been difficult to enforce given that South Africa had its own laws to require companies to do or not do certain things. Thirdly the Code of Conduct likely favoured companies that would be legitimatised in operating in South Africa and reaping profits while seemingly uplifting the standard of living of a few South African Blacks.

⁴⁰⁰ D.F. Vagts, "Multinational Corporations and International Guidelines" (1981) *Common Market Law Review* 463 at 472, cited in United Nations Centre on Transnational Corporations *Transnational Corporations In World Development, Third Survey* (New York: United Nations, 1983) at 124.

⁴⁰¹ The defence of due diligence is available to a corporation charged with a strict liability offence. This will be discussed below.

7.5.3 *Export and Import Permits Act*

The Canadian government seemed to have decided to append the enforcement mechanism of sanctions on to the *Export And Import Permits Act*⁴⁰². This 1953/54 Act seemed to have come into existence to serve several purposes: Canadian security interest, and protectionist measures⁴⁰³. It authorized the Governor-in-Council to establish an "Area Control List", an "Export Control List", and an "Import Control List", being countries, exports and imports respectively to which and from which certain exports and imports could not be sent or received.

Since the government had directed that enforcement of sanctions against South Africa was to utilize the *Export and Import Permits Act*, it was logical to assume that South Africa would be included in the "Area Control List", and goods to and from South Africa in the "Export Control List" and the "Import Control List". It would thus be a breach of the Act to export or import certain named goods to or from South Africa. This is spelt out in ss. 13, 14 and 15 of the Act:

OFFENCES AND PENALTIES

13. No person shall export or attempt to export any goods included in an Export Control List or any goods to any country included in an Area Control List except under the authority of and in accordance with an export permit issued under this Act.

⁴⁰² *Supra* at 11.

⁴⁰³ *Export and Import Permits Act, supra*, ss. 3, 4, 5.

14. No person shall import or attempt to import any goods included in an Import Control List except under the authority of and in accordance with an import permit issued under this Act.

15. Except with the authority in writing of the Minister, no person shall knowingly do anything in Canada that causes or assists or is intended to cause or assist any shipment, transshipment or diversion of any goods included in an Export Control List to be made, from Canada or any other place, to any country included in an Area Control List.

Unlike the Code of Conduct that imposed no penalty for breach of the Code, the *Export and Import Permits Act* imposed a penalty, as spelled out in s. 19:

19. (1) every person who violates any of the provision of the Act or the regulations is guilty of an offence and is liable

(a) on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both; or

(b) on conviction upon indictment to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding five years or to both.

Of particular interest was the penalty that would be imposed on a corporation in breach of the provisions of the Act, the penalty was the same as that imposed on a natural person, as the Act provided for the piercing of the corporate veil to get to the people who were "directing minds" of the corporation. Section 20 provided:

20. Where an offence under this Act has been committed by a corporation, whether or not the corporation has been prosecuted or convicted, every person who at the time of the commission of the offence was a director or officer of the corporation, is guilty of the like offence and is liable, on conviction, to the punishment provided for the offence, upon proof that the act or omission constituting the offence took place with his knowledge or consent or that he failed to exercise due diligence to prevent the commission of such offence.

This provision removed the conceptual problem that usually attended the imposition of liability on corporations, as it spelt out clearly that those persons who were in positions of authority in the corporation during the commission of the offence by the corporation were liable. They could not hide behind the corporate veil. In their defence they would have to show that they either did not have the *mens rea*, which would be difficult to show given that the very commission of the offence by the corporation attracted liability on the officers of the corporation or that they exercised due diligence.

In the spectrum of recognized offences in Canada at that time in the 1980s, the violations of the Act probably fit well in the category of public welfare/strict liability offences. The categorizations of offences in Canada were articulated by the Supreme Court of Canada in the case of *R. v. City of Sault Ste. Marie*⁴⁰⁴:

I conclude, for the reasons which I have sought to express that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the Act committed, or by additional evidence.
2. offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps

⁴⁰⁴ *R. v. City of Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161 at 181-2. See also Harry Glasbeek, *The Corporation As Criminal*, at 226-227, Course material at Osgoode Hall Law School, Winter 1987.

to avoid the particular event. These offences may properly be called offences of strict liability.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment would in general not be inflicted on these without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary consideration in determining whether the offence falls into the third category.

After recognizing the law under which the enforcement of sanctions would be brought i.e. through the *Export and Import Permits Act* and categorizing the offence as probably belonging to that of strict liability offence, rather than *mens rea* or absolute liability offence, it is important to address the question of the enforcement of strict liability offences. How serious was the public welfare offence?

By extension, how serious was the breach of a sanctions law i.e. the *Export And Import Permits Act*? One clue already given is that it was probably in the lower range judging from the penalties imposed, summary conviction attracting five thousand dollars or 12 months imprisonment or both while conviction upon indictment attracted a fine of twenty five thousand dollars or five years imprisonment. Given that in most cases, corporations that were convicted were asked to pay fines, it would seem that for a corporation doing multi-million dollar business with South Africa, five thousand or

twenty five thousand dollars fines were a pittance. This would likely not have deterred a corporation from continuing its business with South Africa, in the face of sanctions.

There is a preliminary problem even before one begins to talk about fines and imprisonment. There was a problem of prosecuting those who violated the law against trading in certain items with South Africa. Who was going to prosecute those who violated the law? Did the government have the will to do so? Was the breach of a sanctions law morally wrong? Who was offended by the breach?

These questions could only be answered in relation to the enforcement of the UN Mandatory Arms Embargo against South Africa of which Canada had experience by virtue of its attempt to live up to its international obligations. There was a problem of enforcement even when the law was clear or when international obligations so required.

7.5.4 International Obligations

7.5.4.1 International Codes of Conduct

Just as national governments had promulgated codes of conduct to govern their corporations operating in South Africa, intergovernmental organizations had also attempted to evolve international codes of conduct to regulate the activities of multinational corporations in general and their operations in South Africa in particular. We will concentrate on the latter aspect only, i.e. South Africa, without losing sight of the general framework within which the codes existed.

The efforts of national government in promulgating codes of conduct and attempting to enact sanctions laws, was in conformity with the international efforts in the same

direction. The European Economic Community (EEC) for example, had a code of conduct for companies operating in South Africa. The United Nations had called for divestment and sanctions against South Africa. Pertinent resolutions on the need for multinational corporations to refrain from collaborating with South Africa had been numerous. The UN Economic and Social Council Resolution 1981/86⁴⁰⁵ on "Activities of Transnational Corporations in Southern Africa and Their Collaboration with the Racist Minority regime in that Area" is worth excerpting in order to emphasize the work of international efforts:

The Economic and Social Council,

4. Welcomes as a positive step the policies of some Governments to bring about an end to the activities of their transnational corporations in Southern Africa;
5. Condemns the racist minority regime in South Africa for its perpetuation of the inhuman system of apartheid and the illegal occupation of Namibia;
6. Condemns those transnational corporations which collaborate with the racist minority regime in southern Africa, and calls upon all transnational corporations to respect the various United Nations resolutions concerning southern Africa;
7. Condemns the actions of those home countries of transnational corporations designed to promote and perpetuate investments by their transnational corporations in South Africa and Namibia in contravention of United Nations resolutions;
8. Calls upon all home countries of transnational corporations to take effective measures to terminate the collaboration of their transnational corporations with the racist minority regime in southern

⁴⁰⁵ United Nations Economic and Social Council Resolution 1981/86 reproduced in (1982) 11 The CTC Reporter 11.

Africa, to prevent further new investments and reinvestments and to bring about an immediate withdrawal of all existing investments in Namibia; ...

12. Urges all transnational corporations to comply fully with the relevant United Nations resolutions by terminating all further investments in South Africa and Namibia and by ending their collaboration with the racist minority regime; ...

14. Reaffirms that the code of conduct on transnational corporations should include effective measures against the collaboration of transnational corporations with the racist minority regime in southern Africa;

It can be seen from the above quote that corporations operating in South Africa were under heavy attack, so were their collaborating home countries. Clause 14 referred to the Draft UN Code of Conduct on Transnational Corporations⁴⁰⁶. Clause 14 of that Code dealt with transnational corporations and South Africa. It stated:

Non-collaboration by transnational corporations with racist minority regimes in South Africa:

14. In accordance with the efforts of the international community towards the elimination of apartheid in South Africa and its continued illegal occupation of Namibia,

- (a) Should respect the national laws and regulations adopted in pursuance of Security Council decisions concerning southern Africa;
- (b) Should within the framework of their business activities engage in appropriate activities with a view to contributing to the elimination of racial discrimination practices under the system of apartheid.

⁴⁰⁶ The UN Code of Conduct on Transnational Corporations has been in the works since the Economic and Social Council of the UN by Resolution 1913 (LVII) created the Commission on Transnational Corporations in 1974. Included in the Commission's terms of reference was the preparation of a code of conduct on transnational corporations. This code in draft form is reproduced in (1982) 12 *CTC Reporter* 3.

Like national codes of conduct which were voluntary, international codes of conduct were also voluntary. The non-effectiveness of national codes of conduct applied to international codes of conduct as well. There was a general reluctance in having mandatory international codes of conduct. Seymour Rubin, a Professor of Law at American University believed that "a mandatory code - one which becomes an international binding agreement would require at least national and probably international measures to put its provisions into effect; but it seems highly unlikely that the (UN) Code will be mandatory in this sense, not least because developing as well as developed nations would have considerable difficulty with the enactment of the consequently required national legislation."⁴⁰⁷

Max Weisglas, from the International Chamber of Commerce and an economic adviser to Unilever, the giant soap multinational corporation, reflected the thinking of international business on codes of conduct. He had stated, on the UN Code that:⁴⁰⁸

The Code should be voluntary. A non-voluntary, legally binding Code would require agreement of a detailed, non-flexible international treaty, to be ratified in each of the countries concerned. This process would not only be time-consuming, but - as treaty practices show - would attract only a rather limited number of ratifications. Such an international legal instrument could in fact compromise the sovereign right of Governments to exercise their legislative powers over vital economic activities, which would also include those of TNCs. The Code would, therefore, be to insist on its being legally binding. The business world's claim for a voluntary status is not a hidden way of escaping from the Code. On the contrary, a voluntary Code promulgated with a very large or full degree of consensus by a highly reputed intergovernmental organization such as the United

⁴⁰⁷ Seymour Rubin, "For A Balanced Code" (1982) 12 CTC Reporter 10 at 11.

⁴⁰⁸ Max Weisglas. "International Business And The United Nations Code" (1982) 12 CTC Reporter 16 at 18.

Nations would in practice set standards with a strong, morally persuasive character from which it would be difficult for companies of status to withdraw without damaging their reputation. Moreover, the agreement reached at the fifteenth session of the Intergovernmental Working Group in January 1982 on the implementation of the Code provides for annual discussions on the code, periodic assessment of its implementation, and a review procedure within the Commission on Transnational Corporations. This should guarantee that a United Nations Code, provided it is practical and realistic, will not become a dead letter.

There is no statement on what would happen to non-complying corporations. It was assumed corporations would comply. Codes were made out to be tools of goodwill.

There is still argument as to whether the issue was whether the Codes were mandatory or voluntary⁴⁰⁹. Baade challenges the popular assumption that a "voluntary" code has no legal effect⁴¹⁰. He contended that an international code of conduct could create valid and binding legal obligations, notwithstanding explicit declarations or disclaimers characterizing the instrument as "voluntary" or "not legally enforceable". The intention of the parties is the key point. Good faith and the intention to create legal obligations, rather than the form of the instrument, are the major determinants of the legal character and effects of the provisions of a code. Further these codes, which were voluntary, could in the long run harden into enforceable settled principles of law. Maybe one could also look at national codes of conduct in the same way, Baade agreed.

Horn, like Baade draws a distinction between the legal character of codes of conduct and their effectiveness⁴¹¹. Horn says that what was crucial was the follow-up procedures in

⁴⁰⁹ The following is summarised in *Transnational Corporations In World Development*, *supra* at 121-124.

⁴¹⁰ H. W. Baade, "The Legal Effects Of Codes Of Conduct For Multinational Enterprises" in *Legal Problems Of Codes Of Conduct For Multinational Enterprises*, (Deventer: Kluwer 1980) cited in *Ibid*; at 121.

⁴¹¹ N. Horn, "Codes Of Conduct For Multinational Enterprises And Transnational Lex Mercatoria" in *Legal Problems ibid.*, cited in *Transnational Corporations*, *supra* at 122.

the process of implementation. The effectiveness of a code of conduct depended on the political commitment of states parties to the undertakings of the code and not on the juridical quality of the instrument.

Pursey, a trade unionist, on the other hand believed in the adoption of tougher mandatory regulatory measures on multinational corporations⁴¹². According to Pursey, codes of conduct should not be undertakings of goodwill. This view was shared by Fatouros who was sceptical about multinational corporations complying voluntarily with codes of conduct without any governmental constraints⁴¹³. Fatouros did not pay much attention to the legal form of the instrument, however. He took a more pragmatic view. He asked instead: Did the instrument influence the conduct of the party concerned in the desired direction? If not, the instrument was ineffective, if yes it was effective. Fatouros did not consider why a corporation would want to cooperate in the absence of any penalties for non-compliance without cause.

One key point that had been raised in relation to codes of conduct regardless of whether they were national or international, was the crucial role of the national government. Did it have political will to enforce the codes or any laws pertaining to the proscribed behaviour? We now return to examining how Canada had utilized its *Export*

⁴¹² S.K. Pursey, "The Trade Union View On Implementation Of Codes Of Conduct" in *Legal Problems* cited in *ibid.*, at 122. See also his "Codes Of TNCs: The Trade Union Experience" (1982) 12 CTC Report 14.

⁴¹³ A.A. Fatouros, "On The Implementation Of International Codes Of Conduct: An Analysis Of Future Experience" (1981) 30 American University Law Review 941, cited in *Transnational Corporations, supra* at 122.

and Import Permits Act to fulfil its international obligations i.e. the UN Arms Embargo against South Africa.

7.5.4.2 *The UN Arms Embargo*

On November 4th, 1977, the UN Security Council, (Canada having joined the Security Council in January, 1977) passed resolution 418 which imposed an arms embargo against South Africa. Security Council resolutions are binding on member nations. The Resolution read in part:

The Security Council; ...

Convinced that a mandatory arms embargo needs to be universally applied against South Africa in the first instance,

Acting therefore under Chapter VII of the *Charter of the United Nations*,

1. Determines, having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related material constitutes a threat to the maintenance of international peace and security;
2. Decides that all States shall cease forthwith any provision to South Africa of arms and related materiel of all types including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the afore-mentioned and shall cease as well the provision of types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned;
3. Calls upon all States to review, having regard to the objectives of the present resolution, all existing contractual arrangements with and licences granted to South Africa relating to the manufacture and maintenance of arms, ammunition of all types and military equipment and vehicles, with a view to terminating them;

4. Further decides that all States shall refrain from any cooperation with South Africa in the manufacture and development of nuclear weapons;
5. Calls upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution; ...

This was the only mandatory resolution the UN Security Council had ever passed on South Africa. It thus carried a lot of weight in international circles and was much talked about by many people concerned with apartheid. It was thus fitting that in the absence of mandatory codes of conduct (national or international) and in the absence of a direct national sanctions law, resolution 418 became the rallying cry of the national enforcement. Canada had had some experience with the enforcement of Resolution 418. The Canadian Government was alerted to these infractions⁴¹⁴.

According to the TCCR, this is how the government responded. Government responses to alleged infractions were perhaps best demonstrated by the following anecdote. When a programme of the Canadian Broadcasting Corporation aired allegations that Levy Auto Parts of Toronto had shipped reconstituted Centurion tank engines and parts to South Africa, the Taskforce phoned the Department of External Affairs to enquire whether these allegations were being investigated. Here they were told that it was not the responsibility of the Department of External Affairs to launch such an investigation, and referred the Taskforce to the Department of Justice. The Justice Department said that it was not responsible either; and advised the Taskforce to get in touch with the RCMP, Canada's security services. The RCMP Legal Department

⁴¹⁴ The following anecdote is taken from Sheila Kappler, *supra* at 5.

explained that it could only investigate if asked to do so by a department of Government and that no such request had been made. In answer to the question whether the public could ask for an investigation, the RCMP explained that such a public request would be extremely difficult to formulate. Since only regulations under the *Export And Import Permits Act* existed, rather than a specific Canadian law governing the enforcement of the South African embargo, it would not be possible to cite an alleged infraction of a specific law. Therefore, if members of the public wanted to request the RCMP to investigate alleged violations, they would have had to cite an alleged infraction of a specific regulation of the *Export And Import Permits Act*. In the view of the RCMP lawyer, such a task without the support of the Canadian Government, would be beyond the means of ordinary Canadians. He added that the issue at hand was of highly political character, and unlikely to receive much official encouragement.

We learn many things from the above account. First, the government was central to enforcing the Arms Embargo and by extension, any sanction laws against South Africa. Secondly, the government may be unwilling to cooperate in the enforcement of the embargo. Thirdly, there was no law in Canada which could have been cited as having been breached and through which enforcement measures would have proceeded. By extension there was no direct Canadian sanctions law against South Africa. South Africa may not even have been on the "Area Control List" or "Import Control List" of the *Export And Import Permits Act*. Fourthly, individuals and organizations had no standing in the enforcement of any sanctions law. The Government would have to do everything related to enforcement.

The Canadian government's attitude towards alleged violations, like that of the Levy Auto Parts of Toronto case (which seemed to have died without thorough and conclusive investigations) led the Taskforce to conclude "that the enforcement mechanisms of the Arms Embargo are weak and are carried out with a singular lack of enthusiasm"⁴¹⁵.

Another case where the government lacked enthusiasm was that of the Plessey Canada.⁴¹⁶ Plessey Canada was exporting military related equipment to South Africa. South African Congress of Trade Unions approached the Investigations Division of Revenue Canada about the possible violation of the Arms Embargo by Plessey. The department agreed to investigate. After a year- long investigation, Plessey was charged with failure to apply for an export permit for controlled goods. Note that it was not charged with contravening the Arms Embargo. The charge was not carried through. The Department informed South African Congress of Trade Unions that political will did not exist to carry through prosecution of the Arms Embargo violation charge. South African Congress of Trade Unions concluded on the basis of the Plessey case that⁴¹⁷:

The Plessey case points to a number of serious flaws in the Canadian system of enforcement. Canada is a signatory to the 1977 mandatory UN arms embargo against South Africa yet there is no definition of "arms" in Canada's endorsement of the embargo. In theory, anything on Canada's export control list including "dual purpose" equipment (such as telecommunications systems) requires an export permit before those commodities can be legally exported.

⁴¹⁵ *Ibid* at 6.

⁴¹⁶ This case is examined in SACTU, *supra* at 27-30.

⁴¹⁷ *Ibid* at 29.

The permit system "coupled with a system of rigorous pre-screening of export permits applications and complemented by customs controls at ports, airports, and central distribution centres", to quote the Ministry of External Affairs, are supposed to ensure that Canada does not arm apartheid. There is a loop hole however. If the corporations do not cooperate by filing for export permits there seems to be little in Canada's enforcement system to identify breaches of the embargo before it is too late. This unwillingness to commit resources to enforce the arms embargo effectively means that Canada's signature is not worth the paper it is written on. One person in Statistics Canada told us there is no revenue to be made from exports so Revenue Canada will not spend any money on enforcement.

Even when corporations were prosecuted for violating the arms embargo, the penalties were minor. For example after Gerald Bull of Space Research Corporation, Canada, escaped liability in Canada for contravention of the arms embargo by selling military parts to South Africa, he was charged and convicted in the United States Court for the same offence. Bull served four months in prison and Space Research was fined a paltry sum of \$45,000.00, a very minute fine for a multi-billion dollar business⁴¹⁸. Citing the Space Research Corporation case, South African Congress of Trade Unions concluded that "the case underscores the ease with which multi-national corporations can make a mockery of government embargoes. This is particularly true when the government where the corporation is headquartered sees its interests as coinciding with those of corporate capital"⁴¹⁹.

Did the interests of the Canadian government coincide with those of corporate capital? David Moore thought the interests of these entities were coincidental⁴²⁰. He had observed that the articulations on South Africa of public interest groups like the

⁴¹⁸ Naiman, Bhabha and Wright, *supra* at 19.

