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South African Victims of Sexual Gender Based Violence
Committed During Apartheid.

International Law Remedies

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ABSTRACT

Apartheid in South Africa did more to the society and the people of South Africa than to merely separate people on grounds of their race.\(^1\) It caused societal dysfunctionalities.\(^2\) Amongst other, the dysfunctionality caused is one between men and women,\(^3\) women being disadvantaged and oppressed.\(^4\) From the time Apartheid was declared a crime against humanity through the time of democracy in South Africa, to current, a consistent failure to deal with Sexual Gender-Based Violence ("SGBV") is evident.\(^5\) It is noted that victims of SGBV in Africa are currently sitting with scars of crimes committed to them\(^6\) while some of the perpetrators sit in positions of authority and are affluent thus have not been held accountable for any such actions.\(^7\)

Statistics from different countries indicates that 35% of all women have been physically or sexually abused by an intimate or non-intimate partner.\(^8\) In South Africa - in the famous SONA by the President of South Africa, Cyril Ramaphosa, made reference to the SGBV crimes that continue in the midst of everything else. He stated that "violence against women and children has reached epidemic proportions." Furthermore, he stated that, "every day, South African women are faced with discrimination, abuse, violence and even death, often by those they are

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\(^3\) Ibid.
\(^8\) Romi Sigsworth Anyone can be a Rapist, An overview of Sexual Violence in South Africa, 2009, page 9.
It is my view that the failure to deal with the sexual gender based violence in the past may have contributed to the high levels of SGBV in South Africa. As a result, this paper seeks to establish the availability of international law remedies for the victims of SGBV which occurred during apartheid. Furthermore, it is argued that the failure to deal to these sexual violations has direct impact on current SGB.

According to the history archives, an apartheid regime reigned in South Africa officially from 1984 -27 April 1994. During the times of apartheid, black people were continuously sent to prison for little or no reason. This made it difficult for opponents of apartheid to resist apartheid. While it is well known and well documented that many black South African men were imprisoned and tortured by the government, mainly white, it is often not discussed that women were not only subject to the same oppression but were also subject to sexual violence by state apparatus. For example, women would suffer sexual violations in the hands of prison waders for food and basic needs, for survival or for any reason unbeknown to them. Whereas the Apartheid Convention declares apartheid to be crime against humanity and that “inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination” are international crimes. Most victims of SGBV still have not accessed remedies available in international law.

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13 Ibid.
This paper seeks to discuss SGBV which took place in South African during the apartheid regime as well as the remedies available in terms of international law for victims of such actions. To do so, a background on the history of apartheid in South Africa will be provided. Occurrences of SGBV violence during apartheid will be outlined and reference will be made on some examples of SGBV occurrences or threats of SGBV. International law provisions on apartheid and the position of SGBV in international law will be provided. In the same instance, consideration on how other African States have dealt with sexual violence in light international law will be made. The South Africa’s response to its international obligations regarding providing remedies for victims will be discussed. Lastly, a preposition of possible available remedies in terms of international law for victims of sexual gender-based in South Africa during apartheid will be made.

APARTHEID BACK GROUND IN SOUTH AFRICA

Before apartheid was codified and made official, stunts to divide native people of South Africa were eminent. The goal of apartheid was to separate white persons (minority) from black people (majority) and other races. And to further divide black people amongst themselves along tribal lines in order to decrease political power to resist the apartheid.16 For example, the Xhosa unity and ability to resist colonial expansion was weakened by famines and political division that followed because of cattle killing movement in 1856 and 1858.17

Segregation therefore existed in even before even before the election of the Nationalist Party in 1948,18 which resulted in the codification, legitimisation and legal enforcement of apartheid.19 This took effect by enacting several laws to allow for segregation and ill treatment of persons who were, by law ‘non-white’. Amongst many other things, these laws yielded inequality and provided protection, privileges

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18 Ibid at page 2.
19 Ibid.
and remedies for white persons and simultaneously deprived black people the same dignities granted to their white counterparts.\textsuperscript{20}

During this time, and in the enforcement of these laws, a number of international crimes provided for in international customary law as well as breaches of human rights were committed against marginalised groups (being black people as well and other non-white persons) without legal recourse available to them.\textsuperscript{21} These crimes include; murder, torture, inhuman treatment and arbitrary arrest of members of a black people; deliberate imposition on a racial group of living conditions calculated to cause it physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups;\textsuperscript{22} the prohibition of interracial marriages;\textsuperscript{23} and the persecution of persons opposed to apartheid.

Due to the fact that no legal remedies were available for victims of crimes committed during and on the basis of apartheid laws, the resisters of apartheid engaged in strikes/ protest actions against acts of violence by the apartheid regime and discriminatory laws.\textsuperscript{24} Amid strikes by resisters of apartheid in South Africa, thousands of arrests by the police were conducted. Unfortunately, and in the absences of the rule of law, thousands of people were killed in custody or during arrest.\textsuperscript{25} Protest actions for liberation and calls to end apartheid caused the state to become ungovernable and international pressures to end apartheid were rife. In order to shift state responsibility, State of Emergency declarations\textsuperscript{26} became an easy way out for the then government to evade responsibility. A noteworthy state of emergency declaration was when Pretoria imposed a state of emergency on the

\textsuperscript{22} The Black Urban Areas Consolidation Act No 25 of 1945.
\textsuperscript{23} Prohibition of Mixed Marriages Act 55 of 1949.
\textsuperscript{26} State of Emergency Act 64 of 1997 section 2.
tenth anniversary of the Soweto uprisings. The government reserved the right to make warrantless searches, control essential services, close businesses, and censor domestic and foreign press. Black people had been imprisoned, tortured, and arbitrarily killed for attending or organizing peaceful demonstrations or funerals or merely walking in groups. There were a number of renowned activist who were determined to end apartheid. This was not done ignorant of the fact that they may be killed in these circumstances. Some of these activists include Bantu Steve Biko etc. During this time, it did not matter if actions taken directly interfered with the fundamental rights of civilians.

