IN RE SIMELANE: FURTHER BRIEF ON INTERNATIONAL CRIMES

Introduction

1. This short Brief aims to address questions arising out the 'Memorandum on the Prosecution of Apartheid-Era Cases as International Crimes under South African Law' (the Memorandum), provided to the National Prosecuting Authority (NPA) on 16 February 2019, and subsequent discussions with the NPA thereon. Broadly speaking, these questions concern: (1) The modalities of prosecutions brought under section 232 of the Constitution, or 'Customary International Law Prosecutions'; (2) The crime against humanity of enforced disappearance; and (3) The relationship between international and domestic charges in the present matter.

2. This Brief will address each of these in turn.

Customary International Law Prosecutions

3. While, for the reasons set out in the Memorandum, there can no doubt that section 232 of the Constitution provides a 'self-standing' basis for prosecutions

under Customary International Law, the NPA raised important questions regarding the modalities of such prosecutions, particularly given their novelty in our law, including:

3.1. The relationship between 'Customary International Law prosecutions' and other relevant legislation concerning international crimes (such as the Rome Statute Act,[1] the Geneva Conventions Act,[2] the Torture Act,[3] and so on); and,

3.2. The specific modalities of bringing a prosecution under Customary International Law, including identifying the relevant crimes and the role of the Court.

4. Simply put, the Rome Statute Act and the Geneva Conventions Act are *irrelevant* to Customary International Law prosecutions. Section 232 of the Constitution provides an *independent* basis for prosecuting international crimes. As such, if charges are brought in the present matter under section 232, whether or not they *could also* be brought under the Rome Statute Act or the Geneva Conventions Act is irrelevant *as a matter of law.*[4]

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[1] *Implementation of the Rome Statute Act of the International Criminal Court Act* 27 of 2002.
[2] *Implementation of the Geneva Conventions Act* 8 of 2012.
[3] *Prevention and Combating of Torture of Persons Act* 13 of 2013.
[4] Of course, *as a matter of policy,* when there are multiple bases available on which to bring charges the NPA will have to consider which holds the greatest likelihood of success.

5. The self-standing and independent nature of section 232 as a basis for prosecuting international crimes was made clear by the Constitutional Court in the passages from *National Commissioner v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC), cited in the Memorandum (at paras. 12-13). By insisting that '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*',[5] the Constitutional Court made clear that these were independent (and at times overlapping) bases for prosecuting torture.

6. As such, even if the Rome Statute Act or the Geneva Conventions Act *hypothetically did not exist,* the alleged crimes in the present matter could still be prosecuted under section 232 of the Constitution as crimes under customary international law. In fact, it was precisely on the assumption that the Rome Statute Act *might not exist in the future* (if repealed), that the Government nevertheless assured the Cape High Court in 2016 that there would be no 'statutory underlap' when it comes to prosecuting international crimes, as these were already 'crimes in South Africa by operation of section 232'.[6]

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[5] *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC), para. 39.

[6] Notably, in doing so, the Government cited the Constitutional Court's decisions in *National Commissioner v Southern African Human Rights Litigation Centre.* 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.

7. Strictly speaking, Customary International Law prosecutions were possible when the Rome Statute Act *did not actually exist* (i.e. prior to its coming into force in 2002). For example, as Wouter Basson was charged only with domestic offences in 1999, in *S v Basson* the Constitutional Court raised, but left open, the question of whether *'customary international law …[could be] the basis in itself for a prosecution*'.[7] However, by answering this question in the affirmative a decade later, the Constitutional Court confirmed that Basson *could have* been charged in the 1990s with international crimes under section 232 of the Constitution (and could still be).

8. For better or worse, then, South Africa has an 'overlapping' regime for prosecuting international crimes, with both statutory and 'non-statutory' bases for prosecution. One way to make sense of this regime is by drawing a parallel to that of Canada, an approach which also brings light to the second question concerning the 'modalities' of section 232 prosecutions.