⁴¹⁹ SACTU *supra* at 29.

⁴²⁰ David Moore, *supra*.

Task Force were rejected by the government, while those of the corporate sector had been listened to and incorporated in the government's foreign policy towards South Africa. The future of economic sanctions looked unsure.

7.6 Conclusion

The imposition of economic sanctions and other measures by Canada against apartheid South Africa was a form of exercise of universal civil jurisdiction. It was a form of accountability against the condemned crime of apartheid.

The initiative to get Canada to do anything about the crime of apartheid was to some extent induced by pressure groups and the moral persuasion of the international community through the United Nations. Pressure groups may be the engine for the exercise of universal jurisdiction. To be effective, pressure groups must have receptive ears in the decision-makers. Prime Minister Brian Mulroney was receptive but the corporate world could not be so easily swayed.

In 1982, Canada incorporated the *State Immunity Act* (SIA)⁴²¹. This *Act* prohibits civil suits in Canada against foreign sovereign governments and their agents. This rule of law was emphatically affirmed in two important cases in Canada under which apartheid criminals could conceivably have been privately sued by the victims of apartheid analogous to the exercise of universal civil jurisdiction by Canadian courts. In *Bouzari v Islamic Republic of Iran*⁴²² an Iranian national sued Iran in Ontario for torture.

⁴²¹ *State Immunity Act* RSC 1985 S-18.

⁴²² (2004) 72 OR (3d) 675 (CA), leave to appeal to the SCC refused, [2004] S.C.C.A. No. 410 (*Bouzari*).

Iran did not defend this action. However, the Attorney General of Canada intervened arguing that the action was barred by the *State Immunity Act*.

A recent case as of 2013 on this same point is the case of the *Estate of the Late Zawra (Ziba) Kazemi et al v The Islamic Republic of Iran et al*⁴²³ where the Courts of Quebec upheld the principles held in *Bouzari*⁴²⁴. These cases, buttressed by the *State Immunity Act*, indicate that civil suits against apartheid criminals would not have succeeded then nor could they succeed currently in the absence of a law equivalent to the U.S. *Alien Tort Claims Act*.

The next chapter examines the question of whether Canada could have exercised universal criminal jurisdiction against apartheid South Africa between 1948 and 1994.

⁴²³ No. 500-17-031760-062 (Quebec Superior Court); *Kazemi v The Islamic Republic of Iran et al*, File 500-09-021457-114 Quebec Court of Appeal; leave to appeal granted by the Supreme Court of Canada *Kazemi v Iran* Docket 35034 (7 March 2013).

⁴²⁴ *Bouzari, supra*.

CHAPTER EIGHT

THE CASE, THE EVIDENCE AND POSSIBLE UNIVERSAL CRIMINAL JURISDICTION IN CANADA DURING THE APARTHEID ERA

8.1 Introduction

This chapter investigates the problems and prospects of prosecuting apartheid criminals in Canada⁴²⁵ between 1948 and 1994. Could Canada have exercised universal criminal jurisdiction against apartheid criminals during the Apartheid era? The Canadian case in this time period highlights some of the legal issues that arise when universal jurisdiction is contemplated or exercised.

There were no attempts to prosecute the architects and perpetrators of apartheid in Canada while apartheid was in existence. Canada could have prosecuted apartheid criminals after the enactment of Bill C-71 in 1987. An earlier chapter discussed Canada's state of war crimes legislation and activities or lack thereof in the prosecution of war criminals between 1945 and 2005. That chapter set the stage and background to this chapter.

As already stated in the last chapter, Mulroney likened Apartheid to Nazism. But his government did not take any proactive activities towards the investigation and or prosecution of apartheid criminals as the government did with respect to Nazi war criminals.

⁴²⁵ *The International Convention on the Suppression and Punishment of the Crime of Apartheid* (United Nations General Assembly Resolution 3068(XXVIII), 30 November 1973, entered into force on 18 July 1976. As of 2008, there were 107 ratifications).

8.2 A Summary of the Legal Basis for Canada's Assumption of Universal Jurisdiction Against the Crime of Apartheid up to 1994

A legal argument could have been made before the collapse of apartheid, that Canada had an obligation to prosecute apartheid criminals in Canada based on the following legal principles:

Racial discrimination is outlawed by international law by virtue of the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*⁴²⁶. This treaty came into force on December 21st, 1965. Canada became a party to this convention on November 13th, 1976. As of December 1986, 124 nations were states parties to the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*. This overwhelming ratification of this Convention attested to the rejection by the international community of the principle of racial discrimination as practiced in South Africa and elsewhere. Treaty law therefore abhors racial discrimination and thus is binding on Canada.

The principle of non-racial discrimination could be said to have become part of customary international law. Customary international law is defined as evidence of general practice recognized and accepted as law of a particular nature by the majority of nation states. Encouraging racial discrimination is a violation of customary international law in this regard.

⁴²⁶ U.N.T.S., vol. 660, at 135.

As evidence of this practice and acceptance, the majority of nation states have in their domestic laws incorporated anti-racial discrimination articles, clauses or sections.

Canada has affirmed the principle of non-racial discrimination in its domestic laws, particularly section 1 of the *Canadian Bill of Rights*⁴²⁷; section 15 of the *Canadian Charter of Rights and Freedoms* and generally the then section 319 of the *Canadian Criminal Code*⁴²⁸, as amended. That section stipulated that hate propaganda is a crime in Canada. Canada also has a human rights code that prohibits discrimination including racial discrimination.

Further because of the massive violations of human rights in South Africa, which violations closely replicated those perpetrated by the Nazi regime during the Second World War, the United Nations had defined the practices of apartheid as a crime against humanity, an international crime, by virtue of the *International Convention on the Suppression and Punishment of the Crime of Apartheid*⁴²⁹. The practices of Nazi Germany were censured as war crimes, crimes against peace and crimes against humanity at the International Military Tribunal in Nuremburg. This was a tribunal that tried and sentenced Nazi leaders for the above crimes using the *Nuremberg Principles*. The United Nations recognized the atrocities of Nazi Germany by codifying the *Convention on the Prevention and Punishment of the Crime of*

⁴²⁷ R.S.C. 1970, c. 44.

⁴²⁸ R.S.C. 1985, c.c. 46.

⁴²⁹ G.A. Res. 3068 (XXVII), 28 U.N. GAOR, Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

*Genocide*⁴³⁰. Canada became a party to this *Genocide Convention* on December 2nd, 1952. The *Apartheid Convention* was modelled on the *Genocide Convention* and went a little further by providing for international jurisdiction for the prosecution of official representatives of the South African regime. While Canada has not ratified this convention, as of December 1986, 86 nations had become states parties. [There are 108 ratifications as of 2012.] This is a strong indication of the international consensus against the monstrosity of apartheid. The human rights practices of apartheid South Africa had reviled the international community for many years; this led to the majority of nations cutting off diplomatic relations with South Africa and/or imposing economic and military sanctions of sorts against South Africa.

The International Law Commission's "Draft Articles on State Responsibility" states that an international crime may result from breach of "an international obligation of essential importance for the safeguarding of the human being, such as those prohibiting...apartheid." These Draft Articles were generally accepted as reflecting customary international law. Hence crimes against humanity are a violation of customary international law as well as general principles of law as recognized by the community of nations.

The latter is evidenced by the total outlawing of genocide-like practices in virtually all nation states. South Africa engaged in "low level genocide" on its black population.

⁴³⁰ U.N.T.S., Vol. 28, at 277.

In Canada, genocide was specifically prohibited and was punishable in 1988 by section 318 of the *Criminal Code*⁴³¹. War crimes and crimes against humanity were punishable in 1988 under Section 6 (1.91) of the *Criminal Code*⁴³². War crimes and crimes against humanity were added to the *Criminal Code* by Bill C-71, 1987. Given that apartheid had been defined as a crime against humanity by the international community, it came within Section 6(1.91) of the *Criminal Code*. Canada could therefore have prosecuted apartheid criminals in Canada before the demise of apartheid in 1994.

8.3 Domestic Legislation in Canada

Bill C-71⁴³³ was proclaimed into force in September of 1987. That legislation has now been amended but its essence remains the same. It provided for universal criminal jurisdiction in Canada to prosecute individuals accused of having committed war crimes⁴³⁴ and crimes against humanity⁴³⁵ anywhere in the world. This enactment

⁴³¹ R.S.C. 1985 c.c. 46.

⁴³² R.S.C. 1985 c.c.46.

⁴³³ An Act to amend the *Criminal Code*, the *Immigration Act*, 1976 and the *Citizenship Act*, passed by the House of Commons on August 28, 1987. The amendment to the *Criminal Code* is in S.6 (1.9). The *Criminal Code* part came into force in September 1987 and the other parts were proclaimed in November 1987.

⁴³⁴ S.6 (1.96) states: "war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts. I refer to those who have committed war crimes as war criminals. See Q. Wright, "War Criminals" (1947) 39 AJIL 257.

⁴³⁵ *ibid* states: "crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations; I call those who have committed crimes

resulted from the recommendations of the *Deschênes Commission_of Inquiry on War Criminals Report*⁴³⁶. The Commission itself appears to have been the result of a sustained political and legal campaign in Canada by various individuals and groups to have suspected Nazi war criminals living in Canada prosecuted in Canada or extradited to face trials for their alleged participation in the Second World War crimes and for committing genocide against the Jewish people⁴³⁷.

Prior to the enactment of the above-named statute, Canada did not appear to have jurisdiction to prosecute those suspected individuals in Canada⁴³⁸. The two statutes under which war criminals would conceivably have been tried i.e. the *War Crimes Act* of 1946⁴³⁹ and the *Geneva Convention Act* of 1966⁴⁴⁰ did not bestow the requisite jurisdiction. The *Criminal Code*⁴⁴¹ itself seemed to forbid any contemplation of such a venture. Nor would have international law broadly defined been of any use, except under the caveat introduced by section 11(g)⁴⁴² of the *Canadian Charter of Rights and*

against humanity as criminals against humanity. For a history of the concept of "crime against humanity" see, Egon Schwelb, "Crimes Against Humanity", (1946) BYBIL 178.

⁴³⁶ *Commission of Inquiry on War Criminals Report*, Part 1, Honourable Jules Deschenes Commissioner (Ottawa: Minister of Supply and Services Canada, 30 December 1986). Herein after referred to as Deschenes Commission Report.

⁴³⁷ See Generally David Matas and Susan Charendoff, *Justice Delayed: Nazi War Criminals in Canada* (Toronto: Summerhill Press Ltd., 1987) especially ch. 9.

⁴³⁸ See discussion in Deschenês Commission Report *supra* pp. 111 -133. See also obiter of Courts in *Federal Republic of Germany v Rauca* (1982), 38 O.R. (2d) 705, affirmed by Court of Appeal for Ontario, (1983), 41 O.R. (2d) 225. For contrary views see David Matas, *Bringing Nazi War Criminals in Canada to Justice* (Toronto: League for Human Rights of B'Nai Brith Canada, February 1985); Matas and Charendoff, *supra* at 151; Kenneth M. Narvey, "Trial in Canada of Nazi War Criminals: Overcoming Certain obiter in *Rauca*" (1983), 34 C.R. (3d) 126. Extradition was one available remedy. For a useful discussion of problems of prosecution in Canada, See Sharon A. Williams and J.-G. Castel, *Canadian Criminal Law: International and Transnational Aspects* (Toronto: Butterworths, 1981) ch. 9.

⁴³⁹ 1946 (Can.) C. 73. See *Supra* at 17-123.

⁴⁴⁰ 1964-65 (Can.) C. 44, now R.S.C. 1970, C. G-3. See note 5 at 123-126.

⁴⁴¹ R.S.C. 1970 C. C-34, ss. 5(2) and 8.

⁴⁴² Section 11 stipulates: Any person charged with an offence has the right, ... (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under

Freedoms,⁴⁴³ which would be shaky by itself. This section of the Charter would however have allowed parliament to pass enabling legislation if it so desired for the prosecution of those accused of having committed war crimes and crimes against humanity and now living in Canada. Parliament had passed the enabling legislation. The next step would have been to investigate the alleged criminals and then to prosecute⁴⁴⁴ them or impose other legal remedies. The legislation stated that Attorney General of Canada or the Deputy had to consent to any such prosecutions.

8.4 Prosecution in Canada

Prosecution in Canada was not the only remedy discussed and available to confront war criminals and perpetrators of crimes against humanity in the Apartheid era. There were two other routes: extradition⁴⁴⁵ and denaturalization⁴⁴⁶ and deportation.⁴⁴⁷

Each of these routes had its strengths and weaknesses. The strength of extradition was that a foreign government with which Canada had an extradition treaty that requested for a particular criminal in Canada was actually interested in prosecuting that individual. There may have been evidence in the foreign country to strengthen the case for possible conviction. Further, the foreign country would likely have had a closer

Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

⁴⁴³ Enacted as Schedule B to the *Canada Act* 1982, (U.K.) 1982, c. 11. Herein after to be referred to as the *Charter*.

⁴⁴⁴ One Imre Finta became the first person in Canada to be charged with war crimes and crimes against humanity, see *Toronto Star* 10 December 1987, at A1.

⁴⁴⁵ See discussion in the Deschenês Commission Report *supra*. For a study of Canadian extradition practice see, G. V. La Forest *Extradition to and from Canada* (Toronto: Canada Law Book Ltd., 1984).

⁴⁴⁶ See discussion in Deschenês *ibid*

⁴⁴⁷ *Ibid*.

connection than Canada to the crime the particular individual may have committed. If an individual was not extradited, Canada was not in a position to prosecute that individual. For these and other reasons, extradition has historically been popular among some war crimes advocates. However, the most serious shortcoming of the extradition option in the Apartheid era was that Canada did not have extradition treaties with the then Eastern European nations where most of the evidence against alleged war criminals living in Canada existed. Accused individuals would not have been extradited and hence would probably never have been prosecuted.

A solution at the time might have been denaturalization and then deportation, say to then Eastern Europe or some other country. No extradition treaty would have been required for denaturalization and deportation. However, the individual might never have faced any prosecution of any sort in that country. Before the process of denaturalization and deportation was completed, complex and lengthy legal proceedings would have likely been necessary.⁴⁴⁸ A government might not have had the legal and or political resources and political will to go through with it. Unless it chose to just apprehend the individual, denaturalize and then deport that person. As of 1982, this, however, would have been subject to a strong legal challenge on the basis of the *Charter*⁴⁴⁹. A

⁴⁴⁸ The *Rauca* case is a good example.

⁴⁴⁹ Section 7 would likely be used. It reads; Sec. 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. Section 7 was used successfully in an important immigration case of *Singh v Min. of Employment and Immigration* [1985], 1 S.C.R. 177, 17 D.L.R. (4th) 422. Though the issues are somewhat different, this case must send a signal that if a refugee can successfully use that section, a citizen would probably use it much more successfully.

government would have had to show that the person misrepresented himself or herself when s/he entered Canada⁴⁵⁰ .

An amendment in 1987 to the *Immigration Act, 1976* occasioned by the Bill under discussion provided for deportation under subsection 19(1) (j):

Persons who there were reasonable grounds to believe had committed an act or omission outside Canada that constituted a war crime or a crime against humanity.

These persons became members of an inadmissible class of persons, subject to deportation. The *Citizenship Act* had also been amended in 1987 to include the denial of citizenship to and exclusion from Canada of persons accused of being war criminals and or criminals against humanity.

If Canada had decided to treat apartheid criminals as persons who have committed crimes against humanity, it could have barred these individuals from either entering Canada or acquiring Canadian citizenship. Canada could also have deported them if they had already entered the country. Because of the newly acquired jurisdiction to prosecute these individuals in Canada, extradition, say to South Africa may not have been exercised or seen as necessary any more, unless it was Canada's choice not to prosecute the alleged apartheid criminal.

Extradition, deportation and denial of Canadian citizenship to war criminals and criminals against humanity were clearly secondary to prosecution at the time in 1987

⁴⁵⁰ As provided for in BillC-71 amendment to *Immigration Act 1976*.

within Canada. Many individuals were surprised that Canada chose this route, i.e. prosecution, given the fact that the United States of America had made extradition (and deportation) the top priority beginning in 1978⁴⁵¹. The United States had more experience in dealing with war criminals than Canada. The Bill to prosecute war criminals from all over the world in the U.S. never reached the floor of the House of Representatives, however. The extradition of war criminals by the U.S. was restricted to Nazi war criminals only. Canada could have followed the same route but it did not.

According to Matas and Charendoff, Canada's choice of not only prosecution within Canada, but also to include all war criminals and criminals against humanity from everywhere (though this latter aspect is not clear in the Bill or anywhere else), was a result of pressure from individuals from Eastern Europe. This constituency did not favour individuals being sent to Eastern Europe or Israel where it was feared, they might not receive fair trials. They also wanted perpetrators of historic crimes in Eastern Europe, e.g., the Soviet famine of the mid-thirties which resulted in the death of thousands of people, brought to justice in Canada. Without political pressure, this legislation would certainly not have seen the light of the day. It came forty years after Nuremberg. Thus if apartheid criminals were to be prosecuted in Canada, it would have likely been as a result of political pressure from some constituency. There was a very strong sanctions constituency that influenced the Canadian government to impose forms of universal civil jurisdiction that was discussed in the previous chapter. There was no

⁴⁵¹ For a good discussion of this see Matas and Charendoff, *supra* .

constituency that urged for the exercise of universal criminal jurisdiction comparable to that of the Canadian Jewish Congress.

8.5 The Debate about Prosecution

While the choice of prosecution in Canada had been on the overall welcomed, there had been some criticisms and some very strong dissenting⁴⁵² voices. The first major criticism related to the fact that prosecutorial power in the legislation was only competent to the federal government⁴⁵³. The provincial attorneys-general were not permitted to prosecute nor were private prosecutions allowed. (All other offences in the Criminal Code could have been prosecuted by the provincial attorneys-general). If the federal government was unwilling or unable to prosecute, as a result of either political pressure or simply inertia, there was no other recourse. The provincial attorneys-general, had they been permitted to prosecute, might probably have been willing to prosecute in clear cases where the federal government was not. In retrospect, both levels of government should have been permitted to prosecute.

The second criticism was that prosecutions were too slow, expensive and too few and far in between; in the long run defeating the whole exercise.⁴⁵⁴ It is not clear whether those who raised this criticism, such as Sol Littman and Irwin Cotler, preferred extradition or deportation. These critics seemed to suggest that the federal government would not have been able to do anything at all, and that provision for internal

⁴⁵² This is discussed in the next section.

⁴⁵³ See Matas and Charendoff, *supra*.

⁴⁵⁴ Sol Littman, Address to Osgoode Hall Law School, Moot Court, 28 October 1987; and Irwin Cotler, Speech given at York University, Senate Chambers, 6 November 1987.

prosecution was merely for public consumption of certain constituencies.⁴⁵⁵ In 1987, Allan Ryan, former Director of the U.S. Justice Department's Office of Special Investigations (OSI) - the office that handles war criminals in the U.S. stressed the necessary intervention of politics in these matters. "... what Canada will decide to do will be a function of the political process ... it would be a mistake for those who support prosecution to assume it will happen ... the right thing doesn't happen just because it is the right thing."⁴⁵⁶ Political intervention would have been necessary if Apartheid criminals were to be tried in Canada. It would not happen on its own just because it would have been the right thing to do.

In 1987, the Chief Justice of Australia, Michael Kirby, expressed a very strong dissent to the legislation in Canada and similar legislation in Australia. His reason was the passage of time since the crimes had been committed⁴⁵⁷. According to Kirby, forty years was too long a time to re-open cases and would have been unfair. He himself had stopped cases in Australia going back a mere six or more years. Another factor related to time according to Kirby was that Canada had agreed to stop prosecutions in 1948 after receiving a memo from Britain. Kirby asked, "a government having decided not to pursue them to now pursue them?"⁴⁵⁸. He noted that the Canadian *Charter* guaranteed a

⁴⁵⁵ Sol Littman *ibid.* See summary of Littman's speech in Munyonzwe Hamalengwa, "What about Canada's Nazis" *Obiter Dicta*, Osgoode Hall Law School, 2 November 1987 at 1.