South African lawyers who represent activists were by no means immune from arbitrary arrests and killings. For example, South African civil rights attorney Victoria Mxenge was killed outside her home, it was alleged that her death was caused by government security forces. It is recorded that she was killed only a few weeks before she was to represent twelve United Democratic Front activists who were charged with treason.

Although not featured in discussions about apartheid, it is well known that during the apartheid era, at different places and times, women and children were subjected to oppression and Sexual Violence. Apartheid laws existed that limited freedoms, perpetuated structural and symbolic violence and largely neglected Violence against women of any kind.

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27 Public Safety Act 3 of 1953.
30 Omer v Minister of Law and Order 1987 (3) SA 859 AD.
According to the report by the Centre for Study of Violence and Reconciliation\textsuperscript{35} the brutality of apartheid; the inequalities the policy gave rise to and the demoralising effect of racism are some of the contributing factors responsible for the violent crimes experienced by South Africans currently.\textsuperscript{36} This is indicative of the fact that, under apartheid, the criminal justice system focused on protecting white South Africans from crimes, while enforcing apartheid laws on black South Africans.\textsuperscript{37} Following this, black women who were victims of sexual violence had minimal access to remedies under these oppressive times. This set a precedent in the minds and lives of possible future victims of these crimes, in that, they may not have access to remedies for any crimes they suffer. It is my view that failure to punish or discourage perpetrators opened room for this crime to increase and expand to various other gender based violence. The CSVR report suggests that “the blatant racially discriminatory and violent nature of the apartheid state… feeds into” other forms of violence, including SGBV.\textsuperscript{38}

Although apartheid was declared a crime against humanity and consistently opposed to by the Security Council,\textsuperscript{39} no one was prosecuted for apartheid in South Africa.\textsuperscript{40} Apartheid was abandoned in 1990 by the regime that had introduced and in 1994 a democratic South Africa came into being as a result of a negotiated peace settlement between the apartheid regime and movements opposed to apartheid, the African National Congress (“ANC”) being at the fore front.

During the negotiated transfer of power an amnesty agreement was written into South Africa’s interim constitution in order to ensure that a peaceful transition from


\textsuperscript{37} https://www.sanews.gov.za/features/sas-violent-crime-has-roots-apartheid-says-report


apartheid state to democratic dispensation was successful.\textsuperscript{41} The result was the Promotion of National Unity and Reconciliation Act\textsuperscript{42} (“the National Unity Act”), which formally established the TRC the year after the ANC secured political victory in the South Africa’s first democratic election. The National Unity Act outlines a number of objectives for the commission, framed by the overarching aim: “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”\textsuperscript{43}

Due to these negotiations, there were no prosecutions of the leaders or agents of the apartheid regime for apartheid and crimes as a result thereof. Instead a Truth and Reconciliation Commission was established with the tasks of achieving reconciliation and supervising the granting of amnesty to those who had committed serious violations of human rights during the apartheid years.\textsuperscript{44}

The Commission on Human Rights in established in 1994 in terms of the Human Rights Commission Act\textsuperscript{45} established an ad hoc working group of experts to investigate charges of violations such as arbitrary killings and torture in South Africa. However, it appears that sexual gender-based violence crimes which occurred during apartheid were to a large extent not investigated at the TRC.\textsuperscript{46} The reason for none investigation is that victims or any affected persons were either not fourth coming with any information, or SGBV was not properly listed as one of the crimes to be investigated.\textsuperscript{47}

**SEXUAL GENDER BASED VIOLENCE DURING APARTHEID**

Campanaro states that “whether a woman is raped by soldiers in her home or is held in a house with other women and raped over and over again, she is raped with a

\textsuperscript{41} Interim constitution of the republic of South Africa Act 200 of 1993.
\textsuperscript{42} National Unity and Reconciliation Act No. 34 of 1995.
\textsuperscript{43} National Unity and Reconciliation Act, 34 of 1995 Preamble.
\textsuperscript{44} Frank Berman, South Africa: A Study of Apartheid Law and its Enforcement, 2 Touro J. Transnat'l L. 1 (1991) at 63-65.
\textsuperscript{45} Human Rights Commission Act 54 of 1994.
\textsuperscript{47} Pumla Dineo Gqola (2007) How the ‘cult of femininity’ and violent masculinities support endemic gender based violence in contemporary South Africa, African Identities, 5:1, 111;124, DOI: 10.1080/14725840701253894
political purpose—to intimidate, humiliate, and degrade her and others affected by her suffering. In times of war, women and girls are targeted for sexual abuse on the basis of their gender, irrespective of their age, ethnicity, or political affiliation. By virtue of their gender, women become the target of one of the most serious violations that occur during war. The effects of rape in such a context, is often to ensure that women and their families will flee and never return.

The South African Apartheid regime was in no way different from other states conflicts. Sexual Gender Based violence were committed during apartheid. There are three types of perpetrators of SGBV during Apartheid in South Africa. The first being the liberators or perpetrators amongst comrades per the context in light of State v Zuma case. The second being state operators. This includes police officers and prison wadgers or such related persons as stated above. The third being, sexual violence by white males on black female servant “authoritative rapes”. In each of these sexual violations, the perpetrators had some protection which made it difficult for victims of sexual violence to come out and talk about it.