9. While it is consolidated under a single Act,[8] Canada essentially also has a 'hybrid' regime for prosecuting international crimes that involves *both* statutory and 'non-statutory' bases for prosecution, depending on date of the

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[7] *S v Basson* (2007 (3) SA 582 (CC), note 147. Noting: 'For the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. *We have not found it necessary to consider whether customary international law could be used…as the basis in itself for a prosecution under the common law'*.

[8] *Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24)*. The Act entered into force in 2000.

commission of the offence. Under Canada's *Crimes Against Humanity and War Crimes Act*:

9.1.1. If an international crime is committed *before 2000*, the legal basis for its prosecution will be that, at the time of its commission, it was a crime under Customary International Law (i.e. a Customary International Law Prosecution, such as those under section 232).[9]

9.1.2. If an international crime is committed *after 2000*, the legal basis for its prosecution will be the provisions of the Act which states that every person who commits genocide, a crime against humanity or a war crime 'is guilty of an indictable offence'[10] (i.e. a 'direct' statutory prosecution, such as those under section 4(1) of the Rome Statute Act).[11]

10. As the Canadian Appeal Court explained in *R v. Munyaneza*, while the *Crimes Against Humanity and War Crimes Act* 'criminalize[d]' international crimes in Canadian law generally speaking, when it came to crimes committed before it came into effect (i.e. 2000) its effect was not 'the retroactive creation of an offence…*ex post facto',* '[r]ather, it [sought] merely to allow the prosecution in

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[9] See section 4(3) and section 6(3) of Canada's *Crimes Against Humanity and War Crimes Act.*
[10] Section 4(1) and 6(1) of the Act. See further *Munyaneza v R* [2014] QCCA 906, paras. 49-55 (where the Appeal Court distinguishes between 'creat[ing] an offence *ex post facto*' and 'an amendment to the rules governing the jurisdiction of courts to allow for prosecutions in Canada for acts that, at the time they were committed, were offences under Canadian or international law'.
[11] Section 4(1) states: 'Despite anything to the contrary in any other law of the Republic, any person who commits a [international] crime, is guilty of an offence and is liable on conviction to a fine or imprisonment…'.

Canada [of existing] crimes under international law'.[12] Moreover, as the Act did not criminalize conduct *ex post facto* (i.e. retro*actively*), it merely 'amend[ed]…the rules governing the jurisdiction of the courts to allow for prosecutions' of acts *already criminalized* under Customary International Law (i.e. retro*spectively*), the Appeal Court held that it did not violate the rights of the accused under Canada's Charter of Rights (and, specifically, the equivalent to section 35 of the South African Constitution).[13]

11. The result is that, when it comes to crimes committed *before* 2000, the relevant provisions of Canada's *Crimes Against Humanity and War Crimes Act* are <u>the functional equivalent of section 232 of the Constitution</u>: both recognise the jurisdiction of domestic courts to hear prosecutions of crimes (solely) based on existing Customary International Law. When it comes to crimes committed *after* 2000, these same provisions are <u>the functional equivalent of section 4(1) of the Rome Statute Act (and section 5(1) of the Geneva Conventions Act)</u>: both *directly* criminalize conduct amounting to international crimes under domestic law as well.

12. In the *Munyaneza* case it was the first route (i.e. Customary International Law prosecutions) that allowed Canadian Prosecutors to secure the country's very

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[12] *Munyaneza v R* [2014] QCCA 906, paras. 50-51.
[13] Ibid, para. 52. The Court found: 'The *Act* is thus consistent with paragraph 11(*g*) of the *Charter,* which recognizes that the criminal nature of an act at the moment it is committed may be assessed under *either domestic or international law*'. Notably, section 35 35(3)(l) of the Constitution makes the same qualification, noting that the right to a fair trial includes the right 'not to be convicted for an act or omission that was not an offence *under either national or international law* at the time it was committed or omitted'

first conviction under the *Crimes Against Humanity and War Crimes Act*, for international crimes that took place in Rwanda in 1994.[14] If one applies the reasoning and findings of *Munyaneza* to the facts of the present case, *mutatis mutandis,* the following conclusion arise:

12.1. As crimes against humanity, the inhuman treatment of Ms Simelane *constituted crimes under customary international law before 1945, and therefore in South Africa in 1983*;

12.2. Section 232 of the Constitution *does not attempt to create an offence* ex post facto, *it seeks merely to allow for the prosecution in South Africa of persons who, before the Constitution entered into force, committed acts that constituted crimes under international law*;[15]

12.3. The law does not prohibit *an amendment to the rules governing the jurisdiction of courts to allow for prosecutions in South Africa for acts that, at the time they were committed, were offences under customary international law*;[16]

12.4. *Consequently,* section 232 *validly permits the prosecution of an individual in South Africa for an international crime committed before*

[14] See *R v Munyaneza* [2009] QCCS 2201, and *Munyaneza v R* [2014] QCCA 906.
[15] *Munyaneza v R*, para. 51.
[16] Ibid. para. 53.

1994,[17] including those responsible for the mistreatment and murder of Ms Simelane.

13. Having addressed the first subset of NPA concerns, we now turn to those regarding the 'modalities' of Customary International Law (or section 232) prosecutions. In doing so the Canadian caselaw proves salutary as - along with the 'Duch case'[18] (discussed in the Memorandum) - *R v. Munyaneza* models the process that courts will have to follow in identifying the applicable Customary International Law, and (albeit to a lesser extent that *Duch*) made relevant specific findings regarding 'the content of customary law'.[19]

14. As far as the modalities of identifying the relevant crimes against humanity, the Canadian courts and the Cambodian Tribunals relied on various sources of international law (custom, treaties, General Assembly resolutions), and specifically 'decisions of the international courts'.[20] As the Appeal Chamber in the *Duch* case put it:[21]

> As for the applicable international law, the plane of reference is broader, encompassing international conventions, customary international law and general principles of law recognised by the community of nations applicable at the relevant time. Complex questions that arise regarding the emergence of international criminal law norms from these sources and the relations among them have been, to a large extent, addressed in the jurisprudence of the *ad hoc* [United Nations] Tribunals.

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[17] Ibid. para. 55.
[18] *Kaing Giiek Eav alias Duch* (Judgement, Case No 001/18-07-2007/ECCC/TC (26 July 2010).
[19] *R v Munyaneza,* para. 30.
[20] *R v Munyaneza,* para. 124.
[21] Para. 92.

15. The Memorandum draws extensively on these same sources in order to set out the applicable definition of crimes against humanity, and their underlying elements, at the *relevant time* (i.e. 1983). For present purposes, it's worth noting what the court found in *R v. Munyaneza*, namely:[22]

> '[C]rimes against humanity were part of customary international law. Killing, sexual violence, ["extermination, enslavement, deportation, imprisonment, torture,… persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group"] *constituted crimes before 1945 and therefore, in Rwanda in 1994.*'

16. And in South Africa in 1983, one might add. In this respect we reiterate that, as the present Memorandum focusses on crimes against humanity (and not war crimes),[23] whether or not there was an armed conflict in South Africa in 1983 is wholly irrelevant, as crimes against humanity can be committed 'in time of war or in time of peace'.[24] As the Nuremberg Military Tribunal stated in the *The Justice Case*: 'Whether or not such atrocities constituted technical violations of the laws and customs of war, they were acts of such scope and malevolence…that they must be deemed to have become violations of international law'.[25]

[22] *R v Munyaneza,* para. 112.
[23] See Memorandum, note 3.
[24] Article 1(a), *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (1968). See further, Article 2(1)(c), *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (1945); and article 7, *Rome Statute of the International Criminal Court* (1998).
[25] *Trials of War Criminals before the Nuernberg Military Tribunals - Volume III,* 'The Justice Case', (1951), p. 982.

