Chapter Four

Normative Standards and Practical Prospects for Further Prosecutions

The process of initiating and conducting criminal trials in the wake of the TRC for those who committed politically motivated gross human rights violations during the apartheid conflict has certainly not been dealt with exhaustively. During the decade succeeding the official end of the TRC in 1998, very few trials were initiated. The task to conduct post-TRC prosecutions is, thus, far from conclusion.

The following chapter will highlight the features of the applicable legal framework which must guide the official approach to establishing criminal accountability for politically motivated human rights violations in South Africa. This also includes dealing with statutory limitations and legally consistent prioritisation criteria. Concurrently, the practical prospects for further trials and the question of whether we may expect a significant number of further proceedings will be examined. Although it is not possible to assess here which cases could still be prosecuted, a short collection of cases will be presented, which were either announced by the NPA as exhibiting sufficient prospects for a successful prosecution, or which due to certain specific features are of extraordinary or exemplary relevance for victims and the issue of post-TRC criminal accountability as a whole.

1. Constitutional and International Law Requirements

Criminal proceedings concerning the politically motivated gross human rights violations of the apartheid era are invariably embedded in a legal framework. As such, norms and legal standards from both
constitutional as well as international law place specific obligations on the government and also determine the legality of the current official approach and the actual conduct of prosecutions through the NPA. The South African government and the NPA must consider this legal framework and fulfill any legal requirements. The extent to which the State continues to fail to conduct a significant number of criminal trials and its policy of trying to prevent trials on a large scale might be seen as conflicting with such requirements. However, any possible legal obligations and South Africa’s compliance therewith will be outlined in the following paragraphs.

1.1 Constitutional law obligations

The politically motivated crimes which were committed in the course of the apartheid conflict violated a range of fundamental human rights, which are meanwhile explicitly protected in the Constitution of democratic South Africa. Many apartheid opponents were abducted, tortured and killed by the security forces simply for their resistance to the inhumane regime. Many civilians also died through activities of the liberation movement. The relevant rights of the Constitution’s Bill of Rights 1 concerned by such conduct are the right to the respect of human dignity of every human being, as enshrined in section 10 of the Constitution, the right to life, according to section 11 of the Constitution and the fundamental rights of freedom and security emanating from section 12 of the Constitution. Section 12 contains the rights not to be arbitrarily deprived of personal freedom, not to be detained without trial, to be free from all forms of violence regardless whether public or private, not to be tortured and not to be treated in a cruel, inhuman or degrading way, as well as the right to bodily and psychological integrity.

According to section 7(2) of the Constitution the state is obliged to protect, respect, promote and fulfil the Bill of Rights. This obligation is not confined to preventive measures but extends to punitive measures

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1 See sections 7 to 39 of the Constitution.