⁴⁵⁶ "Ex-hunter links Nazi's fate to politics" *Globe and Mail*, 6 November 1987 at 16.

⁴⁵⁷ Kirk Makin, "Legality of War-Crimes Trials Questioned: Australian Jurist Cites Fairness" *Globe and Mail* 6 November 1987 at 16.

⁴⁵⁸ *ibid.*

trial within a reasonable time⁴⁵⁹, though there were serious divisions within the Supreme Court of Canada as to what "reasonable time" entailed⁴⁶⁰.

Chief Justice Kirby's concerns could have been answered in part by pointing out that section 11(g) of the Charter seemed to empower courts to try crimes committed a long time ago. As a matter of fact, this section came into being as a result of pressure from constituencies that wanted war criminals to be prosecuted⁴⁶¹. Even international law has sealed the loophole of time limitations involving war criminals and criminals against humanity, by agreeing to have the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*.⁴⁶² Canada is not a party to this convention. To address the problem of time limitation and conform to international law, Canada could have ratified this Convention. However, since Canada already had within its domestic laws a statutory provision addressing the same issue, even though not in precisely the same terms, Canada had no statutory limitations involving the crime of murder, which was an included offence in war crimes and crimes against humanity legislation. The exclusion of statutory limitations to war crimes was also part of customary international law binding on Canada.

⁴⁵⁹ Section 11 of the *Charter* states that, "any person charged with an offence has the right ... (b) to be tried within a reasonable time". But this refers to trial after one has been charged and not the period between the commission of an offence and the charge. That is an entirely separate matter. See *Carter v the Queen* (1986), 26 C.C.C. (3d) 572, 29 D.L.R. (4th) 309, [1986], 1 S.C.R. 981 and *Mills v The Queen* [1986], 1 S.C.R. 863, (1986) 26 C.C.C. (3d) 481. There is obiter in these cases that pre-charge delay may be relevant under Section 11(d) - To be presumed innocent. The relationship between the presumption of innocence and possible prejudice due to a length pre-charge delay was disposed of in *Finta* against the accused.

⁴⁶⁰ See *Carter v The Queen* (1986) *Supra*, *ibid*.

⁴⁶¹ See discussion by Francois Chevrete, "Protection upon arrest or detention and Against Retroactive Penal Law" in Walter S. Tarnopolsky and Gerald-A. Beaudoin, *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 291-329.

⁴⁶² United Nations, *Treaty Series* vol. 754, at 73.

If apartheid criminals were to have been tried, the time factor would not have posed a serious problem. The crime of apartheid was a continuous crime during this period. The perpetrators could have been brought to trial within a reasonable time before the collapse of apartheid. Even if they hid for a long time, they would still be tried whenever they were found due to the absence of statutory limitations on the crime with which they would be charged, namely war crimes and crimes against humanity.

Another strong dissent about the desirability of prosecutions in Canada of crimes that had happened a long time ago was the alleged unavailability of evidence or if available in the then Eastern Europe, the unreliability of this evidence.⁴⁶³ Even the memory of those who were persecuted is bound to have faded in years. This dissent largely appears to be more against the political systems of the then Eastern Europe than about the credibility of the evidence *per se*. This observation is based on the conclusion of the Deschênes Commission which assessed the responses of the various constituencies in regard to "foreign evidence": "No problem arose with the possibility of collecting evidence in western democracies, but a great debate ensued in connection with evidence available in Eastern Europe"⁴⁶⁴. Soviet-type societies allegedly did not enjoy judicial independence, presumption of innocence and the rule of law, or due process of law⁴⁶⁵. The Deschênes Commission summarized the objections thus⁴⁶⁶:

⁴⁶³ See discussion in *supra*, and Williams and Castel *supra*.

⁴⁶⁴ *Deschenes Commission Report supra* at 263.

⁴⁶⁵ Williams and Castel, *supra* at 178.

⁴⁶⁶ *Deschenes Commission Report supra* at 878.

- a) Soviet supplied evidence cannot be trusted, because of fabrication, intimidation, denial of right to independent counsel, lack of full cross-examination and general disregard for the principles of fundamental justice;
- b) Access to Soviet archives is severely limited, when it is not totally prevented;
- c) The same observation applies to access to sites of crimes and to potentially exculpatory witnesses;
- d) The use of Soviet-supplied evidence would constitute a mockery of justice and would represent the worst form of McCarthyist witch-hunts;
- e) The U.S.S.R. places no value on the rights of the individual; it is intent on attacking any ethnic group which opposes the Soviet State;
- f) By travelling to the U.S.S.R., the Commission would legitimize the political claims of the U.S.S.R. on the Baltic States and the Ukraine;
- g) By the same token, the Commission would give legitimacy to the Soviet legal system, which is but a pawn in the hands of the Soviet government;
- h) It would be ludicrous to foresee trials in Canada which would depend on a wholesale obtaining of Soviet evidence.

The utilization of evidence from the then Eastern Europe had also received strong support which the Deschênes Commission summarized as⁴⁶⁷:

- a) The Commission must go where the evidence is;
- b) Documents are in the Soviet archives, or German archives seized by the Soviets;
- c) Eyewitnesses are for the most part in the countries where crimes were allegedly committed;
- d) Victims of the Holocaust should not be deliberately excluded as witnesses and thus doubly victimized;
- e) Soviet motives should not invalidate Eastern European evidence;

⁴⁶⁷ *Ibid* at 878-9.

- f) Soviet-supplied evidence was used and accepted by the courts at Nuremberg and in the Rauca case in Canada;
- g) There is no known instance in Europe or in North America of a Soviet-supplied document having been falsified or of an Eastern bloc witness having perjured himself.
- h) Use of evidence from Eastern Europe will not legitimize the Soviet political or legal systems;
- i) Opposition to the use of Soviet-supplied evidence is a declaration of non-confidence in the Canadian judicial system and its ability to sort out good evidence from bad.

It will not be necessary for the purpose of this chapter to comment on the Commission's responses to the above issues, suffice to say that even with the law to prosecute internally, there would likely have been a continuing problem of evidence. This background is necessary to keep in mind in any study about the prosecution of war crimes in Canada from any country.

There were reports of the Canadian government entering into agreements with the Soviet Union, Czechoslovakia and other East European countries for Canadian investigators to gather documentary evidence and examine witnesses in those countries in accordance with Canadian rules of evidence. Canada had always insisted on those countries to agree to the following conditions before it could enter into agreements with them⁴⁶⁸ :

- i) Protection of reputations through confidentiality;
- ii) Independent interpreters;
- iii) Access to original documents;
- iv) Access to witnesses' previous statements;
- v) Freedom of examination of witnesses in agreement with Canadian rules of evidence;
- vi) Videotaping of such examination.

⁴⁶⁸ *Ibid* at 890-1.

8.6 Canada and International Law in the Apartheid Era

The *Nuremberg Principles* were enshrined in the *International Convention on the Suppression and Punishment of the Crime of Apartheid*. This convention provides universal jurisdiction to states parties to prosecute apartheid criminals, "whether residing in the territory of the state in which the acts are perpetrated or in some other state"⁴⁶⁹.

Article IV stipulates:

The States Parties to the present Convention undertake:

- (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregational policies or their manifestations and to punish persons guilty of that crime;
- (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or some other State or are stateless persons.

Article V goes further to stipulate more concretely universal jurisdiction by virtue of the acquisition of jurisdiction over the alleged criminal:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

⁴⁶⁹ Article 111.

Unfortunately however, Canada was not a signatory to the *Apartheid Convention*. Notwithstanding its non-ratification of the *Apartheid Convention*, Canada was in a position to prosecute apartheid criminals on the basis of their having committed crimes against humanity as these were now punishable under Canadian law. The prohibition of war crimes and crimes against humanity was also part of customary international law binding on Canada.

The international community had been concerned with the issue of torture for a long time. In 1955 for example, a United Nations General Assembly adopted what became known as the *Standard Minimum Rules for the Treatment of Prisoners*⁴⁷⁰. These served as preliminary guidelines on how to treat prisoners in a humane way. In 1975, the United Nations General Assembly passed resolution 3452, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Article I defines torture as:

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

⁴⁷⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders on 30 August 1955 and approved by the United Nations Economic and Social Council on 31 July 1957.

In resolution 32/64 of 8 December 1977, the United Nations General Assembly called on all member states to reinforce their support for the 'Declaration against Torture' by making unilateral declaration against torture and other cruel, inhuman or degrading treatment or punishment. This declaration would comprise of the government's intention to comply with the 'Declaration against Torture' by appropriate legislation and other effective measures. Canada was one of the countries that made the unilateral declaration on December 18, 1982.

Other methods had been sponsored to combat the prevalent torture in the international community. For example in 1979, the United Nations adopted the *Code of Conduct for Law Enforcement Officials*⁴⁷¹ which forbade torture and related acts and in 1982 the United Nations adopted the *Principles of Medical Ethics*⁴⁷² as guidelines for medical and other professions about how to deal with victims of torture and related acts. These "soft laws" became hard binding laws in the form of conventions, particularly *The Convention On Torture*. Apartheid was a state that practiced torture and torture is a crime against humanity.

8.6.1 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

It was not until 1984 that the United Nations adopted resolution 39/46. This resolution became the *Convention Against Torture and Other Cruel, Inhuman or*

⁴⁷¹ Adopted by the United Nations General Assembly on 17 December 1979.

⁴⁷² Adopted by the United Nations General Assembly on 18 December 1982

Degrading Treatment or Punishment. However, in 1984, the definition of torture in its Article I was similar to that of the 1975 *Declaration*.

The 1984 Convention is much stronger than the 1975 Declaration. It provided for universal jurisdiction to States Parties to prosecute all those who have committed the international crime of torture. Article 4 stipulated that "each State Party shall ensure that all acts of torture are offences under its criminal law ...". Article 5(2) stipulates that "each State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ...". That person who was not extradited was subject to prosecution under Article 7. The Convention also provided under Article 8(2) the legal basis for extradition to another country in a case where one country had no extradition treaty with that other country. The alleged criminal could have even been extradited to a state other than the one where the torture took place. The receiving country was able to exercise jurisdiction over the criminal on the basis of the offence as provided for by Article 8(4). The Convention prohibited using "higher orders" or "exceptional circumstances" as excuses for acts of torture.

The *Torture Convention* came into force on 26 June 1987. Not only was Canada a signatory to this Convention it had also enacted domestic law dealing with torture in line with the stipulations of the Convention. Section 245.4 of the Canadian *Criminal Code*, which dealt with torture, provided for jurisdiction in Canada whether or not the offence was committed abroad. The definition of torture in this section was:

"Torture" means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

(i) Obtaining from the person or from a third person information or a statement,

(ii) Punishing the person for an act which that person or a third person has committed or is suspected of having committed, and

(iii) Intimidating or coercing the person or a third person, or

(b) For any reason based on discrimination of any kind, but does not include any act or omission arising only from inherent in or incidental to lawful sanctions.

There were no justifications for torture according to this Section:

(3) It is no defence to charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge, nor that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

The *Torture Convention* and Section 245.4 of the Canadian *Criminal Code* should have been potentially very potent weapons against apartheid criminals in Canada even though Canada had not ratified the *Apartheid Convention* which clearly stipulated apartheid as a crime against humanity and may have been unwilling to recognise it as a crime against humanity for the purpose of prosecution under Bill C-71. At least Canada would have been able to recognise the systematic torture going on under apartheid in South Africa and for it to prosecute the perpetrators should they ever have come to Canada. The prohibition of torture as a crime against humanity is part of customary international law, binding on Canada.

However, torture was a very limited concept in the Canadian case. It was limited in terms of the number of people who may be charged. It can include prison officials and army personnel who directly participated in the torture. But left out is a broad spectrum of individuals who did not directly participate in the torture but were responsible for running the entire system under which torture occurred. The charge of torture for example would leave out members of the State Security Council in South Africa. Torture was further limited under the Canadian *Criminal Code* to imprisonment for fourteen years rather than to life imprisonment.

8.7 Canadian Law

War Crimes and Crimes Against Humanity in Bill C-71 or Now Section 6(1.9) of the Criminal Code as amended were useful vehicles for the prosecution of apartheid criminals.

Because of the limited scope of the crime of torture, it would be preferable if apartheid criminals were charged with crimes against humanity. This is a much broader and more serious crime than torture. It encompasses a good deal of the prohibited acts under the *Nuremberg Principles*, *Genocide Convention*, *Apartheid Convention* as well as the *Torture Convention*. It stipulated:

"Crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or

conventional international law or is criminal according to the general principles of law recognized by the community of nations.

While this amendment to the *Criminal Code* as already stated came about to address the question of Nazi war criminals and the debates so far had indicated that it must apply to all situations defined as crimes against humanity as well as war crimes, it was not clear whether indeed the Canadian Attorney-General would use this amendment as such. It is in this regard that it was emphasized and recommended strongly that this amendment should indeed be used to prosecute all those accused of having committed crimes against humanity from everywhere. Apartheid is defined as a crime against humanity and so far 108 nations had ratified the *Apartheid Convention* which so stipulated. This clearly indicates that there is general global consensus on the criminality of apartheid of such a scale as to constitute a crime against humanity. No other system of government under contemporary conditions had been so labelled as a criminal government against humanity. Given the existence of domestic legislation in Canada to prosecute those who had committed the 'crime against humanity' as well as the 'war crimes' of apartheid, there should have been no hesitation in pursuing apartheid criminals when and if they were found in Canada. The existence of domestic legislation takes precedence over the ratification of international treaties. Thus Canada could not use its non-ratification of the *Apartheid Convention* to refuse to prosecute apartheid criminals. Section 6(1.9) of the *Criminal Code* as amended was clear, it applied to all those who have committed "war crimes" and "crimes against humanity". In

contemporary conditions, of the period from 1948 to 1994, apartheid South Africa was at the top of the list in terms of committing crimes against humanity.

8.8 Defences

What defences could apartheid criminals have offered if prosecuted in Canada during the era of apartheid?

8.8.1 State Orders

The most important defence put forward by Nazi war criminals at Nuremberg and in other forums later was that they acted under the orders of the state⁴⁷³. This was in fact true, Nazi war crimes and crimes against peace and humanity were committed in furtherance of state policies. The perpetrators of the crimes were high state functionaries, military, police and intelligence personnel. Refusal to carry out state directives would probably have brought about severe consequences, including death.

The *Nuremberg Principles* prohibited the defence of acting under state orders or the defence that somebody acted as head of state or government. A string of international conventions, for example, the *Genocide Convention*; the *Apartheid Convention* and *Torture Convention*, has also prohibited the defence of having acted under state orders.

⁴⁷³ As Fritz Weinschenk reports, "the individuals following these orders ... acted - perhaps in error - at any rate, in pursuit of what they had to consider orders by 'Legal' authority. Both army and civil service had sworn allegiance to Hitler personally. Theirs was not to question or scrutinize, but to 'follow orders to the end'." Weinschenk, "Nazis Before German Courts: The West German War Crimes Trials" (1976) 10 Int'l Law 515 at 518. See also A.N. Sack, "War Criminals and the Defense of Superior Orders in International Law" (1945) 5 Law Guild Rev.

What would be the possible defence to charge of war crimes and crimes against humanity in Canadian Law? Before the enactment of war crimes and crimes against humanity, Section 15 of the *Criminal Code* afforded the defence of acting under state orders:

No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

The defence of acting under state orders was still available for certain crimes committed abroad. But it was not available against the charge of war crimes and crimes against humanity by virtue of the new Section 6(1.94) as amended:

Notwithstanding subsection (1.93)⁴⁷⁴ and Section 15, a person may be convicted with respect of an act or omission referred to in subsection (1.91) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

Thus Canadian law had been brought into conformity with the stipulations of international law. It appears therefore that all justifications or defences provided for in

⁴⁷⁴ Subsection 6(1.93) stated:

In any proceedings under this Act with respect to an act or omission referred to in subsection (1.91), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 535(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

S.s.7(3) and 6(1.93) and elsewhere in the *Criminal Code*⁴⁷⁵ as amended were barred with respect to war crimes and crimes against humanity.

8.8.2 Necessity

S.7(3) of the *Criminal Code* as amended provided for the defence of necessity. This defence somewhat encompassed justifications for the impugned act. Even if this defence was available, it probably would not have met the charge of war crimes and crimes against humanity for it seemed to be directed to lesser offences. In *R. v. Perka*⁴⁷⁶, the Supreme Court of Canada discussed the defence of necessity. It can be seen from this decision that "imminent peril" "no reasonable alternative" etc. are criteria that must be satisfied before the defence can succeed. Dickson J. summarised the defence thus:

- (1) the defence of necessity exists in Canadian law as a common law defence by virtue of s. 7(3) of the *Criminal Code*;
- (2) conceptually, the defence is an "excuse" rather than a "justification"; it excuses the offender without justifying the offence. "It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or altruism, overwhelmingly impel disobedience." (at 248)
- (3) the defence requires an "urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible;" (at 260)
- (4)"the importance of the requirement that there be no reasonable legal alternative cannot be overstressed;" (at 252)

⁴⁷⁵ S. 7(3) provided:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the parliament of Canada.

⁴⁷⁶ [1984], 2 S.C.R. 232.

- (5) There is also a proportionality requirement: the infliction of a greater harm cannot be excused to avoid a lesser harm;
- (6) it is doubtful that the commission of a crime when the occasion for necessity arose will prevent the defence from applying; the accused can be punished for the underlying offence, while the subsequent conduct can be measured under the necessity defence;
- (7) the accuser's fault with regard to the situation sought to be excused under the necessity defence, is relevant to the issue of "emergency"; foreseeable conditions are not involuntary in a moral sense as required for the defence;
- (8) the onus of proof with respect to the defence is the normal onus on the Crown beyond a reasonable doubt.

Apartheid criminals could not have committed the crimes of apartheid out of necessity to defend against alleged communism and terrorism. It appears therefore that in the spectrum of offences recognized in Canadian law as discussed in *R. v. Sault Ste. Marie*⁴⁷⁷, war crimes and crimes against humanity probably fit in the category of "absolute liability" offences. Absolute liability offences entail conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There need not be any relevant mental element. Thus there is no defence to an absolute liability offence. This was disputed in *Finta* which will be discussed later in this thesis.

The other two categories of offences are *mens rea* and "public welfare" offences. *Mens rea* offences constitute of some positive state of mind such as intent, knowledge, or recklessness. The state/prosecution in such offences is required to prove the requisite state of mind. In public welfare offences there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the

⁴⁷⁷ *Ibid* at 53-4.

offence, leaving it open to the accused to avoid liability by proving that (s) he took all reasonable care.

8.8.3 Diplomatic Immunity

There was a difficulty with prosecuting before the demise of apartheid because of the existence of diplomatic relationships between Canada and South Africa. In this instance, the defence of diplomatic immunity or state immunity would have been allowed. If for example members of the South African State Security Council were to have visited Canada, they would have had the benefit of diplomatic immunity or state immunity. South African embassy personnel in Canada would have been considered to be on official business. Thus at that stage before the end of apartheid the defence of diplomatic immunity or state immunity existed.⁴⁷⁸ Government officials also benefited from state immunity laws.

Diplomatic immunity however is not an indefinite privilege. Article 39 of the *Vienna Convention on Diplomatic Relations*⁴⁷⁹ of 1961 for example deals with the duration of diplomatic immunity. The relevant parts are as follows:

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

⁴⁷⁸ See also the case of *R v Palacios* (1984), 45 O.R. (2d) 269 (C.A.), the case of a Nicaraguan diplomat charged with possession of cocaine and weapons. He relied on diplomatic immunity.

⁴⁷⁹ (1966) Canada Treaty Series No. 29. Canada incorporated this treaty into its domestic law. See *Diplomatic and Consular Privileges and Immunities Act*, S.C. 1976-77, C.31.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities *shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so*, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled *until the expiry of a reasonable period in which to leave the country*. [Emphasis supplied].

The only way to prevent the possibility of the use of the defence of diplomatic immunity during the period of the apartheid regime was for Canada to have broken diplomatic relations with South Africa. Although some Canadians called for such a step⁴⁸⁰, official policy was against such a move⁴⁸¹.

Between 1982 when the *Charter* came into existence and 1994 when apartheid was abolished, a pressure or public interest group could have challenged Canada's diplomatic relations with Apartheid South Africa by going to court to seek a Declaratory Order based on the following legal theoretical opinion or submission as of 1990.