The case of State v Zuma the former President of the RSA, Jacob Gedleyihlekisa Zuma, was the accused. At the time he was 64 year old accused of the crime of rape as read with the provisions of section 51 of Act 51 of 1977 in that he allegedly upon or about 2 November 2005 intentionally assaulted Ms K (Khwezi), and had sexual intercourse with her without her consent. What is particularly interesting in this case is that reference was made to sexual violations which took place at refugee camps in exile. According to the judgment, during cross-examination the complainant said that in one instance when she was at the tender age of 5 years old, had "an experience with a penis". She also mentioned that in the other instance at about the same age, she was raped. The court concluded that nothing much turns on this save for the fact

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that the word "rape" was used when no rape took place. The conclusion in this regard was simply that Mr K had consensual sex with two adult man when they were in exile at uMkhonto Wesizwe.

At the core of the crime of rape is lack of consent. Furthermore, it is a well-known legal principle that no child under 12 is capable of giving consent to sex, therefore any sexual act with a girl or boy under 12 constitutes rape or sexual assault. Therefore, under no circumstances could it be accepted that a child at the age of five can be said to have had consensual sex with two adult man. There is no reasonable court that can accept the submission by the defence advocate. Although it was not relevant for the conviction of the accused in this case, I submit that the case of S v Zuma was an opportunity for South Africa to investigate these crimes in the context of SGBV which took place during Apartheid and begin to consider reparations in this regard.

According to Jessie Duarte, senior ANC official, if women claimed that they were raped by their fellow comrades, for example, friends of their husbands, family or even their own friends in the struggle, “they were regarded as having sold out to the system in one way or another”. It is well known that women were involved in the liberation movement. And as indicated by Jessie, under no circumstance could women even begin to claim that they had been raped by their fellow comrades. This is therefore indicative of the fact that it was well known and accepted that women were raped by the liberators/ fellow comrades or members of the opposition parties had no real legal remedies.

This is evident in the way in Khwezi is constructed through discourse regarding her domestic life, her responses to the incident and her sexual history as a deviant, whose narrative did not conform to often false social understandings of legitimate

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53 CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007 section 3.
rape scenarios. ‘Given that rape is one of the most underreported crimes worldwide, it is difficult to see how reporting rates can be improved if there is likelihood that the complainant’s sexual history will be paraded in an open court.’

The apartheid laws bred social inequality. As a result, most white people would be able to employ or take black people to their houses for purpose of working for them as servants. This made it possible to for white males to take advantage on the black female servant who would not have legal recourse and would be ashamed to even begin to narrate this shameful crime against their bodies. If they become pregnant, they would be subjected to social stigma and be said to be having children of enemies. As a result, these crimes were not reported as often as they occurred. Where reports have been made, perpetrators would not be seen to be successfully prosecuted for such crimes if reported.

In the submissions made at the TRC for purposes of sharing women testimony, women narrated and to a certain extent, about their own experiences of human rights abuses, including sexual assault by apartheid police. According to Meijies and Goldblatt such testimonies were regarded as indicative of the fact that women’s experience of abuse might have differed from that of men.

INTERNATIONAL LAW POSITIONS

The Constitution of the Republic of South Africa, 1996 (“the Constitution”) is the supreme law of the Republic; and provides that, all law or conduct inconsistent with it

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is invalid, and the obligations imposed by it must be fulfilled.\textsuperscript{59} Thus, when it comes to the role of international law in South Africa, is the starting point the Constitution. Accordingly, section 39 of the Constitution states that “the courts, and other legal bodies, when interpreting the Bill of Rights: Must consider international law. May consider foreign law”. Section 233 provides that, when interpreting legislation, courts: “must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. This section gives direct authority for courts to interpret the laws of the Republic. Further, it seeks to emphasise on the interpretative role of international law. Section 232 of the Constitution makes customary international law the law in South Africa, unless it is inconsistent with the Constitution or legislation.

Further, where international law directly conflicts the Bill of Rights, the South African courts will not uphold it domestically. In \textit{S v Makwanyane}\textsuperscript{60}, former Chief Justice Chaskalson of the Constitutional Court described the role of international law as follows: “(P)ublic international law would include non-binding as well as biding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provides a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals delaying with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]”. In the Grootboom case\textsuperscript{61}, Justice Yacoob of the Constitutional Court said: “…where the relevant principle of international law binds South Africa, it may be directly applicable.”

\textsuperscript{60} \textit{S v MAKWANYANE} 1995 (3) SA 391 (CC).
\textsuperscript{61} Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at Para 26.
The applicable international law obligations to South Africa for SGBV which took place during apartheid, are found in two main branches of international law. Being international criminal law and international human rights law respectively.

International law is a set of rules usually found in a combination of treaties and customs that regulate the conduct of states among themselves. International law has three main sources being customary, treaty and soft law discussed herein.

International Criminal Law

International criminal law (“ICL”) is a body of international rules designed both to proscribe certain categories of conduct (War crimes, crimes against humanity, genocide, torture, aggression, and other listed crimes) and to make those persons who engage in such criminally liable. Apartheid was declared a crime against humanity and as such rightly falls within international crimes. Its perpetrators can be held liable in terms of international criminal law.

