EX PARTE:

FOUNDATION FOR HUMAN RIGHTS

IN RE:

PROSECUTING APARTHEID CRIMES UNDER INTERNATIONAL LAW

OPINION

Legally Privileged: Prepared by External Counsel

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INTRODUCTION

1. Apartheid was a crime against humanity.[1] As a system of racial domination of a White minority over a Black majority, it routinized the widespread and systematic commission of inhuman acts against the civilian population (including murder, torture, persecution, forced removals, and enforced disappearance) that *in themselves* were crimes against humanity.[2] The efforts of other states, including its regional neighbours, to assist in ending White minority-rule and apartheid in the country led to external operations by South African state actors that resulted in the commission of further crimes against humanity and, at times, war crimes. This is a matter of historical record and has been confirmed by the Constitutional Court in *S v Basson*.[3]

2. While the *Promotion of National Unity and Reconciliation Act* 34 of 1995 (the 'TRC Act') granted criminal and civil amnesty to

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[1] See, for example, *United Nations General Assembly Resolution 2202* (16 December 1966); 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (the '1968 *New York Convention*'); and 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (the '1973 *Apartheid Convention*').

[2] See article II, 1973 *Apartheid Convention* and article 7, 1998 *Rome Statute of the International Criminal Court* (the '1998 *Rome Statute*').

[3] In *S v Basson* 2005 (1) SA 171 (CC) the Constitutional Court noted (para. 37): '[T]he state's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. *It is relevant to this enquiry that international law obliges the state to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes*.'

individuals who met the conditions set out therein,[4] it was predicated on the understanding that those who simply chose not to apply for, or who were denied, amnesty would face the full force of the law. As the Final Report of the Truth and Reconciliation Commission stated:[5]

> '[I]t has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have *a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law*.'

3. In his concurring judgment in *S v Basson,* Sachs J explained these 'obligations in terms of international law' as follows:[6]

> 'Nothing shows greater disrespect for the principles of equality, human dignity and freedom than the clandestine use of state power to murder and dispose of opponents. …When the depredations complained of are of such a dimension as to transgress the frontier between ordinary state-inspired criminal violence and war crimes, the engagement with the core of the Constitution becomes even more intense.'

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[4] Chiefly, (i) that 'the act, omission or offence…[was] an act associated with a political objective committed in the course of the conflicts of the past', and (ii) that 'the applicant…made a full disclosure of all relevant facts'. See s20, *TRC Act.*

[5] *TRC Final Report, Vol 6, Section 5, Chapter 1, para. 24.*

[6] Paras. 112-113.

4. Similarly, the majority in that case noted that, the fact that the crimes for which Basson was charged 'may well fall within the terms of' South Africa's obligations to prosecute core international crimes, may have constituted '*an added obligation upon the state*'.[7]

5. Pursuant to these obligations, the National Prosecuting Authority (NPA) has recently begun 'dealing with crimes committed in the past' in earnest.[8] With this in mind, we have been asked to address the following questions:

5.1. Whether acts committed during apartheid that amount to international crimes can be prosecuted under South African law; and,

5.2. Whether the prosecution of pre-1994 crimes would be consistent with the Constitution.

6. We will address each of these in turn.

[7] Para 37.
[8] See further, *Rodrigues v NDPP & Others* 2019 (2) SACR (GJ), para. 39

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7. There are three independent legal bases available under South African law for the prosecution of war crimes, crimes against humanity and genocide (the 'core' international crimes), namely: section 232 of the Constitution, the *Rome Statute Act* and the *Geneva Conventions Act*. We will briefly set out each of these and consider their inter-relation.

8. **First**, the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (the *ICC Act*) provides for the prosecution of war crimes, genocide and crimes against humanity (as defined in Schedule 1).