17. Moreover, the Canadian courts made explicit that, for the purposes of Customary International Law prosecutions, it is *irrelevant* whether or not (1) the conduct in question 'constitutes a contravention of the [domestic] law in force at the time and in the place of its commission',[26] or (2) whether the State on whose territory such conduct took place (i.e. South Africa) had signed up to any specific treaty or convention at the relevant time.

Enforced disappearance

18. The second set out of concerns relate to the crime of enforced disappearance, including:

    18.1. Does the amnesty granted for the arrest and detention of Ms Simelane prevent the NPA from pursuing the charge of enforced disappearance?

    18.2. Is the factual basis for the murder charge incompatible with a charge of enforced disappearance?

    18.3. Is the kidnapping charge

    18.4. Was enforced disappearance a crime under customary international law in 1983?

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[26] See section 4(3) and 6(3) of the *Crimes Against Humanity and War Crimes Act.*

19. At the outset, it's worth recalling the unique nature of the crime against humanity of enforced disappearance; which not only makes it particularly *inhuman*, but also fundamentally *different* from the 'ordinary' domestic crimes of kidnapping and murder. Simply put, the conduct of enforced disappearances is designed to cause maximum suffering to its direct victims (the 'disappeared' persons) and their families,[27] and terrorize the civilian population at large. Its origins can be traced back to World War II, and Adolf Hitler himself, who instructed the head of his Army Forces Wilhelm Keitel that an 'effective and lasting deterrent [to resistance to Nazi occupation] can only be achieved by death sentences *or by measures which will keep the relatives of the perpetrator and the population in suspense concerning the fate of the perpetrator*'.[28]

20. The enforced disappearance of a person therefore invariably involves multiple different inhuman acts (including abduction, detention, mistreatment and oftentimes murder), committed by multiple individuals acting alone or in concert, over a prolonged period of time. However, as noted in the Memorandum,[29] the *crime against humanity of enforced disappearance* focuses on particular aspects of this practice, and in particular discloses two <u>alternative</u> *actus rei* for the purposes of a prosecution:

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[27] As the 1992 *Declaration on the Protection of All Persons from Enforced Disappearance* states: 'Any act of enforced disappearance places the person subjected thereto outside the protection of the law *and inflicts severe suffering on them and their families*' (article 1(2)).
[28] *Trials of War Criminals before the Nuernberg Military Tribunals - Volume III,* 'The Justice Case' (1951), pp. 777-778.
[29] See paras. 84-85 and 88-92.

20.1. The act(s) of *arrest, detention or abduction of one or more persons* (the 'detention' element); OR

20.2. The act(s) of *refusal to acknowledge such arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons* (the 'denial of information' element).

21. If it can be proven that *either one* of these acts were committed (and, as discussed in the Memorandum, there is considerable evidence to support such a finding), and that the person concerned had the requisite *mens rea,* then the underlying element of a crime against humanity of enforced disappearance would have been met. To put it plainly, the NPA could elect to charge one or more of the accused with the crime against humanity of enforced disappearance based on *either*:

21.1. Their participation in the *arrest, detention or abduction* of Ms Simelane (i.e. the 'detention' actus reus); OR

21.2. The subsequent *refusal to acknowledge such arrest, detention or abduction, or to give information on her fate or whereabouts* (i.e. the 'denial of information' actus reus).

22. That either one of these *actus rei* is sufficient for the purposes of securing a enforced disappearance conviction is an important clarification as, in the event that the NPA elects to proceed on the 'denial of information' *actus reus* alone, then the conduct in relation to the kidnapping/abduction, and the subsequent amnesty granted for such conduct, is wholly irrelevant. Notably, based on the finding of the TRC, all of the accused have *prima facie* satisfied this element by refusing to give information on Ms Simelane's fate or whereabouts. Moreover, for reasons set out in detail in the Memorandum, for so long as the accused continue to withhold information concerning Ms Simelane's fate or whereabouts, they continue to commit this crime, and arguably can be prosecuted for it directly under the Rome Statute Act.