Furthermore, international criminal law, provides that criminal responsibility must apply to individuals, members of organisations and representatives of the States who commit, incite or conspire to commit the crime of apartheid.67

International criminal law is concerned with the criminal responsibility of individuals for international crimes. It is premised on the notion that crimes are not committed by abstract entities and thus those responsible must be put to book. International legal prescriptions may impose obligations on individuals.68 It authorises states or impose upon them the obligation to not only put measures in place in order to prevent such conduct from occurring but to further prosecute and punish such criminal conducts if they do occur. Furthermore, it is the role of ICL to regulate international proceedings before international courts and tribunals for prosecuting and trying persons accused

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62 Rome Statute of the International Criminal Court Article 5 (c).
64 Rome Statute of the International Criminal Court, Article 6.
65 Rome Statute of the International Criminal Court Article 7 (f).
66 Rome Statute of the International Criminal Court Article 8 bis,
67 International Law Commission Article 3.
of such crimes. Therefore, an obligation to prosecute perpetrators exists both at international and at national level.

**International human rights law.**

Treaties and customary law form the pillar of international human rights law. Through ratification of international human rights treaties, States undertake to put into place domestic measures and legislation compatible with the international treaty obligations. Other sources of international law, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation.

International human rights law, sets out the basic protections that all individuals are entitled to. It makes it a duty of states to respect, ensure/protect and fulfill these rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights. These obligations are applicable at all times including during situations of emergency and conflict.

The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. In its preamble it provides that “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” it is the basis of most human rights principles.

It is well accepted that Gross Human Rights Violations are international crimes. These include war crimes, crimes against humanity, including apartheid, genocide,

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71 The Universal Declaration of Human Rights Adopted in 1948.
the crime of aggression\textsuperscript{72}. Thus, there is a direct link between the commission of international crimes and breach of international human rights. In that, these crimes amount to breach of well recognised human rights. As such, international laws proscribes the duty of reparation under international law.

**State Responsibility and Individual Criminal Responsibility for Breaches to IHL and ICL**

For any breach of international law obligations, states have a duty to prosecute or make reparations thereby. This was emphasized by the court in Nuremberg tribunal. \textsuperscript{73} Accordingly, the court stated that “*Crimes against International law are committed by men, not by abstract entities, and only by punishing individuals who commits such crimes can the provisions of International Law be enforced.*” Thus, the commission of international crimes and the breach human rights law attracts criminal and civil responsibility. Therefore, international law recognizes international responsibly of both the state and individual’s criminal responsibility. \textsuperscript{74}

In 1928, the Chorzow\textsuperscript{75} case the Permanent Court for International Justice provided that as principle of international law, “*the breach of each legal obligations amounts to responsibility for reparation of the damage*” caused by such a breach. This brought about the inception of responsibility of state in that a state is responsible to provide reparation for any harm caused as a result of breaches to humanitarian law in particular. In the case of *Bosnia and Herzegovina v Serbia and Montenegro*\textsuperscript{76} it was held that, both the State and or individuals may be held liable for crimes against humanity.


\textsuperscript{73} Nuremberg judgement, *France and ors v Goring* (Hermann and ors, Judgment and Sentence, [1946] 22 IMT 203. at 221.

\textsuperscript{74} Art 58 of International Law Commission’s Article on the Responsibility of states for Internationally Wrongful Acts. And ICC Statute, Article 25 (4).

\textsuperscript{75} Chorzow Factory (*Germany v Poland*, 1928).

\textsuperscript{76} *Bosnia and Herzegovina v Serbia and Montenegro* ICJ Reports (2007) para 431.
SEXUAL GENDER BASED VIOLENCE IN RWANDA AND THE APPLICATION AND EXPANSION OF INTERNATIONAL LAW PRINCIPLES

The notion that rape during war is not a serious crime emanated from the, failure to prosecute sexual assaults and overlooking the horrific treatment and the subsequent suffering of women during World War II. This also perpetuated the notion that rape is not as grave as other war crimes.\(^{77}\)

The United Nations Secretary-General, Ban Ki-moon\(^ {78}\) recognised the role of various international stakeholders and stated that; “\textit{In no other area is our collective failure to ensure effective protection for civilians more apparent... than in terms of the masses of women and girls, but also boys and men, whose lives are destroyed each year by sexual violence perpetrated in conflict.}” This is worrying in a context where customary international law prohibits sexual gender based violence and recognised that such an act amounts to crimes against humanity.

In over hundred years ago there has been some evidence of an international commitment to end widespread sexual violence during war and armed conflict.\(^ {79}\) However, the actions taken to protect women from sexual violence have often been both insufficient to non-existent. Furthermore, it appears that sexual gender based violence is regarded as less important than other “rules of war” or any other codified crimes of war and crimes against humanity.\(^ {80}\) Victims of SGBV often do not have access to remedies available at international law.

However, In line with the historical development of international criminal law and the international community’s longstanding recognition of sexual violence as an international crime, the United Nations Security Council recognised that rape and


\(^{80}\) Ibid.
other forms of sexual violence constitute grave international crimes.\textsuperscript{81} Some African countries where sexual violence took place during conflict have, in making use of the international remedies available opted for prosecution.

In Rwanda, in 1994, as part of a massive attempt by Hutus to destroy the Tutsi population women were subjected to brutal forms of sexual violence.\textsuperscript{82} The international community has been concerned with the outlawing of certain acts during armed conflict and to hold the perpetrators of these acts accountable.\textsuperscript{83} As such, the law of war prohibited rape by soldiers. Rape committed on an individual soldier’s initiative has frequently been prosecuted in national courts.\textsuperscript{84} Furthermore, Control Council Law No. 10 provides that, in principle “rape can constitute a crime against humanity”. Theodor Meron, rightly argues that this principle was of groundbreaking importance.\textsuperscript{85} This is because by categorizing sexual violation as a crime against humanity means that when committed, it attracts international responsibility.