8.9 A Declaratory Order Requiring the Government of Canada to Uphold the Rights of Black Residents of Canada Against the Practices in Canada of Apartheid South Africa

8.9.1 Issues:

⁴⁸⁰ . See Peter Edwards, "Kick out South African Envoys, Carr Urges Ottawa" *Toronto Star* 5 March, 1988 at A16.

⁴⁸¹ Arch Mackenzie, "Clark says now not time to cut ties to Pretoria" *Toronto Star* 3 March, 1988 at A1.

1. Whether given the human rights atrocities committed in South Africa as a result of the South African system of apartheid, the presence of the South African Embassy in Ottawa with the acquiescence of the Canadian government, which presence permits the South African Embassy personnel to propagate in Canada ideas supportive of apartheid, leads the Canadian government because of its inaction against the propagation of the above ideas to violate the *Canadian Charter of Rights and Freedoms*, particularly sections 15 and 27, of the *Criminal Code* as well as customary international law and general principles of law as recognized by the community of nations?
2. Given the nature of apartheid, is it legal for the Canadian government to maintain diplomatic relations with South Africa? Alternatively is maintaining a diplomatic relationship with South Africa not violative of customary international law and general principles of law as recognized by the community of nations? Is Canada complicit in the crime of Apartheid by maintaining diplomatic relations with South Africa?
3. Can diplomatic immunity be a defence against a charge of war crime and/or crime against humanity?
4. Though there is no precedent anywhere in the world to what is being asked of the Canadian courts to decide on the matter of South African presence and activities in Canada, the general trend around the world has been that of cutting off of diplomatic relations with South Africa through the political-decision making process. Thus there has not been any need to resort to the law courts. The

Canadian government has however refused to cut off diplomatic relations with South Africa (or to stop South African activities in Canada) on the pretext that Canada's presence in South Africa is required in order to influence developments there. Political decisions like this one are now no longer immune to legal challenges on the basis of the *Canadian Charter of Rights and Freedoms*⁴⁸². Maintenance of diplomatic relations is a governmental act coming within the ambit of Section 32(1) of the *Charter*. It is argued here that Canada's maintenance of diplomatic relations with South Africa, given all that it entails in Canada, is a violation of the rights and freedoms of black Canadians on the basis of both the *Charter* sections 15 "equal protection and benefit of the law" and 27 "multicultural heritage", it also violates Canada's *Criminal Code* pertaining to hate propaganda. It is also a violation of international law principally customary international law and general principles of law as recognized by the community of nations. I will proceed from the general, i.e. international law to the specific, i.e. Canadian law.

5. There are now more nations that have no diplomatic relations with South Africa than there are those who maintain diplomatic relations. For example, of the 48 Commonwealth Nations, only three still maintained diplomatic relations: Canada, Britain and Malawi. South Africa itself was forced to leave the Commonwealth in the early sixties. The lack of diplomatic relations between

⁴⁸² See *Operation Dismantile v The Queen* [1985], 1 S.C.R., at 441.

South Africa and the majority of the Commonwealth Countries is evidence of the repugnancy of apartheid South Africa as will be shown here.

6. The reason why the majority of nations had cut off diplomatic relations with South Africa is because of the latter's policy of apartheid whose racial basis is intense discrimination and extreme repression against the majority of its citizens who are black. Eighty percent of the people in South Africa are black.

8.9.2 Rights Violations in Canada

7. Because of Canada's diplomatic relations with South Africa, it means there are South African diplomatic personnel in Canada ranging from Ambassador down to a common employee. The Ambassador is responsible to his country through the Foreign Minister. In South Africa, the Foreign Minister is a member of the State Security Council (SSC) which is the highest executive decision-making body that is responsible for the maintenance of apartheid, hence for the crimes against humanity going on there. The South African Ambassador is the external outlet for the justification of the crimes against humanity going on in South Africa. He is part of or is complicit in the commission of the crime against humanity in South Africa. He is also responsible for the justification abroad of the policy of racial discrimination in South Africa. He is a criminal against humanity.
8. In Canada, the Ambassador from South Africa and other embassy employees promote apartheid and racial discrimination by lecturing on university campuses

and elsewhere. Their defence of apartheid in the Canadian media is common place. They have also been using advertisements in the media, they have been facilitating business and travel contacts between Canadian and South African companies and individuals and have arranged propaganda tours to South Africa. All these activities have gone on with the knowledge of the Canadian government. It stems from Canada's maintenance of diplomatic relations with South Africa.

9. The promotion of apartheid in Canada which is in fact a justification of the crimes against humanity which are perpetrated by the policy of apartheid has had the effect of threatening and upsetting a great majority of black Canadians and many other Canadians who have felt and feel that this promotion constitutes a serious threat to the multi-cultural harmony of Canada. Promotion of racial discrimination is also a violation of Canadian law.
10. A great majority of black Canadians, at the head of which is the Jamaican-Canadian Association, an incorporated body comprising the largest number of black Canadians, feel that the promotion of apartheid and racial discrimination, and its message that black people are inferior, spreads racial hatred against black people in Canada as in Africa. Inevitably this situation fosters insecurity among black Canadians.
11. Because of the lack of intervention by the Canadian government, black Canadians feel that their rights and freedoms under section 15 of the *Charter* -- "equal rights and equal benefits of the law" as well as under Section 27 of the

Charter -- "Preservation and enhancement of the multicultural heritage", have been denied. Further the lack of government action to stem the dissemination of racial hatred against blacks in Canada as in Africa on the part of the South African embassy personnel has encouraged the violation of *Canada's Criminal Code* as well as treaty law, customary international law and general principles of international law which prohibit discrimination on the basis of race among others.

12. Given that Canada has a duty to act on the basis of sections 15 and 27 of the *Charter*; the *Criminal Code*; the *International Convention on the Elimination of All Forms of Racial Discrimination*; customary international law and general principles of law, Canada by not acting is in violation of this duty to act as provided for in these laws.

8.9.3 Precedents Where Canada Has Acted

13. The amendments to the *Criminal Code* brought about by Bill c-71 which introduced the crimes of war crimes and crimes against humanity into the *Criminal Code* are aimed at "preventing Canada from becoming or being perceived to be a haven for war criminals"⁴⁸³. But Canada has not prevented the dissemination of racial discrimination in Canada by South Africans. Imre Finta was the first person to be charged with war crimes stemming from his activities

⁴⁸³ Statement of Hon. Ramon Hwatyshyn, Minister of Justice and Attorney General of Canada, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-71, An Act to Amend the *Criminal Code*, the *Immigration Act*, 1976 and the *Citizenship Act*, on August 25th, 1987, at 1:12.

during the Second World War. Thus Canada has at last acted in the case of Nazi war crimes.

14. Thus though Canada took forty years to take action, it now recognizes the gravity of war crimes and crimes against humanity for it to start prosecuting those accused of having committed these crimes. It should similarly act against South Africans.
15. The apartheid government of South Africa is the only country now regarded in international law as committing crimes against humanity, which crimes must be prosecuted wherever the perpetrators are found. The South African ambassador is a representative abroad of a regime that commits war crimes.
16. The International Military Tribunal which was set up after the first world war to try former Nazi officials at Nuremberg, set the international precedent for the prosecution of war criminals and criminals against peace and humanity. All those accused whose defences including that of "official orders" were found guilty and were either sentenced to long prison terms or to be hanged. A good number of those who escaped to other countries were later extradited to stand trial in relevant jurisdictions. Bill C-71 in Canada enabled war criminals to be tried in Canada and Imre Finta is the first to be so charged.
17. Apartheid is likened to Nazism. It is now recognized that "collaboration with the perpetrators of apartheid ought to be as impossible as collaboration with the

Nazis"⁴⁸⁴. Apartheid like Nazism is a crime against humanity. By maintaining diplomatic relations with apartheid South Africa, Canada is in advertently party to the commission of a crime against humanity. The Canadian government is party to racial discrimination against blacks in Canada by virtue of its ties to South Africa, which ties permit South Africans to disseminate racial discrimination in Canada.

18. To show its abhorrence of war crimes and crimes against humanity, Canada has barred Austrian President Kurt Waldheim, suspected of having committed war crimes during the Second World War, from coming into Canada⁴⁸⁵. Waldheim is only suspected, he was never convicted of these crimes. Yet he is barred from entering Canada. But Canada is silent on South Africans.
19. On the other hand Canada is maintaining diplomatic relations with South Africa, whose regime is committing crimes against humanity and whose embassy employees in Ottawa are disseminating racial hatred against blacks in Canada and South Africa.
20. On July 6th, 1986 Canada barred Gerry Adams, a British member of parliament, from entering Canada. He has been prevented from coming to Canada many times since. The pretext is that he is a convicted criminal. Yet more massive crimes against humanity are being perpetrated in South Africa but Canada still maintains diplomatic relations with South Africa.

⁴⁸⁴ The Archbishop of Capetown, Desmond Tutu, quoted in Bruce McLeod, "Sanctions help prove the world is watching" *Toronto Star*, 7 February 1989 at A15.

⁴⁸⁵ *Globe and Mail*, 29 April 1987 at A1 and A2, *Vancouver Sun*, 29 April 1987 at A10, *Winnipeg Free Press*, 29 April 1987 at 1 and 4.

8.9.4 Declaration

21. Since no action or proceedings is open to objection on the ground that a merely declaratory judgement or order is sought thereby, and the court may make binding declarations of right, whether or not any consequential relief is or could be claimed, it is requested that the court should make the following declarations, that:
 22. The rights of black residents of Canada to equal protection and benefit of the law under section 15 and to non-discrimination in Canada's multicultural society under section 27 of the *Charter* require the Government of Canada to take appropriate measures to stop South African officials from promoting apartheid within Canada.
 23. Promoting, aiding or supporting apartheid is a crime against humanity within the meaning of section 6, Subsection 1.91 of the *Criminal Code* of Canada.
 24. Diplomatic immunity is no defence against a crime against humanity.
 25. The wilful public promotion of apartheid is a violation of section 319 of the *Criminal Code of Canada*, customary international law as well as general principals of law recognized by the community of nations.
 26. By maintaining diplomatic relations with apartheid South Africa, Canada is complicit in the crime of apartheid.

Such a case was never filed and no court was seized of such an application. Had such a case been filed, interesting legal arguments would have ensued.

8.10 Conclusion

Canada waited for over forty years before enacting legislation that permitted the prosecution, internally, of those who had committed war crimes; crimes against peace and humanity. Once the amendments to the *Criminal Code* were made, Canada could have prosecuted apartheid criminals between 1948 and 1994 on the basis of the amended *Criminal Code* or indeed on the basis of conventional international law or customary international law. The various domestic and international laws that Canada could have used are spelt out in this chapter. The next chapter discusses the possibilities of Canadian prosecution of apartheid criminals in the post-apartheid era.

CHAPTER NINE

GETTING THE STATE TO ACT: PROSECUTE OR EXTRADITE

9.1 Introduction

This chapter asks the question: Can Canada assert universal jurisdiction power to prosecute apartheid criminals in the post-apartheid era? It also discusses the issue of extradition, as it is an aspect of the exercise of universal jurisdiction: prosecute or extradite.

My working hypothesis is that the Canadian *Crimes Against Humanity and War Crimes Act* on its own and as incorporated in the *Criminal Code* is a very potent tool for the prosecution of war criminals and criminals against humanity including apartheid criminals and its application would be a useful example to the whole world as how to fight impunity for international crimes while according justice to the victims of war crimes and crimes against humanity.

9.2 The Legal Context

Canada's prosecution of war criminals and criminals against humanity can only be conducted with the consent of the Attorney General of Canada. The police or the crown cannot independently lay war crimes or any international crime (e.g. genocide, torture or crime against humanity) charge. Private prosecutions are prohibited.

As importantly, Canada does not have the equivalent of the civil US *Alien Tort Claims Act* (ATCA) whereby a foreign individual can sue in the US civil courts, violators of human rights pertaining to international torts committed elsewhere, as long

as the perpetrator is in the United States. Canada does not allow such civil claims for international torts that happened elsewhere.⁴⁸⁶

The assertion of universal jurisdiction for the prosecution of international crimes in Canada is not self-executing. Prosecutions of war crimes and related crimes have to be induced on the government and judiciary of Canada. In the face of governmental inactivity and given that only the government of Canada can give the go-ahead to prosecute a war criminal in Canada, is the avowed universal jurisdiction accessible to victims? Can Canada and its judiciary be induced to prosecute apartheid criminals? How can this be done? What have other groups done to get Canada to prosecute Nazi war criminals and those who perpetrated genocide in Rwanda? What motivates Canada. This chapter discusses all these and other questions.

In implementing the Rome Statute that created the International Criminal Court (ICC), Canada brought in the *Crimes Against Humanity and War Crimes Act* (2000) to domesticate the Rome Statute. Canada also introduced an operational implementation framework. Canada also already had a Program on Crimes Against Humanity and War Crimes. It included personnel from the Department of Justice, the Royal Canadian Mounted Police (RCMP) and the Canada Border Services Agency (CBSA) to cooperate in the investigation, prosecution or deportation of war criminals and criminals against humanity. The personnel included lawyers, historians, anthropologists, sociologists, and social scientists. The departments have an Interdepartmental Operations Group

⁴⁸⁶ Caroline Davidson, "Tort au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law", (2005) 38 *Vanderbilt J Transnat'l L* 1403. See also Gib Van Ert, *Using International Law In Canadian Courts*, 2nd ed. (Toronto: Irwin, 2008).

(IOG) that co-ordinates the activities of the separate war crimes units. The aim of this program is to investigate and recommend to relevant departments what should happen or be done to individuals who are alleged to have committed crimes against humanity, war crimes, torture, or other gross and serious violations of human rights anywhere in the world on information received from third parties or on the motion of the department involved. The recommendation could be to: do nothing, investigate, charge and prosecute, initiate an admissibility hearing, revoke permanent residence or citizenship, continue to monitor, deport and so on.

The cases that the War Crimes Program investigates are divided into two groups: (a) World War II Crimes and, (b) Modern War Crimes. Until relatively recently, the review of the War Crimes Program reveals that there has been an over-concentration of investigations, prosecutions, deportations, revocations etc. on the Second World War crimes.

For the past decade, the War Crimes Program has been publishing Annual Reports. It details how many investigations in Canada and abroad have been initiated, how many individuals and from which countries have been investigated, recommended for action (prosecution, deportation etc) or status revoked and so on. The Annual Reports also contain an appendix among other statistics of designated Regimes that are known historically to have committed war crimes or crimes against humanity or other serious violations of human rights. For example, the following regimes among others are so designated:

(1) The Siad Barre regime in Somalia of between 1969 and 1991, (2) the military regimes of Haiti between 1972 and 1986 and between 1991 and 1994 except between August and December 1993, (3) The Afghan government of 1978 and 1982; (4) the Iraq government of 1968 to May 2003, and (5) the government of Ethiopia from September 1974 to May 1991.⁴⁸⁷

As can be seen, South Africa's apartheid regime from 1948 to 1994, does not appear on this list or any other list compiled by the Canadian government relating to war crimes, criminal regimes or regimes committing crimes against humanity. As can be seen here, the crime of apartheid is missing from the list or from any list in any of Canada's war crimes reports since the late 1990s.

In assessing the new *Crimes Against Humanity and War Crimes Act* that came into being in 2000, Madeleine Schwartz,⁴⁸⁸ counsel in the war crimes unit of the Department of Justice states that:

the challenge of prosecuting crimes against humanity is not simplified by the new *Crimes Against Humanity and War Crimes Act*... Crimes against humanity are not simple offences. They entail organized, criminal action directed towards destroying, at least in part, a civilian population. The concern is not with isolated acts that are criminal on their own, but with acts that together constitute conduct that threatens international peace and security and that shocks the conscience of humanity. Any prosecution of an individual for such offences must start from the premise that the accused played some part in this broader context.

⁴⁸⁷ Various War Crimes Reports up to 2008/9.

⁴⁸⁸ Madeline J. Schwartz, "Prosecuting Crimes Against Humanity in Canada: What must be Proved" (2002) 46 (1) *CLQ* 40. The foremost authority on war crimes prosecutions in Canada and one who has written quite a number of seminal articles and papers, all available on the Internet is Joseph Rikhof, a senior counsel in the Department of Justice's Crimes Against Humanity and War crimes section: "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions On International Impunity", "Canada and War Criminals: The Policy, The Programme and the Results" Paper given at the International Society for the Reform of Criminal Law Conference, Montreal, August 2004. I have personally talked to Joseph Rikhof. He had absolutely no information on any prospects for pursuing apartheid criminals.

The legislation does not appear to place such limits on who must or must not be prosecuted but is this paradigm being adopted by Canada, the high threshold of who must be prosecuted? As reviewed in the previous chapters, particularly chapter one, the crime of apartheid should fit the threshold indicated by Schwartz.

However, each case will depend on its merits, based on the allegations and charges and has to be proved independently of the general conditions under which war crimes and crimes against humanity were committed. The crown would have to call evidence to prove their case. There would also be independent defences mounted by the accused.

As guidance therefore, as to the actual dynamics that would unfold in a Canadian courtroom, it is imperative to look at the only two prosecution cases so far that have ever been actually completed in Canada respecting war crimes, crimes against humanity, genocide and so on: the *Finta* and *Munyaneza* cases. From looking at these cases a picture is likely to emerge as to how a trial of an apartheid criminal might unfold.

David Matas states the following in relation to apartheid criminals: “If a South African torturer is found in Canada, then Canada has a duty to prosecute that torturer, whether South Africa prosecutes or not, whether South Africa grants an amnesty or not. Canada has recognized that duty and legislated the offence of torture in its criminal code. The law gives Canadian courts universal jurisdiction. A South African torturer who committed his crime in South Africa against a South African victim, will be

prosecuted in Canada, provided only that he is physically present there.”⁴⁸⁹ Matas goes on to state that Canada can on the same basis prosecute South Africa’s criminals against humanity.⁴⁹⁰

Canada, however, omitted the inclusion of “enforced disappearances” and the “crime of apartheid” in its definition of “crimes against humanity” in its *Crimes Against Humanity and War Crimes Act* of 2000. According to Fannie LaFontaine in her path-breaking publication *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts*,⁴⁹¹ this deliberate omission coincides with Canada’s failure to ratify the international conventions dealing with these subjects namely *The Convention on Forced Disappearances*⁴⁹² and the *Apartheid Convention*. LaFontaine suggests, with some other authors, that the failure to ratify the *Apartheid Convention* may be explained by its “unease with the grievances of the country’s aboriginal population” who were essentially confined historically to apartheid-like conditions.⁴⁹³ Apartheid-like conditions were imposed on aboriginals also in the U.S., Australia, and New Zealand. Britain, France, Belgium, Germany, Italy, Spain, and Portugal had once been colonial powers and all these countries maintained strong economic ties with apartheid South Africa. None of these countries have ratified the *Apartheid Convention*. Would these countries exercise universal jurisdiction against apartheid criminals.

⁴⁸⁹ David Matas, *No More: The Battle Against Human Rights Violations* (Toronto: Dundurn 1994) at 106.

⁴⁹⁰ *Ibid* at 106.

⁴⁹¹ Fannie LaFontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto Carswell 2012) at 165.

⁴⁹² Doc A/61/488.

⁴⁹³ LaFontaine, *ibid*, Note 25 at 165.

9.3 *The Finta Case*⁴⁹⁴

Finta became the first completed war crimes prosecution in Canada after the 1987 amendments to the *Criminal Code* that were discussed earlier. *Finta* also can be credited with derailing the prosecutions of war criminals for a decade because of the judicial rulings that led to his acquittal and his successes in various crown appeals.⁴⁹⁵ Like all defendants against the exercise of universal criminal jurisdiction, the jurisdiction of the Canadian courts to litigate this case as well as other related defences like: unreasonable delay; retroactivity of the legislation under which he was prosecuted; discrimination and unfairness of the trial were all mounted. The judges all the way to the Supreme Court of Canada rejected the constitutional arguments, challenging the legislation. Despite his defeats on the constitutional challenges, *Finta* still won the all-important acquittal.