23. As to the second concern raised by the NPA in this regard (i.e. whether the factual basis for the murder charge is incompatible with a charge of enforced disappearance), from the outset it has been understood that the practice of enforced disappearance often involves the killing of the 'disappeared' person, and therefore that the prosecution of such acts will often overlap with potential murder charges. For example, the 1992 *Declaration on Enforced Disappearance* specifically provided for national laws to provide for mitigations of sentence for those accused who 'are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance' (which would include the circumstances of the 'disappeared' person's death)', while the 2006 *Convention of Enforced Disappearance* lists 'the event of the death of the disappeared person' as a

potential ‘aggravating’ circumstance in such proceedings.[30] Similarly, the *Convention* specifically places specific obligations on signatories ‘[i]n the event of death during the deprivation of liberty’,[31] including the obligations to provide information to the family regarding ‘the circumstances and cause of death’[32] and ‘to locate, respect and return their remains’.[33]

24. As such, the charging of the accused with *both* the crime against humanity of enforced disappearance and murder does not involve competing factual claims, just the opposite: international law *anticipates* such situations, and creates obligations on States to ensure that prosecutions are *more likely* when a ‘disappeared’ person is found or presumed to have been killed. On the other hand, given the unique nature of the crime of enforced disappearance (as noted above), charging the accused with *both* this crime and kidnapping does not amount to a duplication of charges due to the *fundamentally* different nature of these two crimes.

25. As to the <u>third concern</u> raised by the NPA (i.e. whether enforced disappearance was a crime under Customary International Law in 1983), as noted above the practice of enforced disappearance dates back to World War II. While it was not specifically included in Article II of Control Council Law No. 10, the Nuremberg

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[30] Article 7(2)(b), *International Convention for the Protection of All Persons from Enforced Disappearance.*
[31] Article 17(3)(g).
[32] Article 18(1)(g).
[33] Article 24(3). See further Article 15.

Military Tribunal prosecuted enforced disappearance as a crime against humanity under the residual 'other inhumane acts' category. In this regard Finucane notes:[34]

> In the *Justice case*, the leading lawyers of the Third Reich were tried for their roles in implementing the Night and Fog program. The NMT built upon the earlier decision of the IMT regarding the criminality of enforced disappearance, but it also expanded upon the IMT's judgment. The NMT's prosecutors and judges grounded their arguments not only in the laws of war, but also in the "general principles of criminal law as derived from the criminal laws of all civilized nations" and the "laws of humanity," and therefore classified enforced disappearance both as a war crime and as a crime against humanity.

26. Therefore, as it was prosecuted as a crime against humanity *under Customary International Law* in 1947, there can be little doubt that enforced disappearance can be prosecuted as such in 1983.

A 'belt and braces' approach: The relationship between international and domestic charges

27. The final set of concerns relate to the relationship between the existing *domestic* charges and the proposed additional *international* charges.

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[34] Brian Finucane, 'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War', 35 *Yale Journal of International Law* (2010) 171, pp. 178-179.

28. As I understand the 'Summary of Substantial Facts', the State has already committed itself to the SAPS command structure and hierarchy as the *means* of committing the crime, and 'intelligence gathering' as its *motive* (as opposed to, for example, a private motive on the part of the accused). Similarly, the accused persons' legal fees are being covered by the State Attorney on the basis that the High Court's acceptance that 'they were acting on orders from their superiors as members of the South African Police'.[35] Taken together, these assumptions and the common cause facts suggest that to succeed on the current charges the State will have to prove beyond a reasonable doubt that (i) 'death can be inferred from the circumstances that leave no ground for a reasonable doubt',[36] and (ii) that the accused entered shared a common purpose to commit murder based on a 'prior agreement'.