Justice took the form of prosecution in Rwanda and it was pursued from all ends. An International Criminal Tribunal for Rwanda (ICTR)\textsuperscript{86} was formed for purposes of trying high ranking government officials and other key figures behind the genocide. The Tribunal was formed to ensure that the major war criminals were brought to trial for war crimes, crimes against peace, and crimes against humanity.\textsuperscript{87} Evidence of massive and systematic sexual violence was presented throughout the trial, ending any doubts that sexual violence was an essential and integral part of the genocide committed in Rwanda. Some key people went to domestic courts in Europe and


\textsuperscript{82} Ibid.

\textsuperscript{83} Mispah Roux South African Yearbook of International Law, Volume 2017 Number 1, 2017, p. 80 – 118.


\textsuperscript{85} Ibid at 425.


\textsuperscript{87} Ibid at Article 1 and 6.
North America, while low ranking are being tried in Rwandan community based Gacaca Courts (Justice amongst the grass).

Therefore, both at international and national level, those who planned, ordered and carried out crimes including sexual violations were being held to account. This pursuit of justice for Rwandan victims also lead to the development of international criminal and humanitarian law in that. The jurisprudence of sexual violence and rape were defined and recognized as acts of genocide, crimes against humanity, and war crimes.  

At the charge and trial of Akeyesu, Former mayor of a commune in Rwanda. Rwandan trial chamber found that Akeyesu committed the sexual assaults with a specific genocidal intent to destroy, in whole or in part, the Tutsis. In Akayesu, the Trial Chamber defined the elements of rape as: a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Thus, sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

The Gacumbitsi Appeals Chamber accepted that “non-consent and knowledge thereof are elements of rape as a crime against humanity” “[c]onsent for this purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”

Rwanda expands the international law jurisprudence on sexual gender based violence.

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89 Jocelyn Campanaro, Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes, 89.
90 Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998.
92 Gacumbitsi paras. 292-293, 321-333.
At the resolve of the Rwandan conflict an international Law principle that justice must not only be done but it must be seen to be done was realised. The Rwandan conflict did not leave Rwanda in a position to address it by judiciary means. Many judicial persons had been killed during the genocide. The infrastructure was destroyed and a large number of crimes to be prosecuted had been prosecuted. However, Rwandan government took a radical approach to delivering justice. There were a number of challenges in this regard, such as possible room for unfair trials. However, it is my view that this bold step to seek justice in this manner is the best approach for Rwanda.

THE APPLICATION OF INTERNATIONAL LAW TO SOUTH AFRICA’S POSITION

Although crimes against humanity had been described in a number of treaties such as the 1973 Apartheid Convention, of importance is the Charter of the International Military Tribunal, ("the IMT Charter").\(^93\) Accordingly, the definition of crimes against humanity in terms of the IMT Charter, crimes against humanity includes murder, extermination, enslavement, deportation, and other "inhumane acts" committed against any civilian population before or during war, or as persecution on political, racial, or religious grounds.\(^94\) After the definition as per the IMT charter, for this reason, government officials could be found criminally responsible for persecuting or exterminating their own citizens.

In the annual General Assembly convocations, Apartheid was consistently condemned and said to be contrary to Articles 55 and 56 of the Charter of the United Nations. The Security Council, after 1960 also started and continued to condemn the same.\(^95\) This means that, although the establishment of crimes against humanity as independent international crimes was a gradual process that spread over several

\(^{93}\) International Military Tribunal, 1945.
\(^{94}\) IMT Charter 1945, Article 6(c).
centuries, the international community was against it and later in 1966, the General Assembly labelled apartheid as a crime against humanity.

Flowing from this, the International Convention on the Suppression and Punishment of the Crime of Apartheid was promulgated by the General Assembly in 1973 ("1973 Apartheid Convention"). Accordingly, it condemned apartheid as a crime against humanity and obliged state parties to pass laws and other measures against apartheid. State parties were also obliged by the 1973 Apartheid Convention to prosecute individuals who practice and promote apartheid. The definition of apartheid in terms of this convention includes denial of life and liberty to persons because of their race. South Africa has not been party to the Apartheid Convention. It was believed that the 1973 Apartheid Convention was directed at South Africa.

International law having recognised Apartheid as crime against humanity and establishing a bases for which persons can be held liable. At the time, the Government of South Africa was unwilling to abandon apartheid and as such, the apartheid continued.

Consideration was given in 1980 for the establishment of a special international criminal court, to try persons for the crime of apartheid. However, no such court was established. As such, in South Africa, no one has since been prosecuted for the crime of apartheid. In 1994, peaceful negotiations between the apartheid regime and the movements opposed to apartheid resulted in peaceful settlement. The TRC was formed and tasked to achieve reconciliation and supervision of the granting

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97 General Assembly resolution 2202 A (XXI) of 16 December 1966.
98 Article 7.
99 Article 7.
101 Ibid.
102 Ibid.
103 Barbara-Anne Boswell, Black Women Writers: Narrating the Self Narrating the Nation. 2010.
of amnesty to those who had committed serious violations of human right during the years of apartheid.