9. The *ICC Act* is the principal piece of domestic legislation for core international crimes, adopted in 2002 following South Africa's accession to the International Criminal Court in order to (i) 'provide for cooperation by South Africa with the [ICC]' and (ii) 'provide for the prosecution in South African courts of persons accused of having committed [war crimes, genocide and crimes against humanity]'.[9]

[9] Preamble, *Rome Statute Act.* See further Max du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example', 5(2) *Journal of International Criminal Justice* (2007), 460.

10. While, as we show below, the core international crimes were already criminalized under section 232 of the Constitution, the *ICC Act* provided greater clarity and detail on both the substantive definitions of these crimes (based on the 1998 Rome Statute) and provided specialized procedures for their prosecution. As such, the *ICC Act* will likely be the most commonly used avenue for prosecuting international crimes in South Africa, save for those situations that fall outside its substantive jurisdiction (e.g. the crime of aggression) and temporal jurisdiction (i.e. acts before 2002).

11. **Second**, the *Implementation of the Geneva Conventions Act 8 of 2012* (the *Geneva Conventions Act*) provides for the prosecution of certain war crimes (as defined in section 5).

12. The *Geneva Conventions Act* was adopted nearly 60 years after South Africa signed up to the 1949 *Geneva Conventions*.[10] Unlike the other two avenues under the ICC Act and section 232 of the Constitution, the *Geneva Conventions Act* 'domesticates' war crimes already covered by section 232 generally and the *ICC Act* specifically, and a more limited category thereof. Thus, the *Geneva Conventions Act* will likely be the least commonly used avenue for prosecuting international crimes in South Africa, save for situations where the State wants to rely on its specialized

[10] See further Max du Plessis, Christopher Gevers & Alan Wallis, 'Sixty Years in the Making, Better Late Than Never?: The *Implementation of the Geneva Conventions Act*', *African Yearbook of International Humanitarian Law* (2012), 185-200.

'modes of liability' provisions to prosecute senior military or civilian official on the basis of 'Command Responsibility'.[11]

13. The **third** legal basis for prosecution of international crimes, as confirmed by the Constitutional Court[12] and supported by academic writings,[13] is section 232 of the Constitution. It provides an *independent* ('self-standing') basis for the prosecution of crimes under Customary International Law (section 232 states: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament').[14]

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[11] Section 6, *Geneva Conventions Act.*

[12] In *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC), the Constitutional Court explicitly endorsed the prosecution of international crimes (and crimes against humanity in particular) under section 232 of the Constitution, noting (para. 37): '*Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.*' And: 'In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act *whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the Rome Statute Act.*'

[13] As Max du Plessis & Andreas Coutsoudis recently put it: '[S]ince customary international law is given full and direct force in South Africa in terms of the Constitution, it must be applied directly (unless in conflict with the Constitution or legislation). As was seen in the Torture Docket case, the effect automatically extends to *domesticating all crimes of customary international law.* This case helpfully illustrates the dramatic effect of section 232. Customary international crimes have a long pedigree. They certainly precede the coming into force of the final Constitution by decades.' Andreas Coutsoudis & Max du Plessis, 'We are all international lawyers now: The Constitution's international law trifecta comes of age', 136(3) *SALJ* (2019) 433, 447-8. See further Kemp et al., *Criminal Law in South Africa*; Strydom et al., *International Law*; and Dugard et al., *Dugard's International Law*.

[14] We have not included torture that does not constitute a crime against humanity in these 'core' international crimes of war crimes, genocide and crimes against humanity. The Prevention and Combating of Torture of Persons Act 13 of 2013 (*the Torture Act*) provides for the prosecution of torture (as defined in section 3) whether it forms part of a widespread or systematic attack on a civilian population (and therefore constitutes a crime against humanity) or not. As the Constitutional Court held in *National Commissioner v SALC* supra para 39, 'torture is criminalised in South Africa under section 232 of the Constitution and

14. The Constitutional Court has thus confirmed that any crime under customary international law 'is proscribed as a crime under our domestic law in terms of section 232 of the Constitution',[15] irrespective of whether the crime in question has been 'domesticated' into our law by an Act of Parliament (as most international crimes have been).