29. If this is correct, then the distance between what will need to be proved by the State in order to sustain the existing *domestic* charges, and what would need to be proved by the State in order to sustain the proposed additional *international* charges, narrows considerably. In fact, one might go further and suggest that in the event that the State successfully sustains the domestic charges it will, *in substance,* have also proved the international charges; and in event that the State is *unable* to convict on the domestic charges then the international charges would serve as 'fail-safe'.

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[35] See *Coetzee & Others v Minister of Police & Another* (72747/2016) Gauteng Division, Pretoria (5 June 2018).
[36] *S v Nkuna,* para. 112.

30. It is trite law that the absence of the body of the victim (*corpus delicti*) is not an insurmountable bar to finding an accused guilty of murder.[37] As the Court put it in *S v Nkuna* 2012 (1) SACR 167 (B):[38]

> To require the production or discovery of the body (*corpus delicti*) in all cases would be unreasonable and unrealistic and in certain cases would lead to absurdities. To my mind it would lead to a gross injustice particularly in cases where a discovery of the body is rendered impossible by the act of the offender himself.

31. However, in order to succeed in such circumstances, the State must show that the circumstantial evidence 'has the necessary probative force to warrant a conviction, and … that the death can be inferred from circumstances that leave no ground for a reasonable doubt'.[39] Moreover, in cases where there is no reasonable explanation as to *why* the body is missing (see, for example, *S v Nhleko* 1960 (4) SA 712 (A)) the standard is even higher, demanding 'facts to incriminating and so incapable of any reasonable or innocent explanation as to be *<u>incompatible</u> with any hypothesis other than a finding that the accused has in fact killed the person who has disappeared*'.[40]

32. Such a finding will depend on the facts of each case, however courts have in the past relied on pre-existing intimate relationship (see *R v Sikosana* 1960 (4)

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[37] See *S v Nkuna,* para. 116. See further *R v Nhleko* 1960 (4) SA 712 (AD), *R v Sikosana* 1960 (4) SA 723 (AD), *S v Gofhamodimo.*
[38] Para. 111.
[39] Ibid. para. 112.
[40] Ibid. para. 120.

SA 723*, S v MA* (082/2017) [2018] ZAGPJHC 695 (19 December 2018))and a 'strong financial motive' (see *S v Gofhamodimo* 1984 BLR 119 (CA)) as the basis for such a circumstantial finding.

33. In the present matter there is *neither* a pre-existing relationship between the accused and Ms Simelane, nor any suggestion of a private motive. Therefore, the State will have to show that that the routine practices of the Special Branch, or perhaps past practices of *this* unit, were such that, given that (i) they abducted Ms Simelane, and (ii) she has not been seen since, the only *possible* explanation of her disappearance is that they '*in fact killed the person who has disappeared*'.

34. In order to do so the State will, presumably, have to lead evidence as to the widespread or systematic nature of operations such as this by Security forces during apartheid. It's worth noting in this regard the Affidavits of Adv. Ntsebeza and Frank Dutton on record setting out organizations structure, *modus operandi* of Security Branch (including on the disposal of bodies and 'strategy of fabricating stories to suggest the murders were the result of factional conflict'). [41]

35. In additional to proving the *actus rea* of murder, the State will also have to prove that the accused have the requisite *mens rea.* According to the 'Summary of

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[41] See *Coetzee & Others v Minister of Police & Another,* 'Supporting Affidavit of Dumisa Buhle Ntsebeza', pp. 5, 8, 13, 16 & 20; and 'Supporting Affidavit of Frank Kennan Dutton' pp. 8, 11.

Substantial Facts', the State intends to do so on the basis of the doctrine of common purpose, where 'a person who undertakes jointly with another person or persons the commission of a crime'.[42] As the Constitutional Court has clarified in *S v Thebus*:[43]

> The liability requirements of a joint criminal enterprise falls into two categories. The first arise where there is a prior agreement, express or implied, to commit a common offence. In the second category, no prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.