In 1990 when the Nationalist government unbanned the liberation movement, led by the African National Congress (ANC), and released Nelson Mandela, a key figure in the liberation movement, the path to a democratic country was a difficult one. During the much anticipation of liberation and a democratic government, inter cultural wars began and we rife. In different town ships such as Thokoza and Katlehong mass killings took place during the wars between the Xhosa people mainly supporter of the ANC and the Zulu people, mainly supporters of the Inkatha Freedom Party. Although not publicly discussed, sexual crimes were also committed during this time.\footnote{Independent Board Of Inquiry (IBIIR) 1989-1996 Historical Papers, University of the Witwatersrand, Johannesburg, South Africa available at \url{http://www.historicalpapers.wits.ac.za/?inventoryajax/AJAX/collections&c=AG2543/R/} last accessed on 22 March 2019.}

However, the scene had been set to transfer political power from the white supremacist regime to a democratic government elected by the majority of South Africans.\footnote{Ibid.} In order to transfer powers and ensure a peaceful transfer and state post-apartheid, it agreed that a Truth Commission would be formed and would offer absolution to those who committed atrocities during apartheid. It was believed in the “cleaning power of truth” and unlike Rwanda, there was no intention to prosecute any person for the Apartheid and any other gross violations of human right which took place during Apartheid.

The South African Truth and Reconciliation Commission (TRC) having been the country’s greatest post-apartheid nation-building project.\footnote{Ibid.} The Commission was conceived to unify a people from all backgrounds, tribes, previously advantaged and privileged as well as those on the other end of the construct\footnote{\url{http://www.justice.gov.za/trc/} last accessed 12 April 2019.} in order to find the “Rainbow Nation”,\footnote{Promotion of National Unity and Reconciliation Act, 34 of 1995.} espoused by Archbishop Desmond Tutu, who was appointed as the TRC’s Chair. However, the question remains as to whether the practices of the
TRC and the discourses generated by it had any place for women more so, sexual gender based violence which took place during apartheid.\textsuperscript{109}

The (Promotion of National Unity Act 34 of 1995) was thus enacted with the following objectives inter alia:

- “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from March 1960 to the cut-off date…
- facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
- establishing and making known the fate or whereabouts of victims;
- by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them; and
- compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission.”

The National Unity Act defines gross violations of human rights 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)”

In terms of the National Unity Act, gross human rights violations were defined to exclude acts of rape, sexual assault, sexual harassment or other forms of gender-based violence. On may argue that the Act, through the stated objective of “establishing… the nature and extent of gross human rights violations” leaves room for the commission to establish, retrospectively, that sexual and gender-based violence were indeed gross human rights violations.\textsuperscript{110} This provision allowed for flexibility in defining gross human rights violations. However, according to


\textsuperscript{110} David Weissbrodt; Georgina Mahoney, \textit{International Legal Action against Apartheid}, 4 Law & Ineq. 485 (1986).
Weissbrodt and another, the omission of rape, sexual harassment or sexual assault from the official definition whether deliberate or simply an act of omission, had serious repercussions for women's testimony at the TRC.\(^{111}\) Explicitly naming forms of gender-based violence like rape and sexual assault as gross human rights violations, or even forms of torture, would have created the space for conversation wherein women would narrate such experiences as legitimate forms of human rights abuses in testifying at the TRC.\(^{112}\) This in my view would lead to an acknowledgment of the existence of such grave atrocities which would inevitably attract the need for reparations.

Vetten L, rightly argued that the apartheid politics of rape in South Africa utterly disregarded protection of women against rape.\(^{113}\) However, what is most interesting thing is that, given the fact that sexual crimes were not spoken of at the TRC no one can be said to have been absolved. Thus, those who committed them are to a large degree still liable and were not absolved by the right that were afforded to the witnesses.

Furthermore, the notion that rape and sexual assaults are lesser crimes has caused the exclusion of these atrocities from the public record.\(^{114}\) Thus, whenever sexual gender based violence occurs in the midst of other crimes such as genocide, murder, apartheid, it lacks proper documentation unless used for ethnic cleansing or as a weapon of war.\(^{115}\) This has demonstrated and perpetuated the belief that sexual assaults inevitably accompany war still remain.\(^{116}\) One may draw an inference that, it

\(^{111}\) Ibid.
\(^{115}\) Ibid.
\(^{116}\) Ibid.
should not come as a surprise that people can talk about Apartheid in the absence of sexual violence which took place.

One of the most profound legacies of apartheid has been to render women exceedingly vulnerable to physical and other forms of violence, both in the public and private sphere. In brief, a major legacy of apartheid has been that all women are rendered subordinate to men; and black women have been left overwhelming bereft of rights and resources.

International law makes provision that States parties should not only to ensure that State officials do not themselves engage in gender-based violence against women but should further provide for protection and support for the survivors of violence. At the UN level, the Committee on the Elimination of Discrimination against Women has articulated the obligations of States parties to the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) to eliminate violence against women. Other UN human rights treaty bodies, such as the Human Rights Committee and the Committee against Torture, have also made clear that States parties’ obligations under the International and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) include eliminating public and private violence against women; regional human rights bodies have reached similar conclusions under their general human rights conventions.

Throughout the world, truth commissions are being constructed under the hope that discovering the “truth” about a country’s past conflict will somehow contribute to “reconciliation”. Most such efforts point to South Africa’s process and consider it as an exemplar of apparently a powerful influence of truth finding. The perception is

118 Ibid.
121 Ibid.
that South Africa took a revolutionary approach in transitioning and progressing from a conflict.\footnote{122}{Desmond Tutu \textit{Truth and Reconciliation Commission, South Africa} \url{https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa} last accessed 1 December 2019.} However, this is misconstrued. The Republic of South Africa took a transformative reform. Like most African states, the decision by national authorities to either punish or to grant amnesty for serious violations of international humanitarian law or human rights was not a free choice between equally attractive and legitimate ways of dealing with a legacy of massive violations considering different rights of individuals and obligations of perpetrators as well as the state.\footnote{123}{Avril McDonald \textit{A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law} at page 193.} It was a much difficult decision bearing in mind that this might not favour all people. As a result, it is accepted that these decisions are a compromise approach taken as result of competing rights,\footnote{124}{Ibid.} with the truth commission frequently serving as a way to the amnesties, recognition of the need to take notice of the crimes and of the victims when national prosecutions are or seem to be impossible.