However, *Finta* was permitted leeway in his interrogation of prospective jurors so that the effect was the exclusion of Jews from being on the jury panel, a development that has not escaped analysis by a number of scholars.⁴⁹⁶ *Finta* was allowed to benefit from the judicial interpretation of the legislation which included, that for him to be convicted of war crimes, he had to know that his acts had a factual quality that made them war crimes. He has had to have a subjective awareness that he was committing not a simple crime, but a war crime. Conviction for war criminality carried an added stigma. *Finta* also benefited from the defence of obedience to superior orders and that he had no

⁴⁹⁴ *R v Finta* [1994] 1 S.C.R. 701 (SCC).

⁴⁹⁵ This summary borrows from Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto et al: University of Toronto Press, 1999) at 240 to 243.

⁴⁹⁶ Roach quotes both Irwin Cotler and David Matas as writing that *Finta's* lawyer's cross-examination of holocaust survivors invoked sentiments of anti-Semitism and the trial became a "continuation of the victimization of holocaust survivors" *Ibid.* at 241. M. Cherif Bassiouni, the world's expert on war crimes and international criminal law was an expert witness for the prosecution in the *Finta* case in Toronto.

moral choice as to whether to follow the orders. He was allowed to put forward these defences without testifying including that he mistakenly believed that he was following a valid law which was not manifestly unlawful. The court found that there was an air of reality to justify putting these defences to the jury in part because of the wartime hostility in Hungary at the time towards Jews.⁴⁹⁷

David Matas⁴⁹⁸ criticised the courts' handling of the Finta case in Canada. Matas, asks and answers this question: "The evidence against Finta [was] overwhelming and unanswered....Yet Finta was acquitted. How is it possible that Finta could win his case when he called no evidence on his own behalf and the evidence against him was overwhelming? The answer is a stacked jury and an appeal to racial prejudice"⁴⁹⁹. In a polite critique of the proceedings, Matas states that the judge should not have allowed the questions by defence counsel that bordered on racial baiting and hatred. "The questions Christie asked were designed to exclude all Jews from the jury and the "judge did not correct either adequately or at all"⁵⁰⁰. The result was that Finta was acquitted. This is an indirect judicial critique.

The courts also raised the bar for founding a conviction for war crimes: the perpetrator had to have *mens rea* not only for the underlining offence but the extra layer that the offence was a crime against humanity. In no other context does the judiciary require *mens rea* on top of *mens rea*.

⁴⁹⁷ *Ibid* at 242

⁴⁹⁸ "The Case of Imre Finta" (1994) UNBLJ 281.

⁴⁹⁹ *Ibid* at 282.

⁵⁰⁰ *Ibid* at 282.

9.4 *The Munyaneza Case*

Munyaneza came from Rwanda and was alleged to have been involved in the commission of war crimes, crimes against humanity, genocide and sexual offences. Munyaneza was prosecuted under different circumstances and under more negative criminal regimes for those charged with genocide, war crimes, torture, rape, crimes against humanity and other serious violations of human rights. When the Supreme Court of Canada upheld Finta's acquittal in 1994, the environment had changed by the time Munyaneza was charged in 2005. At that time (1994), the International Criminal Tribunal for the Former Yugoslavia (ICTY) had already been established and the Rwanda genocide was almost at hand and shortly thereafter the International Criminal Tribunal for Rwanda (ICTR) was born and there was a heightened consciousness about war crimes, crimes against humanity and genocide at this time. These two tribunals began generating important jurisprudence on genocide, war crimes, torture, crimes against humanity, etc. National courts now liberally quote these decisions in war crimes and crimes against humanity prosecutions as already indicated. In 1998, former Chilean dictator Augusto Pinochet had been arrested in England on an extradition warrant for having committed torture and other international crimes while he was leader in Chile. This marked the first time since World War 11 that an actual former leader of a country was arrested using the ambit of universal jurisdiction as a basis for the arrest.⁵⁰¹

During the same year, 1998, the Rome Statute establishing the International Criminal Court (ICC) had been adopted. Canada incorporated the Rome Statute into its domestic

⁵⁰¹ There are many publications on this topic, among them are publications by Human Rights Watch, Amnesty International and hundreds of scholarly publications and references in jurisprudence.

legislation, namely the *Crimes Against Humanity and War Crimes Act* which came into being in 2000.

The *Crimes Against Humanity and War Crimes Act* by section 14(1) addressed the issue of superior orders, eliminating the defence of superior orders as follows:

(1) In proceedings for an offence under any sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior--whether military or civilian--to perform the act or omission that forms the subject-matter of the offence, unless, (a) the accused was under a legal obligation to obey orders of the government or superior; (b) the accused did not know that the order was unlawful; and (c) the order was not manifestly unlawful. (2) For the purposes of (1) (c), orders to commit genocide and crimes against humanity are manifestly unlawful". Further, (3) An accused cannot base their defence under the subsection (1) on the belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.

This subsection seems to be a direct response to some of the defences that were successfully deployed by *Finta*. It can be stated that *Finta* but not *Munyaneza* operated under favourable criminal conditions.

Munyaneza's trial commenced in May 2007. *Munyaneza* was convicted in May 2009 on all the seven counts on which he had been charged, namely genocide, war crimes, crimes against humanity and sexually-related offences. He was sentenced to life imprisonment in October 2009. He has appealed his conviction and sentence.⁵⁰²

⁵⁰² I am grateful to Richard Perras, *Munyaneza's* lawyer for supplying me with a lot of appeal documents and arguments in this case. Because the case is ongoing, it would be unscholarly to comment on those documents given the fact that the eventual outcome of the case is unknown. The documents will be put to more thorough and useful use once the appeals are perfected and decisions rendered. The appeal is based

There are some interesting issues in the Munyaneza case. The case was tried before a judge alone. (Finta was tried before judge and jury.) The Munyaneza trial travelled to several countries in order to be in close proximity to the witnesses and evidence: namely France, Belgium, Rwanda, Kenya and Tanzania. It would have been unwieldy and quite expensive to travel with the jury to all those countries had the trial been before judge and jury. However, a video feed could have been used to avoid travelling with the jury. The trial took two years and would have been prolonged had there been a jury. Will all such trials need to travel to foreign countries to access witnesses and evidence? It appears to me that Munyaneza was denied the fundamental right to be tried before judge and jury as should be befitting such cases. The trial also proved expensive. How many such trials can the Canadian tax-payer afford? Will Canada be embarking on further such trials considering the costs?

The Munyaneza trial was principally based on *viva voce* live witnesses' testimony. Identification evidence was central as was the issue of *actus reus*. The judgment details a lot of factual eyewitness evidence and hardly spends any time on jurisdictional issues. The judge quotes the *Crimes Against Humanity and War Crimes Act* whose provisions were not challenged. The appeal is based a lot on the issue of identification and *actus reus*. The *Munyaneza* case is therefore an incomplete record but it establishes a number of fundamentals: universal jurisdiction for the prosecution of war crimes and crimes against humanity, genocide etc is well established and Canada seems to be committed to

on both legal and factual grounds. For an analysis of the Muntaneza decision, see Fannie Lafontaine, "Canada's Crimes against Humanity and War Crimes Act on Trial," downloaded from <http://jicj.oxfordjournals.org> at University Laval on March 17, 2010.

prosecuting war criminals and criminals against humanity, when this is feasible. After Munyaneza was sentenced to life imprisonment in October 2009, Canada arrested another Rwandan for war crimes, crimes against humanity and genocide.

Munyaneza was tried before an ordinary but not specialized criminal court by a Canadian Judge. Other countries are exploring other options for trials of war criminals and criminals against humanity in national courts. Uganda, for example, may be the first country in the world to hire foreign judges to help diversify the judiciary in the efficient prosecution of crimes of an international nature. Indeed Uganda has a special court panel dealing exclusively with war crimes cases; no such court exists anywhere else. The Principal Judge James Ogoola is quoted as saying that: “we are considering the idea of introducing foreign judges in our court. Since we are handling cases of an international nature, we think it will improve the quality of judgment and create a good perception about our work”.⁵⁰³ This would indeed be a revolutionary step to take for a country to consider diversifying its judiciary that way. Could Canada and other countries do the same?

There is another consideration to having a diverse judiciary and jury in western countries trying war criminals from other countries, cultures and races – to avoid racial alienation and the appearance of injustices as so forcefully articulated by Nelson Mandela. At his trial in 1964, Nelson Mandela, for example, demanded a different constellation of circumstances, had denounced the circumstances under which he was being tried in a chapter entitled, “Black Man in a White Court” in his book, *No Easy*

⁵⁰³ Taddeo Bwambale, “Uganda: Foreign Judges To Be on War Crimes Court” *AllAfrica.com*. 29 January 2010.

Walk to Freedom.⁵⁰⁴ On the issue of a representative judiciary, he said, “I am a black man in a White man’s court. This should not be. I should feel perfectly at ease and at home with the assurance that I am being tried by a fellow South African who does not regard me as an inferior, entitled to a special type of justice. This is not the type of justice most conducive to feelings of security and confidence in the impartiality of the court.”⁵⁰⁵ This same point was made by Michael Mandel, as dealt within a previous chapter, in relation to Africans being tried in European countries in exercise of universal jurisdiction while Europeans and Americans are never tried in African courts for the commission of the crime of colonialism imposed on Africans by Europeans and Americans. Munyaneza had the misfortune of being tried before an all-white personnel in Montreal.⁵⁰⁶

9.5 The Defence Side of the Ledger

It should not be forgotten that the literature on the prosecution of criminals against humanity centres on the exercise of universal jurisdiction by the various courts. The other half of this equation is also preparing defences against the extraditions or prosecutions. In the case of South Africa, the perpetrators of apartheid would need to answer for their crimes if prosecuted in Canada. If the apartheid criminals were to be prosecuted criminally, the analysis in an earlier chapter in respect of defences would apply equally here as well, so I will not repeat them in this chapter.

⁵⁰⁴ (London: Heinemann, 1965, 1986 edition) at 125 to 162.

⁵⁰⁵ *Ibid*, at 129.

⁵⁰⁶ I had the occasion to observe the trial in Montreal.

9.6 Retroactive Criminal Legislation

The prohibition against the use of retroactive legislation would be used as a defence in the case of apartheid criminals especially.

The possible retroactive application of the *Criminal Code*, *Immigration Act* and *Citizenship Act* was of major concern during the debates on war crimes legislation in 1987. Deportation of those accused of perpetrating international crimes during the Second World War was a major possibility. Opponents of deportation argued that suspected war criminals who acquired a Canadian domicile before 1976 for example, could not, *ex hypothesis* be deported for war crimes under the previous immigration laws. In other words, it would be retroactive application of the *Immigration Act* if acts that were not grounds for deportation before 1976, could now be grounds for deportation.

To repel the attack on possible retroactive application of Canadian law which could lead to deportation, the Deschênes Commission recommended thus:

51 - To dispel doubts surrounding the construction of certain statutory provisions:

a) s. 9 of the Citizenship Act, 23-24-25 E1. II, c.108 should be amended by adding a provision making it declaratory, so as to render it explicitly applicable to situations arising under former laws on citizenship and immigration.

b) s. 127 of the Immigration Act, 1976, 25-26 E1.II, c. 52 should be amended by adding a second paragraph, as follows: "This section does not apply to a person who has committed or been involved in or associated

with a war crime, or a crime against humanity, as those crimes are defined in ss. 6 (1.9) of the Criminal Code.”

The previous legislations were so repealed.

The application for permanent residence and Canadian citizenship now includes answering questions whether in the past the applicant was involved in war crimes and crimes against humanity and or whether a conviction issued as a result of committing these crimes. The *Immigration Act*, 1976 and as severally amended could be read to have retroactive application. It goes the same for the *Citizenship Act*.

Section 11(g) of the *Canadian Charter of Rights and Freedoms* was precisely brought about in 1982 so as to permit the retroactive application of Canada’s criminal laws to war crimes and crimes against humanity committed during the Second World War. Section 11(g) reads:

11. Any person charged with an offence has the right ... (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

This subsection is modelled principally on two international human rights instruments which provide for retroactive application of legislation in respect of war crimes and crimes against humanity: the European Human Rights Convention and the International Covenant on Civil and Political Rights. Section 7 of the European Convention states:

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

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.

Section 15 of the International Covenant on Civil and Political Rights provides:

15 (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Except for war crimes and crimes against humanity, retroactive application of legislation in penal or criminal offences is prohibited. National legislations and international human rights instruments are agreed on that score. The American Human Rights Declaration for example provides:

9. No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit there from.

The Universal Declaration of Human rights also prohibits retroactive application of penal laws:

11(2) No one shall be held guilty of any penal offence on account of any act or omission that did not constitute a penal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

And so does the *African Charter on Human and Peoples' Rights*:

7 (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.

The courts in Canada have also raised serious doubts about the efficacy of retroactive application of legislation, especially in criminal matters. In the extradition case of *Federal Republic of Germany v. Rauca*⁵⁰⁷ the Chief Justice of the High court of Ontario denounced the retroactive nature of the law:

The submission that legislation be enacted to apply retroactively is foreign to our concept of justice. Retrospective legislation is rightfully viewed with suspicion and when it invades the field of criminal law, it is especially repugnant. I do not consider these to be viable alternatives.

Rauca was however extradited pursuant to the Canada-West Germany Extradition Treaty. In any case, by the time these words were uttered, the Canadian Charter with its

⁵⁰⁷ (1982), 38 O.R. (2d) 705 at 717 (affirmed in 1983), 41 O.R. (2d) 225.

section 11(g) had already come into existence which did not bode well for Rauca. Given that he had been charged with war crimes, he could not have repelled the criminal charges on the basis of retroactivity of legislation.

Apartheid criminals cannot use the defence of retroactive application of criminal law. Apartheid was a crime under international law and criminal law of Canada

9.7 Political Extradition in International Law

The crime for which the Government of Canada seeks to deport or extradite a South African apartheid criminal could be characterized as an offence of a political nature. By delving into the political objectives of those who committed apartheid-era crimes, the South African Truth and Reconciliation Commission opened the door to the defence of the crime of a “political nature”. This crime was committed in the context of a political struggle within and without South Africa.

In general no person is to be surrendered if the offence in respect of which his surrender is required is one of a political character, or if he proves at any stage of the proceedings that the requisition [extradition] for his surrender has been made with a view to try or punish him for an offence of a political character.⁵⁰⁸

In general, a political offence would be an exception to extradition. This exception has sometimes been provided for in extradition treaties between countries. In fact, the defence of political offence has generally and so far been argued in the context of an existing treaty.

⁵⁰⁸ Stephen, F.J, *A History of the Criminal Law of England* (New York: Burt Franklin, 1883) at 69.

All scholars consulted state that there is no agreed upon or satisfactory definition of a political offence. It has been left to the Courts to define in context whether or not a particular act is a political offence. Courts have been able to tailor their reasoning in my view, like scholars, according to their political predilections. They have sometimes narrowed the definition and sometimes broadened the definition according, again in my view, to their world outlook. In short, the concept of political offence is highly malleable and it exhibits itself in contradictory judgments. Courts themselves admit that there is no agreed upon definition.⁵⁰⁹ Two aspects of the definition of political offence however have generally been recognized.

(a) “Pure political offences” - an unlawful act without an element of the common crime and generally directed solely against the sovereign of the power structure. The actor acts as agent of the political movement and without malice against anyone but the state. Additionally the conduct only affects the political structure. Examples include treason, espionage, and sedition. This kind of offence is not extraditable. This would exclude apartheid criminals who were in the employment of the state. This category applies more to those in opposition.

(b) The “relative political offence”- these are offences that are not fully political or wholly common crimes. The offence is in the form of a common

⁵⁰⁹See Gregory Chadwick Perry “The Four Major Western Approaches to the Political Offence Exception to Extradition: From Inception to Modern Terrorism” (1989) 40 Mercer L Rev 709; Nancy P. Kelly “The Political Offence Exemption to Extradition: Protecting the Right of Rebellions in an era of International Political Violence” (1987) Oregon L Rev 405.

crime but has a political objective. The Truth and Reconciliation Commission decided that those who committed crimes in South Africa with a political objective for and against apartheid committed political acts and as long as they confessed, they could be amnestied. Apartheid criminals could attempt to avail themselves of this defence to extradition.

The first aspect of “relative political offence” is non-problematic. It is the second one that scholars’ have grappled with.

Three approaches have been identified in defining what constitutes a (relative) political offence:

- (a) Swiss “predominance” test;
- (b) French “objective” test;
- (c) Anglo-American “incidence” test.

The Swiss test balances the common elements of the crime against the political elements involved. To satisfy the political requirement, two requisites must be met:

- (a) The offence must be directly related to the obtainment of or to the promotion of the movement or political goal; and
- (b) The political element of the crime must predominate over the criminal element, or at least the conduct must be proportionate to the desired political ends.⁵¹⁰

The French test is very restrictive. An offence is political if the actor directly injures the state. Thus the nature of the affected target is very important. Also considered in the

⁵¹⁰ See Kelly at 718-721 and cites therein.

French test is the crime's common element. But the affected target test is predominant.⁵¹¹

The Anglo-American approach consists of two branches. The English branch approach left the definition to judicial interpretation. The 'incidence' test is, however, predominant.⁵¹² The *Castioni* case concerned a request for extradition by Switzerland of a man who had escaped to England from the country after having committed a murder there in the course and in furtherance of an insurrection to overthrow the Swiss Government. The Court held that the murder happened as an incident to an insurrection thus it was a political offence and as such was not extraditable.

This again would exclude apartheid criminals in the employment of the state.

In *Re Meune*⁵¹³ the "two party struggle" requirement emerged. "There must be two or more parties in the state, each seeking to impose the government of their choice on the other" and the offence must be against the other party in pursuit of a political objective. Apartheid criminals in the employment of the state would qualify to use the stated defence here.

In *Ex parte Kilczynsk*,⁵¹⁴ the Court stressed that there must be evidence of political opposition between fugitive and requesting state. Here English courts considered the offence more than the motivation. Extradition was refused. This case and *Castioni* are the only cases where the English courts have held that the offences were of a political nature.

⁵¹¹ See Kelly at 721-723 and cases cited therein.

⁵¹² See *In Re Castioni* [1984] 2 Q.B. 415. The incidence test emerged in this case.

⁵¹³ [1984], Q.B. 415.

⁵¹⁴ [1950] 1 Q.B. 540.

The American branch has followed generally *Castioni* “incidence” test. The incident is regarded as more important than motive, “incidental to a political rebellion”.

In *Re McMullen*,⁵¹⁵ extradition was denied on political offence exception grounds. McMullen was a member of the Irish Republican Army (IRA) who after committing a crime in England fled to the U.S.

In *Re Mackin*,⁵¹⁶ the offence was judged political after considering these factors:

- (a) was there a political uprising
- (b) was accused a participant
- (c) was crime incident to an uprising?

Mackin was not extradited because his offence was judged to be a political offence.

In *Re Doherty*⁵¹⁷ extradition was also denied on political offence grounds. Doherty was a member of the IRA who had committed an offence in Northern Ireland, and then fled to the United States.

*Doherty v. Government of the United Kingdom*⁵¹⁸ also deals with interpretation of war crimes and crimes against humanity and the nexus with extradition law. Doherty, a member of the Irish Republican Army (IRA) was charged with the murder of a British Army Captain. He was convicted and Imprisoned but escaped to the United States. On arrest there, he claimed a political offence exception to the extradition application. The U.S. Court denied the extradition request by the United Kingdom on the basis that the

⁵¹⁵ No. 3 78-1099 (N.D. Ca. 11 May 1979).

⁵¹⁶ 668 F. 2d 122 (2d Cir. 1981).

⁵¹⁷ 599 F. Supp. 270 (1984).

⁵¹⁸ (1984) 599 Fed. Supp. 270 (1984) (New York District Court).

offence was “political” inasmuch as it had been committed in the course of an armed struggle by an organized group aiming at the overthrow of the political regime.

If the person who is putting a political offence objection to extradition or deportation is not a war criminal, chances of succeeding on that front are very strong if it can be shown that that person was involved in a political struggle against a government. In the case of war criminals, the Judge reasoned that :

How then is the political exception doctrine to be construed and what factors should limit its scope? Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offence. Surely the atrocities at Dachau, Auschwitz, and other death camps would be arguably political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Ladice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been and should be unwilling to accept. Indeed, the Nuremberg trials would have no legitimacy or meaning if any act done for a political purpose could be properly classified as a political offence. Moreover, it would not be consistent with the policy of this nation as reflected by its participation in those trials, for an American court to shield from extradition a person charged with such crimes.