36. Recently, in *S v Jacobs* 2019 (1) SACR 623 (CC), the Constitutional Court clarified the 'content of the common law' relating to common purpose as follows:[44]

> Where there is a prior agreement between the parties to a common purpose there need not be presence or participation by each when the fatal assault is administered. *Where no prior agreement is established presence at or before the fatal blow is necessary. Where the time of the fatal blow cannot be established then a finding of murder cannot follow, at most a finding of attempted murder or some other form of assault.*

37. In the absence of a body, it stands to reason, it is impossible to establish when the 'fatal blow' was administered. As a result, the only form of common purpose available for the State to argue is the first one, i.e. a prior agreement, express or implied, to commit a common offence.

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[42] *S v Thebus & Another* [2002] 3 All SA 781 (SCA), para. 18.
[43] Ibid. para. 19.
[44] Para. 106.

38. The basis for the ‘prior agreement’ would presumably be the SAPS command structure and hierarchy, however this alone would not suffice. One might draw an analogy to the leading case of *S v Yelani* 1989 (2) SA 43 (A), where the Appeal Court found that it was not sufficient to show that the accused was a member of (and had even presided over at some point) an *ad hoc* ‘comrades court’ that deliberated over the fate of the deceased, and eventually ‘sentenced’ him to death. Rather, it had to be proved beyond a reasonable doubt that the accused was present and implicated when ‘a firm and final decision to burn the deceased was taken’, and left no doubt as to when ‘a final decision was reached…and in what terms’.[45]

39. In the absence of direct evidence of an express prior agreement (or in corroboration thereof), the State will have to prove the existence of an *implied* prior agreement, which one assumes will require leading circumstantial evidence of the widespread and systematic murder and mistreatment of prospective ‘informants’ in ‘kopdraai’ operations, by the Special Branch generally or Section C thereof in particular. In other words, the State will have to show that the *modus operandi* of such operations was such that one can imply a prior agreement amongst the accused: i.e. that they shared ‘a common purpose to commit a crime [i.e. murder], act[ed] together to achieve that purpose, [and] the conduct of each of them in the execution of that purpose is

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[45] *S v Yelani* 1989 (2) SA, at p. 52.

imputed to the others',[46] *irrespective of the fact that one or more may not have been present when then fatal blow was struck, and that the actual circumstances of the killing remain unknown.*

40. Simply put: securing a conviction for a bodiless murder, based on an implied prior agreement, in the absence of any private motive, will likely require considerable and compelling evidence to be led regarding (i) the SAPS command structure and hierarchy, (ii) the *modus operandi* of the 'intelligence gathering' or 'kopdraai' operations, and (iii) similar examples of mistreatment and murder by the security services during the course of these operations, setting out their scale (i.e. widespread) and nature (i.e. systematic).

41. This is substantially the same evidence that will need to be led in order to prove the proposed *international* charges of crimes against humanity (see further Memorandum, paras. 44-65 & 88-92), which means that if the State is successful in proving the domestic charges it will have *in substance* proved the international charges as well.

42. One might go a step further, and argue that even if the State is *unable* to prove the domestic charges beyond a reasonable doubt, the nature of the international charges are such that the State's evidence may nevertheless be sufficient for a conviction on these counts. In particular:

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[46] C.R Snyman, *Criminal Law 4th Ed.* (2008), 261.

42.1. If the State fails to prove the *physical* element of the domestic murder charge on account of the absence of a body, it may succeed on a charge of the *crime against humanity of murder*, given that 'bodiless' murders are more common in 'international criminal law' prosecutions. As pointed out in the Memorandum, the ECCC pointed out that, in the absence of a body, '[t]he fact of a victim's death can be inferred circumstantially, including from proof of the following: *incidents of mistreatment directed against the victim, patterns of mistreatment and disappearances of other individuals*, a general climate of lawlessness at the place where the acts were allegedly committed, *the length of time that has elapsed since the person disappeared*, and the fact that *the victim has failed to contact other persons that he or she might have been expected to contact*, such as family members'.[47]