15. In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*[16] the Constitutional Court expressly recognised that section 232 of the Constitution supports the direct application of customary international law in South Africa. The Court acknowledged that torture is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture enjoys the status of a peremptory norm. The Court held:

> 'Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct

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the Torture Act whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act.'

[15] *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC), para. 60. Section 232 states: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

[16] 2015 (1) SA 315 (CC).

because "all states have an interest as they violate values that constitute the foundation of the world public order". Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm" (footnotes omitted).'[17]

16. The Court went on to extend its findings in respect of section 232 to crimes against humanity generally. It held: *'In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act.'*

17. Section 232 is thus both the longest standing and arguably most important avenue for prosecuting international crimes in South African law. It preceded the adoption of various 'domesticating' statutes,[18] and - as the State explained under oath to the Constitutional Court in 2016[19] - continues to ensure that there can

[17] Para 37.

[18] Most importantly for present purpose, the 2002 *ICC Act,* and the 2012 *Geneva Conventions Act.*

[19] See 'Answering Affidavit on behalf of the 1st, 2nd and 3rd Respondents in CCT 255/16 and on behalf of the 1st, 2nd, 3rd and 7th Respondents in CCT 256/16', filed in *Democratic Alliance v Minister of International Relations and Cooperation and Others* (CCT 255/2016) and *Council for the Advancement of the South African Constitution v President of the Republic of South Africa and others* (CCT 256/2016), para. 89. Notably, the Government cited the Constitutional Court's decisions in *National Commissioner v Southern African Human Rights Litigation Centre.*

be no 'underlaps' when it comes to fulfilling our obligations to prosecute international crimes.

18. Section 232 would prevent such 'underlaps' in the event of the repeal of a 'domesticating' statute (as the Government attempted to do in 2016); or in the event of the State's prosecution of crimes before those statutes came into force, such as situations arising between 1994 and when the first 'domesticating' statute came into force in 2002 (for example, in the case of Mr Kouwenhoven),[20] or even before 1994 provided such prosecutions are 'not inconsistent with the Constitution' (as discussed below).

19. As the third of these – section 232 – is distinct from the first *statutory* bases (although not dissimilar from the overwhelming majority of South African criminal law which remains 'non-statutory'), and possibly the most novel and challenging, we offer the following further remarks regarding 'section 232 prosecutions'.

20. We note that prosecutions under section 232 place an additional obligation on the NPA to (i) prove to the Court that the alleged offence was a crime under Customary International Law at the time of its commission, and (ii) set out the applicable definition of

[20] Guus Kouwenhoven is currently resident in South Africa. He was convicted by a Dutch court in 2017 of complicity in war crimes committed in Liberia and Guinea between 2000 and 2002, following which the Dutch authorities sought his extradition. The matter is presently before South African courts, after an initial refusal by a Magistrate to grant the extradition. In the event that Kouwenhoven cannot be extradited, and South Africa authorities wish to prosecute him, then the only avenue available would be section 232 as his alleged crimes preceded the coming into force of the *Rome Statute.*

the crime in question at the relevant time. However, it is important to note that these obligations are neither unique to South African law, nor are they as onerous as they might first appear. In fact, there are a number of decisions from foreign and international courts addressing precisely these questions. So while by no means 'trite', there is a substantial body of jurisprudence that the NPA can draw on when doing so. We point to two cases that we consider particularly instructive in this respect.