The Court concludes therefore that a proper construction of the Treaty in accordance with the law and policy of this nation requires that no act be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception of the Treaty . .

⁵¹⁹

Whatever the precise contours of that elusive concept (political offence) may be, it was in its inception an outgrowth of the notion that a person should not be persecuted

⁵¹⁹ *Ibid* at 274 and 275.

for political beliefs and was not designed to protect a person from the consequences of acts that transcend the limits of international law.

In the extradition hearings against Demjanjuk⁵²⁰ the District court of the North District of Ohio elaborated on the unacceptability of putting forward a political offence objection to extradition by war criminals:

The murder of Jews, gypsies and others at Treblinka was not part of a political disturbance or struggle for political power within the Third Reich. The murders were committed against an innocent civilian population in Poland after the invasion of Poland was completed. No allegations have been advanced, or could be sustained, claiming that those Jews and non-Jews killed were part of an active attempt to change the political structure or overthrow the occupying government. Respondent's claim that the killing of defenceless civilians at Treblinka was part of the Nazi war effort, and therefore is political in character, is frivolous and offensive. The crimes alleged are inconsistent with international standards of civilized conduct. The murdering of numerous civilians while a guard in a Nazi concentration camp, as part of a larger "Final Solution" to exterminate religious or ethnic groups, is not a crime of a "political character" and thus is not covered by the political offence exception to extradition.

For war criminals, the political offence exception is not available. It is available to others who have committed political offences and are facing the possibility of extradition or deportation. Apartheid criminals could not benefit from the political offence exception as they would be charged with war crimes and crimes against humanity. They would also not benefit from any pardons or amnesty because they had

⁵²⁰ *Israel v Demjanjuk*, MTSC No. 83-349, Northern District of Ohio, 15 April 1985, at 49-51.

not asked for this in South Africa. Pardons and amnesties may also not be applicable as exceptions in international criminal law⁵²¹.

In *Queen v. Robinson*⁵²² extradition was granted. The court held that an offence is political only if the involved crimes occur inside the area over which the participants seek governmental control. The court stated there was no uprising in England where the offence was committed. In *McMullen*⁵²³ the court said violence had spread to England.

There is a link between the offence and the promotion of the political goal in American jurisprudence.

The political offence exception to extradition therefore seems to favour opponents of oppressive states and not the perpetrators.

9.8 Conclusion

Canada has some experience in the application of universal jurisdiction for the prosecution of war crimes and crimes against humanity that happened elsewhere. It has prosecuted to completion as of December 2010 two war crimes cases: *Finta* and *Munyaneza*.⁵²⁴ It has also a great deal of experience in dealing with and confronting complex legal issues that arise in the immigration and citizenship context involving war crimes and crimes against humanity. The prosecution of apartheid criminals or their extradition or deportation could be successfully achieved by Canada, if embarked upon. In the recent past Canada has unfortunately amplified its preference for immigration

⁵²¹ See Theissen, *supra*.

⁵²² 783 F. 2d 776 (1986).

⁵²³ *Supra*.

⁵²⁴ For the *Finta* and *Munyaneza* cases see *supra*.

rather criminal proceedings against perceived war criminals. This is because immigration proceedings are cheaper and faster than war crimes proceedings. The danger is that deported or extradited alleged war criminals may not be criminally charged in those countries and will continue to live with impunity.

CHAPTER TEN

THE ROLE OF VICTIMS IN ENFORCING UNIVERSAL JURISDICTION

10.1 Introduction

This chapter discusses the issue of “standing” to prosecute by victims of war crimes and crimes against humanity. What is the possible role of victims of war crimes in the prosecution of war criminals. So far victims have been accorded a silent voice. The exercise of universal jurisdiction often requires the instigation of the victims of international crimes or their supporters before the state apparatus (the attorney general, the police, and the judiciary) get involved. It is the victims who had previously encountered the brutality of the war criminals and it is they who can recognise war criminals in various settings⁵²⁵. Unlike in civil jurisdictional cases where the victims can file civil legal suits to initiate the actions, war crimes prosecutions are so complex and political that only the state is competent to prosecute them⁵²⁶.

The lack of a direct role by the victims of war crimes to prosecute the perpetrators continued to marginalize the victims whereby the purveyors of war crimes stand the potential of living with impunity if the state refuses to initiate investigations and prosecutions on the information of the victims. While victims in the domestic setting

⁵²⁵ Redress, *Challenging Impunity for Torture: A Manual for Bringing Criminal and Civil Proceedings in England and Wales for Torture Committed Abroad* (Surrey: Aldridge Print Group, 2000).

⁵²⁶ *Ibid.* The jurisprudence pertaining to standing to sue in Canada and England is comprehensively analysed in Law Reform of British Columbia: *Report on Civil Litigation in the Public Interest* (1980).; Other than the proliferation and influence of interveners, the jurisprudence on standing has remained stationary in the last 30 years.

like Canada have acquired tremendous powers and clout over the last 30 years⁵²⁷ foreign and sometimes domestic based victims of war crimes have little power to force governments to act.⁵²⁸

10.2 Declaration

Apartheid was such a public and international issue, which touched the conscience of a good part of humanity and qualifies as a subject of sufficient interest of which individuals and groups must be accorded standing to sue, should an application be brought. The following is a sample of how a suit for standing could be initiated in the Superior Court of Justice or equivalent level of court in Canada to compel the Canadian government to prosecute or extradite apartheid criminals in contemporary times.

Declaration that the failure or refusal by Canada to extradite or prosecute apartheid criminals in the same manner as what Canada has done or is doing to Nazi and Rwandan war criminals violates the rights of the victims of the crime of apartheid to equal protection and equal benefit of the law and Canada's international legal obligations to extradite or prosecute war criminals.

10.2.1 Facts

1. Apartheid was a low intensity genocidal and criminal system of racial segregation and governance practiced by the Government of South Africa from 1948 to 1994.

⁵²⁷ See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto et al: University of Toronto Press, 1999).

⁵²⁸ For the evolution and status of Victims rights in international law, see M. Cherif Bassiouni, "International Recognition of Victims' Rights" in M. Cherif Bassiouni, ed. 3rd. Ed. *International Criminal Law* (Dordrecht: Martinus Nijhoff, 2008) at 635-701.

2. More than 80% of the residents of South Africa during that time were Black.
3. Under Apartheid, Black residents of South Africa could not vote in elections that determined the government.
4. Under Apartheid, the Group Areas Act restricted the regions that Black residents of South Africa could live in; after the proclamation of this Act the Government of South Africa forcibly deported thousands of Black people to barren areas known as "Bantustans."
5. Under Apartheid, the Government of South Africa suppressed political opposition by conducting widespread torture and killing of Black people.
6. Apartheid had been condemned as a crime against humanity by the General Assembly of the United Nations in its *International Convention on the Suppression and Punishment of the Crime of Apartheid*, which Convention called for the punishment of official representatives of the South African regime.
7. The Convention called for the exercise of universal criminal jurisdiction to extradite or to prosecute apartheid criminals.
8. As of 2012 108 nations had ratified the *Apartheid Convention*, making it therefore part of customary international law obligation to extradite or prosecute apartheid criminals whether or not the state had ratified the *Apartheid Convention*.
9. The provisions branding apartheid as crime against humanity have been incorporated into the 1998 Rome Statute that created the International Criminal Court.
10. Canada has incorporated the Rome Statute into its domestic legislation, mainly the *Crimes Against Humanity and War Crimes Act* (2000).
11. Canada has used the *Crimes Against Humanity and War Crimes Act* to investigate and prosecute Rwandan war criminals and had previously used the older legislation to investigate and prosecute Nazi war criminals.

12. The perpetrators of the crime of apartheid have enjoyed unprecedented impunity from prosecution in Canada and elsewhere and Canada has enabled these criminals to use it as a haven for these war criminals.
13. Victims of the crime of apartheid continue to be traumatized by the impunity enjoyed by apartheid criminals and the failure or refusal by Canada to extradite or prosecute these criminals.

A Declaration is therefore sought that pronounces that:

1. The refusal or failure to extradite or prosecute apartheid criminals is a violation by Canada of the constitutional rights of the victims of apartheid to equal protection and equal application of the laws of Canada and its obligations under international law.
2. Canada must perforce provide suitable remedies pursuant to section 24(1) of the Charter and various international conventions and customary international law to the victims of apartheid without delay.

This chapter discusses the issue of standing to sue the state for purposes of compelling it to exercise the warranted universal criminal jurisdiction against war criminals and criminals against humanity. To sue the state, one has to pass through another apparatus--the judiciary and courts. Which means, in effect that it is at the discretion of courts to accord standing. The doctrine of "standing" can be used to restrict or to expand access to courts. Standing is mainly allowed to resolve concrete disputes among individual litigants or parties to an issue. This is the narrow compass of standing. However, if the doctrine allows the courts to engage in the exposition of constitutional norms, through public interest litigation, standing necessarily becomes expansive and for

the better. The courts have discretion in Canada as elsewhere to accord broad and compassionate standing.

10.3 General Requirements for Standing

The general requirement for standing is that the Plaintiff must have a sufficient private or personal interest in the subject matter⁵²⁹. According to Brian A. Crane, historically the right to become a party differed according to the relief sought. In general terms, standing was given in cases of *mandamus* only where a party was aggrieved or had a special interest in the outcome. The position was similar where a declaration was sought. A court however, might more readily grant standing where *certiorari* or prohibition was sought.⁵³⁰ Since there is a very strong connection between standing and the requested remedy, it is necessary to define some of these remedies.⁵³¹

Mandamus is a writ used to compel an inferior tribunal to exercise the authority conferred by statute. *Certiorari* is a writ issued by a superior court to quash a decision already taken by an inferior tribunal. *Prohibition* is a writ to restrain a tribunal from taking a certain action. *Declaration* (or declaratory judgement) asks the court to declare and define whether some act taken or proposed by a tribunal is beyond its powers or is violative of some enshrined rights.

Victims of war crimes and crimes against humanity and their supporters would be seeking mainly *mandamus* to compel the government to exercise universal criminal

⁵²⁹ *Finlay v Minister of Finance* [1986], 2 S.C.R. 607.

⁵³⁰ Crane, "Procedural Developments in Administrative Law" (1988) *The Advocate Quarterly* 22 at 26-27. This has not changed since.

⁵³¹ These definitions are taken from Kenneth Kernaghan, "Judicial Review of Administrative Action" in Kenneth Kernaghan, ed. *Public Administration in Canada* 5th edn. (Toronto: Methuen, 1985), at 358; see also S.A. de Smith, *Judicial Review of Administrative Action*, 2nd edition, (London: Stevens 1968), at 422-432, 525-526, 571-574. The ambit of these remedies have not changed.

jurisdiction and secondarily a declaration that their rights have been violated by the state's failure or refusal to exercise universal jurisdiction.

In constitutional law cases where it is not necessarily required that a party has some direct interest, certain criteria have been established as required for standing in the famous Supreme Court of Canada cases of *Thorson v. A.-G.Can.*,⁵³² *N.S. Board of Censors v. McNeil*⁵³³ and *Minister of Justice of Canada v. Borowski*⁵³⁴ thus:

- (a) there must be a serious constitutional issue.
- (b) the issue must be justiciable.
- (c) there must be no reasonable alternative means to test the validity of the statute (which will usually include an express or implied refusal by the Attorney General to act)⁵³⁵

These cases broke new ground in the doctrine of standing but it is not clear to what extent the criteria they set are applicable to non-constitutional, administrative law context.⁵³⁶ Since war crimes prosecutions involve domestic criminal law and international criminal law, I will be discussing mainly standing in criminal law as well as in international criminal law. The subject of standing to compel the state to exercise universal criminal jurisdiction has not received any attention at all in legal scholarship. Most constituencies embark on lobbying and pressuring the state to engage in criminal prosecutions as discussed in an earlier chapter.

⁵³² [1975], 1 S.C.R. 138.

⁵³³ [1976], 2 S.C.R. 265.

⁵³⁴ [1981], 2 S.C.R. 575.

⁵³⁵ Crane, *supra* at 27.

⁵³⁶ J.M. Evans, et al (eds.) *Administrative Law: Cases, Text and Materials* 2nd edn., (Toronto: Emond Montgomery Publications Ltd, 1984), at 791.

In all three cases mentioned above, the Attorneys General or the Officers of the Crown refused the requested "relator" proceedings by the individuals who initiated the actions. In administrative law, it is not usual to persuade the Attorney General to accept relator proceedings, unless strong public interest is established not to. Some areas e.g. environmental questions involving a large public interest would probably more readily attract acquiescence by the Attorney General to relator proceedings than others. However, the Attorney General has discretion to act or not to act.

The three cases mentioned above however, while broadening the criteria for standing, reinforced a very important existing baseline for standing -- which is that standing is always within the discretionary power of a court to grant. This is to allow judicial control of the process. This has far-reaching implications. The major one is that the presiding judge may exercise his discretion to deny standing, not because a litigant does not qualify, but because of the issue or remedy being brought. The judge may simply not like the issue before him or her. A judge could also characterise it as non-justiciable when in fact it may be. Admittedly one may appeal the ruling or seek another forum. But this may not always be feasible. Thus as Dale Gibson correctly says, the three decisions "did not guarantee a right of standing to anyone"⁵³⁷

Canada has had no litigated case compelling the Attorney General to prosecute a war crimes case or to engage in civil litigation in the public's interest. This should be

⁵³⁷ "Enforcement of the Canadian Charter of Rights and Freedoms", in W.S. Tarnopolsky and G.A. Beaudoin (eds.) *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982), at 496.

attempted if there is a compelling case. I have provided a sample of how this could be framed at the beginning of this chapter.

The United States Courts have had some experience in the question of granting standing to individuals and groups who wanted to enforce U.S. laws on sanctions or otherwise against South Africa⁵³⁸. The Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law, a Washington, D.C.-based public interest group, spearheaded most of the case law in the U.S. courts.⁵³⁹ These were all civil cases.

Domestic cases litigated by the project have (1) challenged the publication by *The New York Times* of want-ads for employment in South Africa which expressed directly or indirectly racially discriminatory criteria for employment⁵⁴⁰; (2) challenged an order of the Civil Aeronautics Board (CAB) which authorized South African Airways to serve a new route between Johannesburg and New York on the grounds that the order violated the Federal Aviation Act which prohibited the CAB from issuing a permit to a foreign air carrier which discriminated among its passengers on a racial basis⁵⁴¹; (3) sought declaratory and injunctive relief to prohibit the import of seal furs from Namibia in violation of UN security Council Resolutions⁵⁴²; (4) challenged the U.S. Commerce Department practice of sending special trade missions to Namibia⁵⁴³; (5) challenged on behalf of the United Mine Workers and the State of Alabama the importation of South

⁵³⁸ For a comprehensive review of these cases see Goler Teal Butcher, "South African Issues in United States Courts" (1983) 26 Howard LJ 601. This article is reprinted by the Lawyers' Committee for Civil Rights Under the Law Project as a booklet.

⁵³⁹ The next paragraph is excerpted from the introduction by the Project to the Butcher article at (i.).

⁵⁴⁰ *ACOA v The New York Times* quoted in *Ibid.*

⁵⁴¹ *Diggs v CAB* quoted in Butcher, *supra*.

⁵⁴² *Diggs v Richardson* quoted in *ibid.*

⁵⁴³ *Diggs v Dent*, *ibid.*

African coal into the United States on the grounds that it violated the Tariff Act of 1930 which precluded the importation of goods that had been produced by forced or indentured labour⁵⁴⁴; and (6) intervened twice in proceedings before the U.S. Nuclear Regulatory Commission, to challenge the issuance of a license to export sizeable quantities of highly enriched uranium for use in South Africa⁵⁴⁵.

Canada did not experience the U.S. litigation explosion against apartheid. Thus one could argue that an advance on standing had been achieved in the U.S. More important perhaps than anything else was the enormity of publicity that surrounded some of the cases. The publicity heightened political consciousness against apartheid in the U.S. It is difficult though to assess what impact the political consciousness generated. It probably led to deterring corporations from publicly flaunting sanctions or other laws. The publicity may also have led to the promulgation of codes of conduit like the Sullivan Principles and other measures of corporate responsibility. In the 1980s these challenges including political pressures led the Reagan administration to impose economic sanctions. If governments were unwilling to enforce sanctions, individuals must be accorded standing to enforce the laws.

In the U.K., a man who brought a string of cases to court over a period of time to require the government to enforce its laws was accorded standing.⁵⁴⁶ This kind of

⁵⁴⁴ Butcher, *ibid.*

⁵⁴⁵ Butcher, *ibid.*

⁵⁴⁶ *R v Commissioner Of Police Of The Metropolis, ex parte Blackburn*, (1968), 2 Q.B. 118 (enforcement of gaming laws by the police); *R v Police Commissioner, ex parte Blackburn*, (1973) QB 241 (enforcement of pornography laws by the police); *R v GLC ex parte Blackburn* (1976) 1 WLR 550 (enforcement of censorship law by GLC).

allowance may even encourage people to develop more confidence in the legal system. There is a dearth of this pertaining to international law.

In accordance with the three famous standing cases in Canadian constitutional law: *Thorson*, *McNeil* and *Borowski*, one may argue that the public interest, the constitutional issue and the engagement of international law at stake are so fundamental that any remedy would be appropriate.

In the case of *Prime Minister of Canada et al. -and- Khadr*⁵⁴⁷ the Supreme Court of Canada declared that the Canadian government's treatment of Khadr who was in detention outside Canada, violated the constitutional rights of Khadr but the court was powerless to order that Canada must ask for Khadr's repatriation to Canada as a result of Canada's violation of his constitutional rights. The court reasoned that the separation of powers prevented the court from issuing a mandatory order on the government. The Canadian government refused to entertain the repatriation of Khadr from the United States' Guantanamo Bay Detention Centre on the pretext that he is facing serious criminal and terrorism charges in the United States.⁵⁴⁸ The case stands for the proposition that the court has powers of declaration. After such a declaration, the issue can become a political issue depending on the character of pressure applied on the government.

An empowering decision for the victims of war criminality and crimes against humanity was made on July 20th, 2012 by the International Court of Justice in the Hague. Belgium had brought a suit against Senegal for Senegal's failure to prosecute or extradite Hissere Habre, a former dictator of Chad, who was domiciled in Senegal after he was deposed from power. The International Court of Justice ordered Senegal to

⁵⁴⁷ 2010 SCC 3.

⁵⁴⁸ *National Post*, 4 February 2010; "PM drops ball in Khadr case" *Toronto Star* 5 February 2010, at A22.

either prosecute or extradite Habre, otherwise it would be a violation of Senegal's international obligations⁵⁴⁹. So far no country has commenced a suit to compel South Africa to prosecute or extradite its apartheid criminals. At least there is now an emerging duty, pronounced authoritatively by the International Court of Justice to prosecute or extradite war criminals.

10.4 Conclusion

The rights of victims of war crimes and crimes against humanity are not well protected by the states or the courts when the states or the courts are unwilling, unable or incapable of extraditing or prosecuting the perpetrators of international crimes. Only the Attorney General of Canada is given competence to initiate prosecutions of war crimes and crimes against humanity. He is not compellable in the laws of standing to prosecute when he does not want to. There is no case law in Canada so far in which a remedy has been sought in the courts to compel the Attorney General to act in the matter of prosecuting a war criminal. A scenario for a declaration is proposed in this chapter should an occasion arise in the future.

All the chatter in the world about victims' rights and the existence of universal jurisdiction by the domestication of international law principles is hollow if victims cannot access justice directly when the attorney general is reluctant to prosecute. Canada could adopt the practices of some European countries where victims can go directly to a judge to issue a warrant for the arrest of a war criminal if the state does not take a

⁵⁴⁹ *Questions Relating to the Obligation to Prosecute or Extradite: Belgium v Senegal*, No. 144, ICJ 20 July 2012.

proactive initiative.⁵⁵⁰ In some European jurisdictions, the state's refusal to pursue a war criminal is judiciary reviewable, and the state can also be compelled to act, while in Canada such a decision is not reviewable and the attorney general is not compellable.⁵⁵¹ Reform in this area is therefore much needed as is reform in providing avenues for civil actions and stripping war criminals and criminals against humanity of some of their state acquired immunities.