The Promotion of Peace Act\footnote{125}{The Promotion of Peace Act Act 34 of 1995.} allowed for the granting of amnesties to the perpetrators of crimes during Apartheid. However, such amnesties were going to be granted in respect of persons who first give a full and truthful accounts of the facts and only when the crimes were political and proportionate to the aim sought to be achieved.\footnote{126}{Avril McDonald \textit{A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law}.} Although this makes it difficult to ascertain as to who becomes liable, it is accepted that the amnesties in South Africa have not let everyone off the hook. \textit{Persons who did not apply for amnesty or in respect of whom amnesties have been denied remain liable to be prosecuted.}\footnote{127}{The Centre for the Study of Violence and Reconciliation, \textit{The Violent Nature of Crime in South Africa, A concept paper for the Justice, Crime Prevention and Security Cluster Prepared by 25 June 2007 Page 16.}} A number of remedies remain available for victims.

\textbf{REMEDIES}

\begin{itemize}
\item \footnote{122}{Desmond Tutu \textit{Truth and Reconciliation Commission, South Africa} \url{https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa} last accessed 1 December 2019.}
\item \footnote{123}{Avril McDonald \textit{A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law} at page 193.}
\item \footnote{124}{Ibid.}
\item \footnote{125}{The Promotion of Peace Act Act 34 of 1995.}
\item \footnote{126}{Avril McDonald \textit{A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law}.}
\end{itemize}
In order to address high levels of sexual violence in contemporary South Africa, the state needs to acknowledge the ways in which a colonial, white supremacist and patriarchal past has shaped responses to sexual violence.\textsuperscript{128} Doubt to the law dates back to the repressive role of the criminal justice system and the law during the apartheid era, although it is also sustained by factors in the current political environment.\textsuperscript{129}

National and international approaches to dealing with serious international crimes generally focus on the perpetrators rather than their victims.\textsuperscript{130} Considering the rights of victims of international crimes may also assist in drawing attention to the position of these people as the most and worst affected, individually and collectively, directly and indirectly. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)\textsuperscript{131} focused on victims of ordinary crimes. However, it makes provisions for victims who have suffered harm ‘through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights’. Apartheid was not recognised as a crime nationally. Majority of sexual violations which took place during that time we not prosecuted. However, apartheid and crimes consequential to that were declared crimes against humanity. As such, remedies exist both in international law.

**International law Provision**

The origins of reparations in human rights law stem from the adoption of the UDHR in 1948\textsuperscript{132}. Article 8 states that: *Everyone has the right to an effective remedy by the*...

\textsuperscript{128} Lucy Valerie Graham *The importance of confronting a colonial, patriarchal and racist past in addressing post-apartheid sexual violence* New York University.


\textsuperscript{130} Benson Chinedu Olugbued and Another, *Enhancing the protection of the rights of victims of international crimes: A model for East Africa* (2011) page 612 Vol 11AFRICAN HUMAN RIGHTS LAW JOURNAL.


competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The Human Rights Committee adopted its General Comment No. 31\(^{133}\) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant. The Committee noted that, appropriate, reparation involves restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. Accordingly, the remedies require states (at national level) to act positively towards their realisation.

In cases of SGBV, the CEDAW has recommended that States are to:

- “Review legislation that is a barrier to eliminating the gender discrimination
- Effectively investigate and prosecute
- Effectively implement new laws
- Erase the burden of proof
- Provide rehabilitation
- Cooperate with NGOs to protect and support those who come forward”\(^{134}\).

National Application

Prosecutions changes in relevant laws and practices

Judicial remedies are available to the victims of sexual gender based violence which took place during apartheid in South Africa. In June 2018 in the case of L v Frenkel,\(^{135}\) Section 18 of the Criminal Procedure Act was brought to the Constitutional Court to confirm the declaration of its invalidity. In this case, the eight applicants went to

\(^{133}\) CCPR General Comment No. 31, The Nature of General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, para. 16.


\(^{135}\) L and Others v Frankel and Others 2017 (2) SACR 257 (GJ) (15 June 2017).
the high court in an attempt to change the law. Accordingly, the law prior to being declared unconstitutional, prevented victims of sexual abuse from criminally charging their abusers 20 years after the crime had been committed. The application was a result from the refusal by the Director of Public Prosecutions (DPP) in Gauteng to prosecute Sidney Frankel. The bases for such refusal was prescription in term of the Criminal Procedures Act. The applicants in this matter alleged that Frenkel had sexually assaulted them in and around Johannesburg more than 20 years ago. At the time of the alleged sexual violations, the Applicants were between the ages of six and 15 years old. These sexual violations took place between 1970 - 1989, during apartheid.

The High Court held that the creation of the cut of time of 20 year prescription for sexual offences by the legislature was random and irrational. The court substantiated its claim based on the fact that there has been sufficient body of evidence demonstrating that sexual offences inflict deep and continuous trauma on survivors. The constitutional court confirmed the invalidity of section 18 of the Criminal Procedure Act. The results is that the Prescription in Civil and Criminal Matters (sexual Offences) Amendment Bill.