20.1. The first case is *R v Munyaneza* [2009] QCCS 2201 in which the Superior Court of Quebec heard the first prosecution under Canada's *Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24)*, which (like section 232 of the Constitution) provides for the prosecution of conduct that, at the time of its commission, 'constitutes a crime against humanity [genocide, or a war crime] according to customary international law…'. (section 6(3)). In this case Mr Munyaneza was ultimately convicted of seven counts of genocide, crimes against humanity and war crimes committed in Rwanda in 1994, as the court was satisfied - after considering the relevant state practice, treaties and international jurisprudence - that these constituted crimes under customary international law at the time of their commission. In 2014 the Court of Appeal upheld the conviction on the basis that these were crimes under international law 'long before the events in Rwanda in 1994' (and, in the case of crimes against humanity, before the

Nuremberg trials in 1945 (*R v. Munyaneza* [2014] QCCA 906, para. 14).

20.2. The second case we bring to your attention is that of *Kaing Guek Eav alias Duch* (Judgement, Case No 001/18-07-2007/ECCC/TC (26 July 2010)), where the Extraordinary Chambers in the Courts of Cambodia (ECCC) - established in 2001 under an agreement between Cambodia and the United Nations - found the accused guilty of crimes against humanity and war crimes committed between 1975 and 1979. As Cambodian law contained no provisions relevant to crimes against humanity and was not party to any international treaty relevant to these crimes during the period in question, the ECCC had to first 'establish that these offences constituted crimes under… [customary] international law during the 17 April 1975 to 6 January 1979 period' (paras. 283-4). In doing so the Court not only found that 'the Nuremberg-era tribunals [and] codifications of international law on genocide and apartheid, *two of crimes against humanity's most egregious manifestations,* confirmed the customary status of the prohibition of crimes against humanity' (para. 288), it also held that while these crimes had been 'variously defined and its elements have been refined throughout the years… [t]he principle of legality prevents neither a reliance on unwritten custom nor a determination through a process of interpretation and clarification as to the elements of a particular crime' (para. 290). On this basis the court proceeded to *interpret* and *clarify*

the definitions - under customary international law - of crimes against humanity and war crimes between 1975-1979, laying the legal foundation for future domestic and international courts (and prosecutors) tasked with ascertaining the definitions of such crimes under customary international law since 1975. As in the case of *R v Munyaneza,* the ECCC set out and discussed an extensive body of state practice (including General Assembly resolutions), treaties and international jurisprudence in support of its findings.

21. Taken together, these three avenues form the legal patchwork for the prosecution of international crimes under South African law. While the patchwork could have been sewn more neatly, in substance it is not dissimilar to the corresponding legal regimes of other states. To give two brief examples:

21.1. The United Kingdom's *International Criminal Court Act* (UK *ICC Act*), adopted in 2001, makes the 'core' international crimes offences under domestic law, and specifically provides for their prosecution dating back to '1 January 1991'.[21]

[21] Section 65A(1), *International Criminal Court Act* (as amended). As Cryer notes: 'There were many possible dates to which the various forms of international criminality could have been domestically criminalized… . The Government decided, however, despite suggestions that they should go back further, to set the start of 1991 as the cut-off date for retrospectively applying the crimes in the ICC Act'. See Robert Cryer & Paul D. Mora, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?', 59 *ICLQ* (2010), 803-813, at 805.

21.2. In contrast, Canada's *Crimes Against Humanity and War Crimes Act* (Canada's *Crimes Against Humanity Act*), which entered into force in 2000, recognizes these as crimes under Canadian law and provides for their prosecution dating back to the time they *'constitute[d] a [international crime] according to customary international law…*whether or not it constitute[d] a contravention of the law in force at the time and...place of its commission'.[22]

22. Notably, both of these legal regimes for the prosecution of 'core' international crimes provide for the prosecution of acts that took place before they entered into effect, however they do so using different means: the UK elected to set a specific 'cut-off' date, while Canada opted to leave it up to the courts to determine the point at which each 'core' international crime 'constituted an offence according to customary international law'.[23] Of these two, Canada's more closely resembles South Africa's patchwork legal regime, as section 232 and arguably the *Geneva Conventions Act* both place the responsibility on judges to determine the temporal jurisdiction. However, it is worth noting that the UK ICC Act does require UK courts to determine and 'directly apply' customary international law, but in a more limited sense.[24]

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[22] Section 4(3) & 6(3), *Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24)*.