⁵⁵⁰ See REDRESS, *Legal Remedies for Victims of "International Crimes": Fostering an EU Approach to Extraterritorial Jurisdiction*. March 2004

⁵⁵¹ *Ibid* for a survey of the European practices.

CHAPTER ELEVEN

CONCLUSION

11.1 Introduction

Thus far we have spoken primarily about bringing apartheid criminals to account for their actions. There is a further dimension to the study. Should the victims of these crimes be eligible for some sort of reparations? Surely, serious considerations of the reparations issue in the case of apartheid criminals could not occur without those criminals first having been brought to account. However, in considering the need and possibilities of bringing such criminals to account, it is reasonable to think through what might come next. In this case, as in so many others, reparations is one answer.

This chapter looks forward to the reparations issue. It deals with it in general terms focusing on the justifications offered and the legal and other strategies employed by those seeking reparations. The discussion of reparations in this case is limited to actions taken thus far in the United States with respect to slavery. Briefly I link the situation in the United States with that of South Africa. I offer several models or strategies that might be employed to seek reparations. I conclude by saying that, in order to reach the reparations stage, let alone holding apartheid criminals to account, there needs to be a paradigm change, and suggest that, despite its timidity in general on such issues, Canada is a good place to locate such a paradigm change.

The premise of this dissertation has been that there is an overwhelming need for a comprehensive, sustainable and truly independent and impartial international or foreign

criminal justice system to start to effectively addressing the vast legacy of apartheid-era violations committed in South Africa. At present, thousands of perpetrators continued to enjoy impunity for war crimes, crimes against humanity and torture, committed during the apartheid-era in South Africa. Either through inability, incapacity or unwillingness, the South African government has been rendered impotent to provide justice to the victims internally. Foreign jurisdictions like Canada's have a role to play in ending impunity in South Africa.

The justification for the application of universal jurisdiction is to seal the observable legal gap in both South African domestic criminal law and international criminal law with respect to the treatment of "apartheid criminals."⁵⁵² The prosecution of apartheid criminals in South Africa has been characterized as an unfinished business but there appears to be receding prospects of any further prosecutions. There has been little or no activity either with respect to domestic civil reparations or other remedies. The issue of apartheid war crimes committed by South Africa in neighbouring countries like Namibia, Zambia, Mozambique and Angola remains unaddressed⁵⁵³. The only civil remedy that has been undertaken, as already stated, is the application of universal civil jurisdiction in the United States where corporations but not individuals that aided and abated apartheid have been sued albeit against the initial opposition of the South African

⁵⁵² For a balanced and comprehensive study on the South African prosecution status, see Harvard Law school's International Human Rights Clinic, *Prosecuting Apartheid- Era crimes: A South Africa Dialogue on Justice* (Cambridge, MA, June 2008).

⁵⁵³ See Marlene Burger and Chandre Gould, *Secrets and Lies: Wouter Basson and South Africa's Chemical and Biological Warfare Programme* (Cape Town: Zebra, 2002). Grey Zulu, who served in various portfolios in the Zambian government during South Africa's military incursions in Zambia has compiled reliable data about South Africa's criminality in Zambia, see *Memories of Alexander Grey Zulu* (Lusaka:Times Printpak, 2007) Chapters 25 to 32.

and US governments. There are no apartheid prosecutions in foreign countries or international tribunals. There is no international tribunal created to address the question of prosecuting apartheid criminals. How long are South African apartheid criminals going to get away with impunity?

The international criminal tribunal route is only feasible if one is created. At present, no international *ad hoc* or special tribunal have been created to try apartheid criminals as have been the case with the former Yugoslavia and Rwanda or Sierra Leone, Cambodia and East Timor. South Africa, a signatory to the Rome Statute that created the International Criminal Court (ICC) has not referred any apartheid criminals for prosecution by the ICC as has been done by Uganda, Equatorial Guinea and Rwanda nor has the United Nations Security Council on its own motion referred an apartheid criminal to the ICC as it did in the case of the Darfur crises in the Sudan. South Africa by its own actions, behaviour and statements will not support the creation of an international tribunal. Belgium brought Senegal before the International Court of Justice for the ICJ to compel Senegal to prosecute Hissene Habre, a former leader of Chad for war crimes and crimes against humanity. But no country has brought any suit against South Africa before the ICJ to compel South Africa to prosecute apartheid criminals.

Foreign jurisdictions are not clamouring to investigate, deport or prosecute apartheid criminals as they have done with respect to Nazi war criminals and those accused of war crimes, crimes against humanity and genocide from Rwanda and former Yugoslavia, for example. There have been investigations, deportations and or prosecutions involving Nazi war criminals by Israel, Canada, the U.S and Britain, and Rwandan war criminals

in the UK, Belgium, France, Australia, Spain, Canada and Switzerland. Apartheid criminals have not been so pursued. Post-conflict leaders have been prosecuted in Argentina, Chile, Ecuador, Brazil, Peru and other places to the point of near finality and showing results of accountability⁵⁵⁴, but in South Africa, even the government, as well as victim groups, non-governmental organizations and lawyers' groups have continued to amplify the reality of the unfinished business in South Africa with respect to the conflict of the past. The South African government has adopted the position by words, actions and behaviour that the TRC process was accountability enough.

Victims of apartheid have not been as active as the victims of Nazi, Rwandan, Chilean and other war criminals in compelling governments to initiate criminal prosecutions against apartheid criminals. They have only been busy in the civil law context in the US. It is suggested that they should expand their advocacy and litigation to compelling governments to embark on criminal prosecutions. The evidence is massive. The perpetrators are known and available. The TRC uncovered massive evidence and named names. Universal jurisdiction is available as surveyed in this study. The issue of the criminality of apartheid will not go away as cases surveyed in this study demonstrate.

Unresolved conflicts of the past have a way of echoing into the future and sowing the seeds for future genocide as in Rwanda or mini-genocides as in Zimbabwe. Historic injustices continue to affect the body politic as in the unresolved consequences of

⁵⁵⁴ Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (New York: Cambridge University press, 2009).

slavery and race relations and other causes in the US⁵⁵⁵; native grievances in the US, Canada , including sexual and other abuses of natives in residential schools which have led to the institution of a Truth Commission in Canada, an apology in Australia⁵⁵⁶ and New Zealand; The Canadian-Japanese internment case⁵⁵⁷; the Chinese Head Tax case in Canada⁵⁵⁸; The Armenian genocide by Turkey; the Nazi Holocaust against the Jews by Germany; sex slavery of Chinese and Korean women by the Japanese; the slavery and colonialism issue of Africans by the Europeans, to name just a few historic injustices that continued to bedevil nation states and international relations centuries or decades after the injustices were committed.

South Africa has the potential of future implosion because of the racial basis of the historical injustice to develop into a festering US-type of grievance society with dire long-term legal and political consequences. Zimbabwe already provides a cross-border precedent of what could potentially happen when historic injustices, especially based on race are perceived not to have been addressed. It is important to digress here and compare the U.S. with the possible developments in South Africa as a result of the failure of reparations for slavery and apartheid respectively.

11.2 Historic and Modern Parallels Between the U.S.A. and South Africa

⁵⁵⁵ See Michael T. Martin and Marilyn Yaquinto, *Redress for Historical Injustices in the United States* (Durham: Duke University Press, 2007).

⁵⁵⁶ James Grubel, "Australian Says Sorry to Aborigines" Reuters, www.uk.news.yahoo.com accessed on 02/19/2008.

⁵⁵⁷ Roy Miki, *Redress: Inside the Japanese Canadian Call for Justice* (Vancouver: Raincoat Books, 2004).

⁵⁵⁸ Matt James, "Recognition, Redistribution and Redress: The Case of the Chinese Head Tax" (2004) 37:4 Can J Pol Sc 883.

Historically and in the contemporary period, the similarities in racial politics between the U.S.A. and South African are eerie. In March 2012, you could still find newspaper headings titled, “In a Divided City, Many Blacks See Echoes of White Superiority” and statements like “Apartheid left deep scars that still demarcate [South Africa] Cape Town”.⁵⁵⁹

In relation to the U.S.A., journalists can still end their articles with analysis like “Racial politics is embedded deep in America’s DNA. And a post racial nation is still a distant dream.”⁵⁶⁰

It is the entanglement of racial injustices perpetrated over a prolonged period of time that complicates the resolution of the historic racial divides in both South Africa and the U.S.A. and that makes this a compelling case for comparison and to emphasize the need to deal with the impunity of apartheid criminals. This state of race relations informed American (and western) responses to the crime of apartheid between 1948 and 1994. Apartheid South Africa reflected or mirrored its own historical and ongoing practices.

It is important to examine the weaknesses and strengths of the various models that have been used, attempted or suggested for the resolution of the demand for reparations for the historic crime and injustice of slavery and its vestiges like colonialism, the holocaust, apartheid, poverty of the subject peoples and racial discrimination. These models are not mutually exclusive. I will concentrate on the reparations debate as it has unfolded in the United States of America involving African-Americans. The debate has been most vigorous there. At the same time, it has met its most silent neglect and defeat

⁵⁵⁹ *New York Times* 23 March 2012 at A9.

⁵⁶⁰ Margaret Wentz, “Racial Politics: Why Did Trayvon Die” *Globe and Mail* 27 March 2012.

there. I will point out what I consider to be the most effective model for effectuating reparations for slavery. Could any of these models be useful in post-Apartheid South Africa which is threatening to mould itself into a post-civil rights America with its unresolved racial dynamics and unrequited demands for reparations for historic injustices. Before I discuss the various models, I survey the state of the debate in the U.S. to date.

Reparations for slavery has been variously urged as “a matter of justice”⁵⁶¹ or as a settlement of a humongous “debt”.⁵⁶²

11.3 An Historic Injustice

It has been pointed out that slavery has been recognized as a crime against humanity by several international instruments for example the *Convention Against Slavery*, the United Nations Charter, the *Genocide Convention*, the *Apartheid Convention*, the Charter of the Nuremberg Tribunal and others.⁵⁶³ According to Robinson, “Anywhere from ten to twenty-five million Africans died in slave ships en route from Africa to the Americas. A lifetime of bondage awaited those who survived the passage. This massive crime against humanity – the enslavement and exploitation of tens of millions of human beings – is an American holocaust”⁵⁶⁴. Robinson goes on to state that “the Black holocaust is far and away the most heinous human rights crime visited upon any group

⁵⁶¹ Lord Anthony Gifford, “The Legal Basis of the Claim for Reparations”, paper presented to the First Pan-African Congress on Reparations, Abuja, Nigeria, April 27 – 29, 1993.

⁵⁶² Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Dutton, 2000).

⁵⁶³ Gifford, *supra*, Robinson, at 33.

⁵⁶⁴ Robinson *ibid* at 33. For a quick study of the impact of slavery and its *modus operandi*, see S.E. Anderson, *The Black Holocaust for Beginners* (New York: Writers and Readers publishing, Inc., 1995).

of people in the world over the last five hundred years.”⁵⁶⁵ Slavery was “the ultimate crime against humanity, to deny human status to a vast section of humankind”, and for centuries.⁵⁶⁶ The numbers of the dead due to slavery are staggering. The duration was agonizingly counted in terms of centuries.

Slavery proper is estimated to have lasted in the range of 300 years and continues in various manifestations to the present day.⁵⁶⁷

In terms of South Africa, Andrea O’Shea states that “the non-whites of South Africa suffered one of the longest periods of oppression by one government in the 20th century history.”⁵⁶⁸

Boris Bittker, in his book, *The Case for Black Reparations*⁵⁶⁹, makes the argument that “slavery, Jim Crow, and a general climate of race-based discrimination in America had combined to do grievous social and economic injury to African Americans”⁵⁷⁰.

This analysis continues to be made in relation to South African Blacks as well, due to the legacy of apartheid.

Reparations are aimed at redressing the injustice of slavery and its vestiges. At the international level, debt relief is touted as the appropriate vehicle for reparations. Coretta Scott King, the late widow of the prominent civil rights leader in the U.S., Martin Luther King, Jr. stated the following in relation to debt relief as partial reparation for slavery: “African countries face more than 370 billion dollars in foreign debts,

⁵⁶⁵ Robinson *supra*, at 216.

⁵⁶⁶ Gifford, *supra*. at 4.

⁵⁶⁷ Anderson, *supra*, Robinson, *supra*.

⁵⁶⁸ Andreas O’Shea, *Amnesty For Crime in International Law and Practice* (The Hague: Kluwer) (2001;98-101) at 295.

⁵⁶⁹ Boris Bittker, *The Case for Black Reparations* (New York: Vintage, 1973).

⁵⁷⁰ Bittker, *supra*, quoted in Robinson, *supra* at 202.

which consume much of their budgets. Canceling these debts is the morally right thing to do – partial reparation for the tragic history of slavery, colonialism and exploitation that brought famous wealth to the United States and Europe on the backs of African people. No amount of money can right the injustices of slavery. But even a conservative estimate of the fair-market value of the unpaid labour of slaves and the ruthless exploitation of Africa’s resources would put the U.S. several hundred billions of dollars in debt to Africa.”⁵⁷¹ The South African government as will be seen is advocating for broad-based economic empowerment for all South Africans to redress the economic injustices and legacy of apartheid rather than instituting individual reparations. The victims of the crime of apartheid, however, prefer to be given reparations individually as recommended by the Truth and Reconciliation Commission (TRC).

Within the U.S., it is proposed by Robert Westley among others that a “private trust” be established for the beneficiary of African Americans and given out on the basis of educational and economic need.⁵⁷² In the U.S., the direct victims of slavery and the perpetrators are long dead; in South Africa, a great many of them are still alive in 2013. A tax on white wealth has been variously proposed in South Africa, but has been rejected.

11.4 Justifications for Reparations

⁵⁷¹ Corretta Scott King, “U.S., not Africa, Owes the Greater Debt” *USA Today*, October 6th, 2000 at 25A.

⁵⁷² Robert Westley, “Many Billions Gone” *Boston College Law Review* (June 1999) quoted by Robinson *supra*, at 244.

According to Mari Matsuda and others, reparations serve a multitude of purposes. The decision to award reparations is an act of contrition and humility that can ease victims' bitterness and alienation. Reparations recognize the personhood of victims. Lack of legal redress for racist acts [or the crime of apartheid] is an injury often more serious than the acts themselves, because it signifies the political non-personhood of victims. The grant of reparations declares: "You exist. Your experience of deprivation [or injury] is real. You are entitled to compensation for that deprivation [or injury]. This nation and its laws acknowledge you." This recognition is an important prerequisite to the victim's political participation. Finally, reparations are said to be transformative. They recognize the crimes of the powerful against the powerless.⁵⁷³

Despite these noble justifications for reparations, why is it that thus far, according to Martha Minow, none of the claims for reparations "on behalf of African-Americans has yielded political or legal success ... the process of seeking reparations and facing rejection [thereby] creating new wounds for individuals affiliated with victimized groups".⁵⁷⁴ This question is being raised in south Africa as well because the post-apartheid government did not live up to the promise of reparations.

Rhonda Magee explains that in the context of the U.S., "conscious and subconscious racial motives must explain why some form of reparations policy has never been

⁵⁷³ Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) Chapter 5; Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" in Kimberlé Crenshaw et al, (eds.) *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995) at 63 – 80.

⁵⁷⁴ Martha Minow, *ibid*, at 101.

implemented as an explicit remedy in the legislative or judicial arenas”⁵⁷⁵. Randall Robinson concludes after enumerating all groups that have received reparations throughout history and the world that, “only in the case of black people have the claims, the claimants, the crime, the law, the precedents, the awful contemporary social consequences all been roundly ignored ... America accepts responsibility for little that goes wrong in the world, least of all the contemporary plight of black Americans”⁵⁷⁶. Anthony Gifford states that the political and economic power centers of the world have evidenced a ruthless lack of conscience when it comes to black and African peoples’ demands for reparations. Gifford has confidence however, that if the power centres in the world are compelled to recognize that the rights of non-white peoples are founded in justice, they will relent.⁵⁷⁷

In the case of South Africa, as late as March 2012, more than 200 members of the human rights group Khulumani were still handing a memorandum to the office of the President in Pretoria saying the delay in granting reparations to victims of apartheid was “untenable”. Khulumani said reparations had yet to be paid to thousands of people who had endured gross human rights violations, or their families under apartheid. The group represents about 65,000 victims of apartheid atrocities. It is also questioning what is to become of the more than 1 billion Rand that is meant for victims of apartheid and which is sitting unused in the President’s Fund.⁵⁷⁸

⁵⁷⁵ Rhonda V. Magee, “The Master’s Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse” (1993) 79 Virginia L Rev 863 at 907.

⁵⁷⁶ Robinson, *supra*, at 221 and 222.

⁵⁷⁷ Gifford, *supra* at 2.

⁵⁷⁸ International Bar Association Brief, Issue 472, 26 March 2012, at 5, quoting *Cape Times*.

11.5 Waves for Reparations Demands and Debates

By the beginning of the 21st century, the global power structure should have been convinced that the demands of blacks for reparations for slavery is firmly rooted in the principles of justice, both nationally and internationally. Especially since the same governments have made reparations to Japanese-Americans; Jewish claimants for suffering and enslavement under the Nazi regime; Native Americans; Native Hawaiians and other groups.⁵⁷⁹ Professor Derrick Bell has suggested that the real reason why the power structure would never support reparations is because to do so would operate against its interests.⁵⁸⁰ Rhonda Magee offers that the groups that have received reparations have had political or economic or other leverage.⁵⁸¹ Randall Robinson has also espoused this thinking.⁵⁸² Blacks have had no or little leverage of any kind, in the U.S. or elsewhere in relation to the question of reparations and or other issues of the moment.

These and other explanations for lack of redressing the issue of reparations for slavery particularly in the United States are supported by the length of the period by which the demand for reparations has been on the table. All other demands for reparations and coincidentally which have been met, are of recent vintage point. The South African conundrum threatens to be of long duration.

⁵⁷⁹ See Robinson, *supra*, at 221.

⁵⁸⁰ Derrick Bell, "Dissection of a Dream" (1974) 9 Harv C R – C L L Rev. 156.

⁵⁸¹ Magee, *supra* .

⁵⁸² Robinson, *supra* .

Rhonda Magee has traced the history of the demand for reparations for slavery in her article.⁵⁸³ She identifies 3 periods: the first serious calls for African-American reparations were made shortly after the fires of the civil war (1861-65) ceased. It appears that that first initiative was the most successful. Blacks were promised “40 acres and a mule” each: Some blacks had even been given some land. Legislation had been initiated to deal with a broad-based plan of reparations. However, the initiative and nascent reparations were nipped in the bud by the presidency of Andrew Johnson who succeeded Abraham Lincoln who was assassinated in 1865. The second wave of demand for reparations for slavery came on the heels of the civil rights movement, whose heyday was from the mid-fifties to the late sixties. This second wave which Magee calls the era of the Black Manifesto, a name which comes from the name of the document by the same name authored by one James Forman in 1969. This wave according to Magee was triggered as a result of the heightened expectations of Blacks for the redress of the racial wrongs following the legislative gains of President Lyndon Johnson’s “great society policies.”⁵⁸⁴

The third wave is the modern Congressional Reparations Proposal.⁵⁸⁵ An African-American democratic congressman, John Conyers from Michigan, introduced reparations legislation in the House of Representatives in 1989 and 1991. This legislation was modeled on the previous legislation that had been passed to compensate Japanese-Americans.

⁵⁸³ Magee, *supra*.

⁵⁸⁴ *Ibid*, at 883.

⁵⁸⁵ *Ibid*, at 876 – 877.

All these initiatives came to nothing. The U.S. political, economic and judicial establishments have not been moved. The reasons for this have already been advanced above.

There have been other waves demanding reparations for slavery after the ones identified by Magee above. There has been firstly an international movement based in Britain, Africa and the U.S.A. for the internationalization of the demand for reparations. For the first time in history, under the auspices of the Organization of African Unity (OAU) (now named the African Union – A.U.), the first Pan-African conference on the subject of reparations was convened in Abuja, Nigeria in April 1993. This conference issued a declaration which read in part that the OAU, “calls upon the international community to recognize that there is a unique and unprecedented moral debt owed to the African peoples which has yet to be paid – the debt of compensation to the Africans as the most humiliated and exploited people of the last four centuries of modern history.”⁵⁸⁶ Will there be similar demands for reparations for the crime of apartheid? This is important to keep remembering because of the already noted historical and contemporary similarities on racial politics between the U.S. and South Africa.