42.2. If the State fails to prove the *mental* element of the domestic murder charge (i.e. a 'prior agreement' to murder the deceased), it may succeed on a specific charge of the *crime against humanity of enforced disappearance,* which would not require proving the existence of a prior agreement between the accused persons, but only that (i) Ms Simelane's whereabouts or fate remains unknown and, (ii) that

[47] *Kaing Giiek Eav alias Duch,* Judgement, ECCC, Case No 001/18-07-2007/ECCC/TC (26 July 2010), para. 332.

accused persons have knowledge thereof and fail to disclose this information.[48]

43. As such, the international charges might be seen as a 'fale-safe' for the domestic charges *in this particular case*. Notably, the point is not that *in every case* the 'essential elements' of a charge of crimes against humanity will be included in the domestic charge of murder (more often the precise opposite will be the case), but rather that *in this case in particular,* the evidentiary basis that the State will have to lay for the charge of murder might well require proving the 'essential elements' of the crimes against humanity of murder and enforced disappearance (amongst others), such that even if it fails on the former it might succeed on the latter.

44. There are additional overlaps of both substantive law and evidence between the existing domestic charges and the proposed *international* charges, as well as distinct *procedural* advantages, that cannot be canvassed in this short Brief. The overall point, however, is that the domestic and international charges should be viewed as *complementary* not cumulative, and that while 'international criminal law' prosecutions are certainly novel in our law their innovations might work to the advantage of the State in cases such as the present one.

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[48] Or, in the alternative, the accused persons participated in the arrest, detention or abduction of the 'disappeared' person. See further Memorandum, paras. 84-85.

Concluding Remarks

45. I would like to end by returning to the Canadian example in order to underscore that South Africa is by no means unique in the way that its domestic regime for the prosecution of international crimes has evolved and matured over time, nor is the NPA alone in the challenges it faces in working with these novel crimes and somewhat foreign procedures.

46. It was in 1987 that Canada first decided to amend its domestic law to allow for the prosecution of war crimes and crimes against humanity, following allegations that there were thousands of Nazi war criminals living in the country, and its progress in this regard was neither linear nor without setbacks. Following the amendment of its *Criminal Code,* Canadian prosecutors brought four unsuccessful prosecutions under its provisions.[49] These setbacks resulted in further legislative intervention in 2000 in the form of the *Crimes Against Humanity and War Crimes Act*, and finally the first conviction in 2009: a little over two decades since Canadian authorities had decided to prosecute international crimes domestically.

47. Similarly, a little over two decades since the transition to democracy South Africa awaits its first prosecution of war crimes, genocide or crimes against

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[49] See *R v Pawlowski* (1992), 13 C.R. (4th) 228 (Ont. Ct. (Gen. Div.)); *R v. Reistetter* (unreported, 1991, Ont. S.C., Court File No. RE 185/90); *R v. Grujicic* [1994] O.J. No. 2280 (QL), 25 W.C.B. (2d) 49 (Ont. Ct. (Gen. Div.)); *R v. Finta* (1992), 92 D.L.R. (4th) 1, 73 C.C.C. (3d) 65, 14 C.R. (4th) 1 (Ont. C.A.). Only the last of which ran its course (resulting in an acquittal), the first three ended with a stay of proceedings.

humanity; and not for want of opportunities to do so, given the extensive *substantive*, *personal* (see section 4(3)(c) of the *ICC Act*) and *temporal* jurisdiction (see section 232 of the Constitution; section 7(4) of the *Geneva Conventions Act*) over international crimes under our law. However, in contrast to Canadian Prosecutors in 1987, should the NPA chose to bring an international prosecution under either Customary International Law or the relevant legislation[50] today, there is now a considerable body of foreign and international jurisprudence, as well as best practice, that it can draw on. As a teacher and practitioner of international law, I stand ready to assist the NPA and our Courts insofar as possible in this regard.

Christopher Gevers

Durban

16 March 2021

[50] The Rome Statute Act, the Geneva Conventions Act, the Torture Act, and so on.