[23] As the courts subsequently have done, see the discussion of *R v Munyaneza* 2009 QCCS 2201 above.

[24] Section 65A(2) of the UK's *ICC Act* provides that - in respect of crimes against humanity and war crimes committed between 1991 and 2001 - a judge must ensure that these were 'criminal offence[s] under international law' at the time they were committed. See Robert Cryer, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into

23. In summary, under South Africa law 'core' international crimes can be prosecuted from the point at which they constitute crimes under customary international law (as determined by the courts). For acts that take place prior to 2002, these will (likely) take place under section 232 of the Constitution;[25] for acts that take place after 2002, these will (likely) take place under the *ICC Act.*

24. As all three 'core' international crimes were, broadly speaking, recognised as crimes under customary international law before 1994 - and before 1945 in some instances[26] - the State can in principle prosecute international crimes committed during apartheid under section 232 of the Constitution.[27] We now turn to consider whether such prosecutions would be consistent with the Constitution, and conclude that, not only are such prosecutions permitted under the Constitution, they are anticipated by it.

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the Future?', 59 *ICLQ* (2010) 803-813, at 806-808.

[25] We leave open the possibility of prosecuting 'continuing crimes' - such as enforced disappearances - that commenced prior to 2002 but persisted beyond it, under the *ICC Act*.

[26] Article 6(c) of the 1945 *Charter of the International Military Tribunal* (the Nuremberg Tribunal) defined crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population'. Similarly, in *R v Munyaneza* the Court noted that 'prior to 1945…crimes against humanity were part of customary international law'. *R v Munyaneza* 2009 QCCS 2201, para. 112.

[27] In respect of war crimes in particular, these might also be prosecutable under section 7(4) of the *Geneva Conventions Act.* See further Max du Plessis, Christopher Gevers & Alan Wallis, 'Sixty Years in the Making, Better Late Than Never?', supra.

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25. Taking into account the experiences of other jurisdictions, one likely objection to the prosecution of international crimes committed before 1994 would be that it amounts to the retroactive application of the law, in violation of the principle of *nullum crimen sine lege.*

26. Given that such prosecutions are most likely to occur under section 232 of the Constitution, we make the following immediate points. While such prosecutions may be *retrospective* in nature (if the conduct in question took place before the entry into force of the Constitution), they do not amount to the *retroactive* application of law and they cannot be said to violate the principle of *nullum crimen sine lege* (or the principle of non-retroactivity).

27. As the Canadian Court of Appeal put it in *R v Munyaneza,* such provisions cannot be said to be *retroactive* as they '[do] not attempt to create an offence *ex post facto*', rather they 'merely allow the prosecution in Canada of persons who, before the *Act* entered into force, committed acts that, at the time of their commission, constituted genocide, crimes against humanity, or war crimes, according to the definitions of those crimes under international law'.[28] Like its Canadian equivalent, section 232 of the Constitution

[28] *R v Munyaneza* 2014 QCCA 906, at para. 51.

'did not create new legal consequences for the past but only for the future'.[29]

28. As a result, not only do prosecutions under section 232 of the Constitution comport with the principle of non-retroactivity, they are in fact *anticipated* by section 35(3)(l) of the Constitution, which protects the right of an accused person 'not to be convicted for an act or omission that was not an offence *under either national or international law* at the time it was committed or omitted'. Notably, the Court of Appeal in *R v Munyaneza* found precisely this in respect of the corresponding provision in the *Canadian Charter of Rights and Freedoms.*[30]

29. South African prosecutors have a firm legal basis to successfully resist objections of this sort. In our view, South African courts will be likely to reject these objections on the basis of the sound reasoning in foreign and international case law. Such objections have been raised before Canadian courts (in the very first prosecution brought under their *Crimes Against Humanity Act*), as well as before International Tribunals and Human Rights bodies, and have been rejected consistently. The terms upon which these