The amendment provides a positive outlook into the position of sexual violations in South Africa. It has affirmed that victims of sexual violations committed during apartheid can still be bought to court for prosecution. This amendment read together with the Unity Act, provides access to justice for victims of sexual gender based violence during apartheid in South Africa. Once the platform has been given to the victims, outcome should provide satisfaction, be just and equitable and in line with the principles and values of the Constitution of South Africa and International law.

Training
According to the Reparations and Remedies for Victims of Sexual Gender Violence Based Report of January 2016, some international bodies have ordered State to implement measure to train and raise awareness of official staff, adopting public policies, educational curriculums and institutional programs to train official staff and police units on women’s rights and SGBV.

In South Africa, bearing in mind the prescription rule on sexual violence crimes, victims of SGBV crimes would stand a chance accessing justice in the event the necessary official are properly trained. Such training should bear in mind the gender of officials when dealing with reported cases.

In the Akayesu trial, women who testified about violence against her family and the killing of her husband, was never question about sexual violence in Kigali. The issue was first raised by a male prosecutor in Arusha. She told him nothing, despite the fact that both her and her daughter had been raped during the genocide. This was because he was a male prosecutor.

It is therefore recommended that in order to begin providing remedies for SGBV in South Africa, international law lesson on the approach to SGBV should be borne in mind.

**Public apologies, public memorials, guarantees of non-repetition**

The role of the Apartheid government during the Constitutional Reform on one that remains protected and unspoken off. Majority of South Africans still have genuine fears of having a white government in the RSA. Accordingly, one of the most revolutionary stance that could be taken by the RSA for is for the old government and its beneficiaries to put and effort providing public apologies for all forms of

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137 Ibid.

violence which were perpetrated to the detriment the oppressed. And to further make guarantees, and edge all beneficiaries of apartheid to be conscious of such benefit in act positively in making reparations.

Public Consultation as an added approach

As discussed, above, SGBV victims are prone to victimization and social stigma, fear or discrimination may impede their familial and community well-being and active participation in society. In the event that they Social stigma to be combatted through various campaigns. SGBV comprises various dimensions of violence including but not limited to – physical, sexual and socio-economic. In order to provide relevant remedies, it is best for consultations with relevant victims who have been both directly and indirectly affected by the perpetration of SGVB.

Although the consultation will not be like a transfer of demands to the state, a report unique to the experience of SGBV victims of apartheid in South Africa may be obtained. This report can then be used as a direction to begin making reparations in a more meaningful way.

CONCLUSION

Sexual violence in South Africa is not a ‘women’s issue’, nor a sudden ‘epidemic’, and it should not be a platform for political point scoring. Rather, high levels of sexual assault in South Africa draws attention to a continuing history of social and economic inequality that needs to be confronted by the State in order to prevent the continuance of sexual gender based violence. Until the State recognizes the ways in which gender inequality has been forged by a violent history of patriarchal racism,

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and finds ways to address the socio-economic and gender inequalities that are
directed related to South Africa’s past – the impacts of apartheid sexual violence will
remain unresolved.

In terms of international law, the violation of international human rights and the
commission of international criminal law gives rise to state responsibility and
consequently the duty to reparation. Accordingly, treaties form an important
substantive body of international law; they directly create obligations for the state
parties to either act positively towards protecting civilians.

As discussed above, South Africa is not the only country in Africa which had a
conflictual past. This paper considers Rwanda’s approach in light of the fact that
South Africa’s approach to the resolution of any crimes committed during such times
respectively. This is material because, although South Africa’s approach is said to be
a peaceful and iconic in nature. However, it has failed to provide remedies for this
particular criminality. As indicated, a number of these occurrences of SGBV have not
only been ignored but victims have been silenced.

However, this paper acknowledges that failure to prosecute perpetrators of SGBV in
South Africa for international law crimes committed during apartheid may have set as
tone for current SGBV. It is accepted that prosecution is not the only remedy for
reparations available to South Africa’s apartheid victims of SGBV. International law
allows for symbolic reparations which are necessary. Other reparations include:
Training, Public apologies, public memorials, guarantees of non-repetition. This
paper also bring to the attention the importance of consultation into establishing what
is referred to as meaningful reparations. The apartheid legacy of political and sexual
violence disappearing, reparation and reconstruction will according to Goldblatt and
another, need women’s organisations and forums to take up the healing of the
survivors.

141 BETH GOLDBLATT & SHEILA MEINTJES (1998) Dealing with the aftermath: sexual violence and
the Truth and Reconciliation Commission, Agenda,
<https://www.researchgate.net/publication/254235681_Dealing_with_the_Aftermath_Sexual_Violence
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The victims’ remedies are endorsed by International Law but South Africa remains and implementing Country. South Africa has established a sexual offences court with specialised investigators in order to deal with the SGBV. The case of Frankel has extended the prescription for SGBV. Furthermore, one may consider the possibility for the a similar court to privately deal with awarding compensation for SGBV to victims of apartheid where these crimes were perpetrated by the three main perpetrators as indicated in this paper.

It appears that the remedies for this gross human right violation is not only a legal issue to be dealt with through legislation, court procedure and lawyers. However, it is my view that in order to decisively deal to the current SGBV in South Africa, the root issue which I submit that it is apartheid lawlessness, must be addressed. Grave human rights abuses which did not enjoy amnesty in terms of the TRC must then be addressed. It is my submission further that the justice system as it is needs reformation in so far as SGBV is concerned. I proposed that Civil Society Organisations, should be thoroughly engaged in assisting with regards to addressing the SGBV which has since been silence during apartheid.

According to a few consultations I did with regards to crimes committed during apartheid, what is common is that victims require that first respective perpetrators must be prosecuted. Subsequent to this, any other forms of reparation can then be considered.
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