The most recent wave demanding reparations for slavery is what I call “The Debt” wave, and is represented by Randall Robinson in his path-breaking and wide-ranging

⁵⁸⁶ “Declaration” First Pan-African Congress on the Subject of Reparations, Abuja, Nigeria, April 27 – 29, 1993.

book called, *The Debt: What America owes to Blacks*⁵⁸⁷. The calls for debt relief globally in part attaches reparations for slavery as an underpinning justification.⁵⁸⁸

Just like the previous waves demanding reparations have been ignored, so have the latest calls. The calls for reparations have continued and will continue. The next section discusses the various models that have been used or proposed to deal with the issue of reparations.

11.6 Models for Prosecuting Reparations for Slavery

It is already self-evident from previous sections what reparations proponents have been attempting to do to secure reparations. For clarity I identify the major models here. These models are not mutually exclusive. The models can be identified as: (1) the domestic litigation model; (2) the legislative model; (3) the international tribunal litigation or settlement model; (4) the diplomatic model, and (5) the political “moral panic” model. Are these models useful to settle the issue of reparations for post-apartheid South Africa?

11.6.1 Domestic Litigation Model

This model seeks to litigate reparations for slavery in domestic courts of the country or countries concerned. This has been more prevalent in the United States. In terms of African-Americans, three suits are known to have been filed in California in the early

⁵⁸⁷ *Supra.*

⁵⁸⁸ See Coretta Scott King, *supra.*

1990s. They came before the same judge who proceeded to dismiss all of them giving identical reasons for the dismissal. The judge reasoned that these cases were time-barred. He however stated in helpful obiter that “the moral weight of the plaintiff’s charges cannot be gainsaid ... and are morally compelling.” The judge went on to state that “congress is a far more promising arena than the courts for advancing such claims.”⁵⁸⁹

Indeed it has been pointed out by Reggie Oh and Frank Wu that litigating historic injustices in U.S. Courts is untenable, especially when it comes to African-Americans.⁵⁹⁰ It is shown by Oh and Wu that each case that has been taken to court on the issue of reparations and affirmative action has failed and in terms of the latter, the courts have been backtracking considerably.

To minimize the losses in the courts, Bittker in his book, *The Case for Black Reparations* argues for the litigation of more recent injuries.⁵⁹¹ The statute of limitations would not have run out. If slavery is a crime of humanity, then there is no limitation period. Magee argues that though unlikely to succeed in the courts, reparation claims should be processed first in this forum for their symbolic value in the struggle for affirmative legislative response.⁵⁹²

⁵⁸⁹ *Lloyd v U.S.A.*, No. C94-01192CW, 1994 U.S. Dist. Lexis 7869; *Jackson v U.S.A.*, No. C94-01494 CW, 1994 U.S. Dist. Lexis 7872; *Lewis v U.S.A.*, No. C94-01380 CW, 1994 U.S. Dist. Lexis 7868 (all by Judge Claudia Wilken of the United States District Court for the Northern District of California).

⁵⁹⁰ Reggie Oh and Frank Wu, “The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese-Americans to Disapproving Affirmative Action for African-Americans.” (1996) 1 Mich J Race & L 165.

⁵⁹¹ Bittker, *supra*.

⁵⁹² Magee, *supra*.

It is possible that if there is a massive coordinated legal suit for reparations for slavery, accompanied by appropriate legal research and backed by reputable individuals and organizations, this suit may go a long way in paving the way for a serious judicial consideration. Even if such a well-coordinated legal suit fails, a political response may be gained or opened up. This model has tremendous potential. Could the victims of apartheid use the domestic litigation model? The future will tell but at present this has not worked or happened.

11.6.2 Legislative Model

This is another way the reparations debate can be advanced. However, a legislative response has to be preceded by a lengthy unprecedented political organization and pressure. The legislation that enabled the reparations to Japanese-Americans was preceded by many years of political pressure by Japanese-Americans.

In the case of African-Americans, the Bills sponsored by Congressman Conyers were not preceded by any unprecedented political pressure and were not pursued relentlessly, year after year. African-Americans also lack political and economic clout.

To influence the legislature, Randall Robinson proposes the launching of “a Year of Black Presence”: amassing factual evidence; precedents; serious scholarship; demonstrations and so on. This should make the political decision makers take notice.⁵⁹³ Reparations in the U.S.A. are impossible without legislature intervention. Can the post

⁵⁹³ Robinson, *supra*, at 247.

apartheid state entertain a legislative solution given its reluctance and inability to willingly embark on a reparations strategy? The future will tell.

11.6.3 The International Tribunal Litigation or Settlement Model

Anthony Gifford argues that for reparations to Africans everywhere to succeed, an international tribunal ought to adjudicate the issue. There is at present no such court or tribunal competent enough to adjudicate this issue.⁵⁹⁴ This is despite the fact that the first international tribunals were created to adjudicate the crimes of slavery.⁵⁹⁵

The already mentioned Declaration by the First Pan-African Congress on Reparations seems to lean in this direction as well. The Congress called the international community to pay attention to this issue and work towards its resolution.⁵⁹⁶

There are now new international tribunals being set up for specific functions, for example former Yugoslavia, Rwanda, Sierra Leone and so on. It is very possible that if the issue of reparations acquires the necessary international visibility, especially in tandem with the pressure for debt relief, an international tribunal may very well be set up. It is however, a remote possibility.

There is also an increasing avalanche of scholarly literature on emerging international tribunals, particularly the punitive ones, but also those related to reparations for previous historical injustices.⁵⁹⁷ This literature may raise the requisite international consciousness

⁵⁹⁴ Gifford, *supra* at 10.

⁵⁹⁵ Martinez, Jenny S., *The Slave Trade And The Origins Of International Human Rights Law* (Oxford: OUP, 2011).

⁵⁹⁶ First Pan-African Congress on Reparations, *supra*.

⁵⁹⁷ See Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W.W. Norton, 2000); Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War*

to set up an international tribunal to deal with reparations for slavery and related causes. An international tribunal could be ripe for the crime of apartheid. So far this does not appear possible given the stance adopted by the South African government. The victims of apartheid have not proposed such a model. The AU has not called for the creation of such a regional or international court

Reports from national commissions like the South African Truth and Reconciliation Commission (T.R.C.) have received favourable endorsements and could provide models in the international forum.⁵⁹⁸ The U.S. has never convened a commission of inquiry into slavery or its reverberating consequences. The T.R.C. of South Africa recommended prosecutions and reparations which have not been adopted by the South African government. This route is bleak.

11.6.4 The Diplomatic Model

The diplomatic model has been helpful in pressuring or nudging parties to settle amicably. For example most litigation for reparations for Jewish experience of the Nazi holocaust were settled in the final analysis after legal suits were filed, by the intervention of U.S. political and judicial muscle.⁵⁹⁹

Crimes Tribunals (Trenton: Princeton University Press, 2000); Martha Minow, *Between Vengeance and Forgiveness*, *supra*.

⁵⁹⁸ See Minow, *supra*, for extensive discussions of national reconciliation commissions.

⁵⁹⁹ See Burt Neuborne, "Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts" (2002) 80 Wash ULQ 795.

The diplomatic model, espoused by Anne-Marie Slaughter and David Bosco is aimed at curtailing damage to diplomatic and foreign relations between nations as well as preventing courts from overriding sovereign prerogatives.⁶⁰⁰

Could apartheid victims' civil suits in the U.S. compel the U.S. government to engage in diplomatic pressure on the South African government to engage in a reparations exercise internally for the victims? The future will tell, but this route is unlikely to be pursued for fear of treading on the sovereignty of nation states.

11.6.5 The Political “Moral Panic” Model

Given the intransigence of the world's political and economic power structures to the call for reparations for slavery, some scholars have called for triggering some form of “moral panics” to nudge the system into action. Moral panics are also triggered by the behaviour of governments in reaction to certain events.

In reference to reparations, the specter of triggering a “moral panic” has been raised by Professor Derrick Bell.⁶⁰¹ Bell states that:

[S]hort of a revolution, the likelihood that blacks today will obtain direct payments in compensation for their subjugation as slaves before the Emancipation Proclamation, and their exploitation as quasi-citizens since, is not better than it was in 1866, when Thaddeus Stevens recognized that his bright hope of “Forty Acres and a Mule” for every freedman had vanished “like the baseless fabric of a vision.”⁶⁰²

Bell argues that:

⁶⁰⁰ Anne-Marie Slaughter and David Bosco, “Plaintiff’s Diplomacy” (September/October 2000) *Foreign Affairs* 102.

⁶⁰¹ Bell *supra*.

⁶⁰² *Ibid* at 157.

Even if Professor Bittker had devised a fool-proof legal theory for black reparations litigation, few judges or legislators would be moved in the absence of some dramatic event, major crisis, or tragic circumstance that conveyed the necessity or at least the clear advantage of adopting a reparations scheme ...

*... Legal analysis cannot give life to a [remedial program] that must evolve from the perceptions of those responsible for the perpetuation of racism in this country.*⁶⁰³

The election of the first black president, Barack Obama in 2008, did not resuscitate the debate for reparations. Derrick Bell's thesis is amply supported by the history of the gains obtained by blacks in the U.S. Only the massive demonstrations, boycotts, riots and rebellions that accompanied the civil rights movements of the fifties and sixties compelled the U.S. government to accede to some demands of African-Americans, like the *Civil Rights Act* of 1965, voting rights and affirmative action programs. Once the government got the handle of the moral crisis accompanying the civil rights movement, the legislative impulse wavered. The courts maintained the momentum for a decade or so and then also began to backtrack.

Further, the first legislative wave after the civil war of the early 1860s was triggered by the moral crisis of the war and accompanying black demands for reparations.

Whether the issue of reparations is framed in terms of "justice" or "debt", the U.S. has shown its disdain by absolute silence. Nor has it shown any concern that it has made reparations to other communities except to African-Americans. Nor that it has forced other countries to make reparations to certain groups for historical injustices perpetrated

⁶⁰³ *Ibid* at 165.

on these groups by those countries. This double standard has not escaped the glare of African-Americans. Randall Robinson notes that compensation to African-Americans would have been accomplished if it was “sought with the same vigour that Under-Secretary of State Stuart Eizenstat demonstrated on behalf of Jewish survivors of the Nazi holocaust, inducing sixteen German companies under pressure from the U.S. to establish a fund of 1.7 billion dollars to compensate mainly Jews used as slave laborers during the Nazi era.”⁶⁰⁴

It is in this historical and comparative context that I propose that the moral panic model will probably do more than others to compel the U.S. government to accede to reparations for slavery. Could this be the model to redress the crime of apartheid? What kind of moral panic could be triggered? The same thinking applies in the international arena. A combination of models will more likely also compel the governments to act. The future will tell.

11.7 Paradigm Shift

In light of German reparations for Jewish slave labour during the holocaust with the critical intervention of the U.S., Elazar Barkan sees an important silver lining and paradigm shift for African-Americans. Could this also be attempted in the case of the crime of Apartheid? Barkan states the following and I quote him at length:

Germany’s Slave Labor – An American Predicament

Following the successful litigation with the Swiss banks for plundering money from World War II victims, the attention of victims and lawyers

⁶⁰⁴ Robinson *supra*, at 245.

was directed to German companies that had benefited from slave labor during the war. Early discussion suggests that there will be ample apologies and not insubstantial payments involved. In pursuing the Swiss, various branches of the U.S. government, from the federal government through the judicial branch to the state and local governments, were at the front of the moral crusade. For politicians, it seemed a win-win issue. But what will be the impact of this restitution for slave labor in the United States? If there was little explicit analogy between lost bank accounts in Switzerland and African American suffering, the situation changes dramatically when the discussion shifts to slave labor. If U.S. courts support the payments to compensate slave labor in Germany, it is hard to imagine how they could deny a voice to African Americans. If pursuing payments for slave labor beyond the statute of limitations is “legal” in the German case, presumably doing the same in the name of the descendants of American slave labor would also be legal as well as moral. It hardly makes strong moral sense to claim that just because the victims died, the perpetrators (in this case the U.S. government and the states in the South) should profit and not be held responsible. Prima facie, the revival of the question of slave labor in Germany may turn out to have more of an impact on the United States than on Germany.⁶⁰⁵

It is however too soon to predict what German reparations for Jewish slavery will do for reparations for African slavery or for the crime of apartheid. This will be the subject of further research based on concrete developments in the debate on reparations for slavery and the crime of apartheid. The suggestion is that a combination of legal and political strategies, nationally and internationally, could be used to compel the prosecution of apartheid criminals, and for reparations for the victims of apartheid.

In history, paradigm shifts as well as moral panics, have been the engines for change.

11.8 Universal Jurisdiction Model

⁶⁰⁵ Barkan, *The Guilt of Nations* at 300.

The exercise of universal jurisdiction is partly designated to cure the deep wounds of historic crimes. Canada is well positioned to lead the universal jurisdiction crusade. According to Fannie Lafontaine, “Canada now poses as a champion of the fight against impunity on the international plane. Its principled positions on accountability and the modifications of its legal landscape through the *War Crimes Act*, arguably facilitating the criminal prosecution of war criminals found on its territory, are to be welcomed.”⁶⁰⁶ Even with this evaluation, Lafontaine is aware of Canada’s “rather timid willingness to prosecute war criminals.”⁶⁰⁷ No less a person, however, than a Supreme Court of Canada Justice has tremendous hope for Canada’s role in the vindication of international justice by the exercise of universal jurisdiction: “Canada was a leader in the movement to establish the ICC and was a vocal advocate for a strong and independent court ... it has become a leader in the global fight to hold perpetrators of atrocities and human rights abuses accountable. Canada has become more effective at bringing war criminals living at home to justice. Indeed, the era of Canada acting as a safe haven for war criminals is now over.”⁶⁰⁸

The recent past has however, demonstrated that Canada is backtracking on its limited zeal of war crimes prosecutions by its emphasis on deportation rather than prosecutions.

One of the tools that could still be explored to address the impunity of apartheid criminals is universal jurisdiction.

⁶⁰⁶ Fannie Lafontaine, “Think Globally, Act Locally: Using Canada’s Crimes Against Humanity and *War Crimes Act* for the ‘Sustainable’ of International Criminal Law” (Ottawa, 19 October 2007), at 9

⁶⁰⁷ *Ibid.*, at 10.

⁶⁰⁸ Justice Marie Deschamps, “Moving Forward in the Prosecution of War Crimes: International Criminals and the Canadian Experience” at 4 and 10. Open source on the web. Downloaded on 26th June 2010.

Of those states incorporating the Rome statute into domestic law, only those adopting temporal mandates stretching back in time [and which provided for universal jurisdiction, if there was no other country connection] could conduct prosecution of South Africa's apartheid criminals. This is because the Rome statute's temporal mandate is prospective only, from 2002 forward. Many states have only created prospective jurisdiction, thus narrowing the number of states able to prosecute South Africa's apartheid criminals. These latter states if they become imbued with political will through politicization can re-amend their legislations to apply retroactively as Canada did with section 11(g) of the *Charter* of 1982 or they can simply ratify the *Apartheid Convention* of 1973 which would confer them jurisdiction to prosecute apartheid criminals. These countries could also rely on the *Torture Convention* of 1984, should they have ratified it.

11.9 Conclusion

There were great prospects on the basis of an analogous international law precedent of Nazi prosecutions, the enthusiastic advocacy of the victims of apartheid, and the United Nations that apartheid criminals would be prosecuted on the demise of apartheid. On the basis of the practices of apartheid as detailed in Chapter One, the United Nations and the victims of apartheid branded apartheid as a crime against humanity. All that remained was total victory against apartheid in order to embark on the prosecutions as happened after the defeat of Nazi Germany when high commanding individuals, groups, organizations and institutions were prosecuted at Nuremburg.

In South Africa, however there was no outright defeat of the perpetrators of apartheid. Instead there was a negotiated solution to the crime of apartheid as discussed in Chapter Three. The lesson of Nazi Germany could therefore not be applied to post-apartheid South Africa. The Nazi prosecution precedent is not applicable to South Africa. The lesson of Nazi Germany is simply this: There is victor's justice whenever one of the protagonists is defeated. There are hardly any prosecutions when there is no outright victor party. In South Africa the compromise led to the convocation of the TRC which the post-apartheid government eventually and conveniently, because of lack of political will, claimed to have performed the role of ensuring accountability for the crime of apartheid. The TRC had recommended prosecutions and reparations. The few prosecutions that took place were not prosecutions based on the crime of apartheid as a crime against humanity or as a war crime, but merely as ordinary crimes. The most significant prosecutions failed.

The *Apartheid Convention* had envisaged the setting up of an international tribunal to prosecute apartheid criminals. No tribunal was set up precisely because there was no outright victor in South Africa. Most if not all specialized or ad hoc tribunals are set up after there has been a victorious party as evidenced by the tribunals of the former Yugoslavia and Rwanda, following the Nuremberg tribunal. This is discussed in Chapter Four.

This dissertation explores the possible use of universal jurisdiction where prosecutions are based on national legislations. This tool has tremendous potential as a few cases discussed in Chapter Five demonstrate. However, those who have been

prosecuted under this jurisdiction in various countries represent some of the most abhorred of crimes. They are also prosecuted by highly motivated regimes for political and not necessary legal ends. Most importantly, the lessons they teach is that national jurisdictions are highly selective in who they choose to prosecute utilizing the tool of universal jurisdiction.

In order to demonstrate the politics and law of war crimes prosecutions utilizing universal jurisdiction, a case study of Canada has been chosen. Chapter Six is a concise history of Canada's war crimes prosecutions. It discusses the impact of highly motivated constituencies in effecting government policy on prosecutions. The exercise of universal jurisdiction requires multiple pressures on the government to prosecute.

Canada did not prosecute any apartheid criminals before or after the demise of apartheid. It however, applied economic sanctions as an aspect of universal civil jurisdiction. This was possible because there were various political constituencies pressuring the government to impose economic sanctions and various measures as discussed in Chapter Seven. There was also a receptive political environment under the leadership of Prime Minister Brian Mulroney who additionally provided the same political environment that enabled the enactment of legislation that made it possible to pursue Nazi War Criminals in Canada.

The Mulroney government was not pressured to prosecute apartheid criminals despite the presence of legislation which it used to prosecute Nazi war criminals. This is discussed in Chapter Eight. It is not known whether the Mulroney government would

have prosecuted apartheid criminals if there was an active constituency. International law as well as domestic legislation were available for use if there was political will.

The Canadian government showed political will to prosecute Rwandan war criminals as discussed in Chapter Nine. This step was preceded by high pressure from the victims of the Rwandan genocide. The most important lesson, it seems, is that governments may criminally prosecute war criminals from other countries when those other countries are involved in prosecuting their war criminals domestically. Rwanda is prosecuting its war criminals, so Canada felt justified in prosecuting Rwandan war criminals. It goes the same for the ICC. It is mainly pursuing African war criminals from countries that have either referred these war criminals for prosecution or these countries are also prosecuting their war criminals.

In the end, the organizational strength and status of the victims of war crimes, as well as the legal avenues available to the victims in the host countries, and the receptivity of host governments, dictate the state of prosecutions of war criminals as discussed in Chapter Ten. Governments ought to allow victims leeway to either criminally and privately initiate war crimes prosecutions or to sue under civil jurisdictions. The combination of criminal and civil suits against war criminals might help in limiting impunity for war criminals.

This project is an incomplete and therefore on-going project. Preliminary interviews of government officials in Canada and South Africa as well as some victims, judges and scholars disclose that the issue of the application of universal jurisdiction to apartheid criminals has neither crossed their minds nor have they given it much thought

whatsoever. Canadian War Crimes Reports contain nothing about the crimes of apartheid despite Canada having placed criminal regimes on these lists going back to 1969.

Apartheid criminals therefore continue to enjoy impunity both in South Africa and abroad. The next stage is to engage South African victims and officials, as well as government officials elsewhere in interviews about possible use of both criminal and civil universal jurisdiction to end the impunity enjoyed by apartheid criminals.

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