[29] *R v Munyaneza* 2014 QCCA 906, para. 54. The Constitutional Court has explained the 'fine distinction' between *retrospectivity* and *retroactivity* in the *Du Toit* case in similar terms, noting (at para. 33): 'A retrospective provision *operates for the future only but imposes new results in respect of past events.* A retroactive provision operates as of a time prior to the enactment of the provision itself and *changes the law applicable* with effect from a past date'. *Du Toit v Minister for Safety & Security* 2009 (6) SA 128 (CC).

[30] Section 11(g).

courts did so are instructive for any potential challenge to such prosecutions under the Constitution.

30. As we have already explained, in the *Munyaneza* case, which concerned acts of genocide allegedly committed in Rwanda in 1994 (i.e. before Canada's *Crimes Against Humanity Act* came into force in 2000), the Court of Appeal was emphatic that there was no 'principle of legality' violation in prosecuting such crimes in Canada.

31. Notably, the court in *Munyaneza* also explicitly rejected the argument that the act in question had to be criminal under *both* domestic and international law.[31] Moreover, in any event, it is worth noting that even prior to 1994 South African courts had made clear that customary international law was part of our law, and there is no reason to think customary international criminal law was somehow excluded from this determination.[32]

32. Finally, insofar as any objections of *retroactivity* may be raised, it is worth recalling the following exhortation of the late Langa CJ in *Du Toit v Minister of Safety & Security*:[33]

[31] *Du Toit* supra, para 125. Notably, these had been a requirement of the previous Canadian legislation, and was repealed by the Act.

[32] This would also contradict section 35, as discussed below.

[33] Paras. 28-30.

> The process of reconciliation is an agonising one which requires give and take from all sides. … What is important is the delicate, constitutionally required balance that is implicit in the legislation and that must be achieved by implementation. That is, after all, a project directed at national unity and reconciliation and *to grant disproportionate benefit to one party at the expense of the other would be unjust and would strike at the equilibrium envisaged by the Constitution*.

33. In giving effect to the amnesty provisions in the Constitution[34] the TRC Act was, according to the Constitutional Court, 'unavoidably retrospective', 'reach[ing] into the past …refer[ing] to acts committed before the enactment of the statute and seek[ing] to expunge the record of such acts'.[35] *To the extent* that section 232 is interpreted as 'reaching into the past' to prosecute international crimes, it cannot be said to be unjust. On the contrary, to extend the 'carrot' of amnesty retrospectively but not the 'stick' of prosecutions would be 'to grant disproportionate benefit to one party at the expense of the other'. It would, in effect, amount to creating a two-tier amnesty system for the crimes of the past: a *conditional* amnesty for ordinary offences, and a *blanket* amnesty for international crimes. As the Constitutional Court stated in *S v Basson* 2005 (1) SA 171 (CC) (para. 37):

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[34] See section 22(2) of Schedule 6 to the Constitution, which incorporates the relevant provisions of the Epilogue to the 1994 Interim Constitution.

[35] Para. 34.

> '[T]he state's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to *all offences committed before it came into force*. It is relevant to this enquiry that international law obliges the state to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.'

34. In addition to this general retrospectivity argument, a related but more specific objection might be that prosecuting international crimes committed before 1994 on the basis of section 232 violates the principle of *nullum crimen sine lege*, contained in section 35 of the Constitution. That section states, in relevant part:[36]

> 'Every accused person has a right to a fair trial, which includes the right…not to be convicted for an act or omission that was not an offence *under either national or international law at the time it was committed or omitted.*'

35. This provision is important to the present inquiry for at least two reasons: First, it confirms once again that customary international law is a 'self-standing' basis for prosecuting international crimes under South African law (as, if a 'domesticating' statute was required as well, it would render the reference to an 'offence

[36] Section 35(3)(l), Constitution.

under…international law' in section 35 redundant). Second, it illustrates that the Bill of Rights does not only recognize the constitutionality of 'retrospective' prosecutions under section 232, it anticipates them; the only requirement being that a Court is satisfied that *at the time of its commission* the conduct was a crime under customary international law.

36. This interpretation has been upheld by national courts (including in *R v Munyaneza),*[37] international human rights bodies[38] and international criminal tribunals[39] when interpreting the corresponding provisions concerning the right to a fair trial.

37. Notably, in *Jorgic v Germany* the European Court of Human Rights went a step further, finding that even if a prosecuting state adopts a broader interpretation of an international crime in convicting an accused on this basis, this would not run afoul of the *nullum crimen* principle as long as 'the national court's interpretation of the crime…could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time'.[40]

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[37] Para. 52 (interpreting paragraph 11(g) of the *Canadian Charter,* which states that: 'Any person charged with an offence has the right…not to be found guilty on account of any act of omission unless…it constituted an offence under Canadian or international law…'.).

[38] *Jorgic v Germany* [2007] ECHR 583 (12 July 2007), paras. 89-116.

[39] See, for example, ICTY, *Prosecutor v Aleksovski,* IT-95-14/1-A, Appeals Chamber, 24 March 2000, para. 126; and ECCC, *Kaing Guek Eav alias Duch, Appeal Judgement (Public), 4 February 2012,* para. 91.

[40] *Jorgic v Germany* [2007] ECHR 583 (12 July 2007), para. 114. Similarly, the Cambodian Tribunal has noted that '[t]he principle of legality prevents neither a reliance on unwritten custom nor *a determination through a process of interpretation and clarification as to the elements of a particular crime*'. ECCC, *Kaing Guek Eav alias Duch, Judgement, 26 July*

38. In summary, our view is that the principle of legality central to these provisions would not be violated by the application of customary international law, for at least two reasons.

39. First, the *nullen crimen* principle is applicable only in instances where a new offence is created, and therefore offences that were, at the time of their commission, criminalized under international law and subsequently domestically criminalized on a later date, will not offend this principle. This exception is recognised in the South African and comparative law we have cited above. It is also recognized in international human rights law. According to the International Covenant on Civil and Political Rights (ICCPR), 1966, to which South Africa is a party: '*[n]o 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*'.[41] Further, Article 15(2) specifically qualifies this statement in respect of international crimes, noting: '*[n]othing 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*'. [42]

2010, para. 290.

[41] Article 15(1), the ICCPR.

[42] Article 15(2), the ICCPR. Similarly, article 7(2) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms also makes the prohibition on retrospectivity subject to the following proviso: "*[t]his Article shall not 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 recognised by civilised*

40. Second, in applying customary international law to this case, judges in South Africa are - like the judges at the ICTY and ICTR before them - still bound by their constitutional, legal, and professional obligation to ensure that the offences charged constituted criminal offences under customary international law at the relevant time. In making this assessment, our courts would be fully entitled to consider the decisions of other courts (domestic and international) which have already passed judgment on these specific offences. As we have already explained, that is the approach that other domestic and regional courts have taken, and from which our courts would draw support. And those comparative examples confirm there to be no violation of the principle of legality in pursuing such prosecutions of international crimes before domestic courts.

CONCLUSION

41. For these reasons we conclude as follows:

41.1. International crimes committed during apartheid can be prosecuted under section 232 of the Constitution, from the point in time that a Court determines these constituted crimes under customary international law; and

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nations."

41.2. A prosecution undertaken pursuant to section 232 in this regard would not amount to the retroactive application of law and/or would not violate section 35 of the Constitution and the principle of *nullum crimen sine lege.*

Max du Plessis SC

Christopher Gevers

Chambers, Sandton, Durban

15 March 2021