In re:

Private prosecution in the matter of **State v Pretorius, Coetzee, Mong and Another**

OPINION

To: M Ismail
Haffagee Roskam Savage Attorneys

From: S A Nakhjavani

INTRODUCTION

1. Our consultant is the Foundation for Human Rights ("FHR"), a South African human rights organisation. The aims of the FHR are to build a human rights culture and to address the historical legacy of apartheid, using the South African Constitution as a tool.

2. We are instructed that:

   2.1. our consultant represents the interests of the family of Ms Nokuthula Aurelia Simelane;

   2.2. Ms Simelane became a member of uMkonto weSizwe during 1982; was abducted by the Security Branch on or about 10 September 1983; then detained and held incommunicado at a remote location for a period of approximately five weeks; severely assaulted and tortured by members of the Security Branch; and subsequently disappeared, in circumstances more fully described in the records of the Truth and Reconciliation Commission;

   2.3. during 2006, our consultant provided the Priority Crimes Litigation Unit ("PCLU") of the National Prosecuting Authority ("NPA") with counsel's

opinion that the physical and mental abuse perpetrated against Ms Simelane constituted the crime of torture under customary international law; that the PCLU did not dispute the contents of this opinion; or take the matter further with our consultant;

2.4. on 14 March 2016, the NPA preferred charges against four co-accused, in connection with the kidnapping and murder of Ms Simelane, in the matter of *S v Coetzee, Pretorius, Mong and Another* ("the indictment");

2.5. since that time, the legal representatives of the family of Ms Simelane have made multiple representations to the NPA to amend the indictment to include charges for offences under customary international law — namely the crimes against humanity of apartheid, murder, torture and enforced disappearance ("the international crimes charges");

2.6. the legal representatives of the family of Ms Simelane have, from November 2016 to March 2020, furnished the NPA with the opinions of a legal academic and of senior counsel in respect of the lawfulness of preferring international crimes charges in this matter, and the international obligations binding on South Africa in this respect;

2.7. to date, the NPA has, expressly or tacitly, either failed or refused to amend the indictment to include any of the international crimes charges; and

2.8. the trial on the indictment is currently set down to be heard in the High Court from 2 to 27 August 2021.

3. We are briefed with the indictment, as well as the following documents relevant to the international crimes charges:

3.1. the notice of motion and founding affidavit of Thembisile Phumelele Nkadimeng, dated 18 May 2015, in proceedings to compel the NPA to refer the presumed killing of Ms Simelane to inquest;

3.2. an expert affidavit by Christopher Gevers, provided to the NPA on 17 November 2016;

3.3. the opinion by Christopher Gevers, provided to the NPA on 16 February 2019;

3.4. the opinion by Max Duplessis SC and Christopher Gevers, provided to the NPA on 16 March 2021; and

3.5. a memorandum by Christopher Gevers, also provided to the NPA on 16 March 2021.

SCOPE OF THE OPINION

4. Our opinion is sought on the following questions:

4.1. whether the High Court is empowered to waive the requirement of section 9(1)(b) of the Criminal Procedure Act, 1977 ("CPA") — namely, the obligation on a private prosecutor to "deposit" (ie pay into Court) security for defence costs;

4.2. *if not*, whether a frontal challenge to the constitutionality of section 9(1)(b) has reasonable prospects of success, in the particular context of accountability for the international crimes charges, and where the defence is state-funded;

4.3. whether our law makes provision for the relevant Director of Public Prosecutions ("DPP") to issue a certificate *nolle prosequi* in respect of the

international crimes charges only, whilst proceeding to prosecute on the basis of the existing indictment; and

4.4. whether our law makes provision for a private prosecution on international crimes charges to proceed concurrently with a public prosecution on the existing indictment.

5. We traverse each question in turn.

SECURITY FOR DEFENCE COSTS IS A MATTER OF DISCRETION

6. In our opinion, the High Court enjoys both statutory and inherent discretion to determine whether a private prosecutor is obliged to furnish security for the costs of the defence; and if so, whether to set those costs at nil, or at a nominal amount.

7. Section 9(1)(b) provides the following:

> "*(1) No private prosecutor* [...] *shall take out or issue any process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed —*
>
> [...]
>
> *(b) the amount such court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge."*
>
> [emphasis added]

8. The proper approach to the interpretation of any legislation is set out succinctly by the Constitutional Court in **The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others**:

> "*When interpreting a statutory provision the point of departure is that the words employed must be construed in accordance with their ordinary grammatical meaning provided an absurdity does not result. The jurisprudence is clear that this is subject to the requirement that statutory provisions must be interpreted purposively and be properly contextualised*." [fn20]
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> [fn20] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28 and *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni Municipality*) at para 18.
>
> [at para 46; footnotes in original; emphasis added]

9. In ordinary civil proceedings, costs are always a matter "wholly within the discretion of the trial court".[1] An appeal court will only interfere with costs orders — as with all discretionary orders granted by a lower court —where it is shown that

> "…*the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not*

[1] The principle is a "trite" one: Sublime Technologies (Pty) Ltd v Jonker and another 2010 (2) SA 522 (SCA) para 2.

> *reasonably have been made by a court properly directing itself to all the relevant facts and principles.*"[fn1]
>
> [fn1] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11. See also *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 14 and the authorities referred to therein.
>
> [para 2; footnotes in original]

10. So too, the ordinary meaning of section 9(1)(b) vests the Court with statutory discretion as to the award of costs, analogous to the Court's inherent jurisdiction.

11. The factors relevant to the proper exercise of the Court's discretion under section 9(1)(b) — in the particular context of a private prosecution on international crimes charges — should, in our view, include at least the following:

    11.1. the merits of bringing the private prosecution — whether the private prosecutor appears *ex facie* the indictment to be pursuing unfounded or vexatious charges; or, rather, is *bona fide* seeking justice;[2]

    11.2. the purpose of bringing the private prosecution — whether the private prosecutor aims primarily to redress a mere private wrong; or, rather, is prosecuting charges primarily in the public interest;

    11.3. the necessity of bringing the private prosecution — whether there is evidence on which the Court may determine *prima facie* that DPP erred in declining to

[2] **Hossack v Pretoria Town Council** 1908 TS 846; **Bornman v Van der Merwe** 1946 OPD 192; **Buchanan v Voogt** 1988 2 All SA 1 (N); 1988 2 SA 273 (N).

prosecute the charges, such that the State may in due course be held to bear the costs of the prosecution;[3] and

11.4. the source of the funds from which defence costs will be paid.

12. The first three factors have a good, arguable foundation in the Act and the case-law under the Act.

13. We turn to consider the legal basis on which the fourth and final factor is properly relevant to the exercise of the Court's statutory discretion under section 9(1)(b) of the Act. We traverse two points in this regard:

13.1. the interpretation of the meaning section 9(1)(b) by the courts; and

13.2. the relevance of fact that the costs of the accused will likely be borne by the State, and its implications an interpretation of section 9(1)(b) consistent with the principle of equality of arms enshrined in the Constitution.

14. First, the existing case law on the interpretation of section 9(1)(b) favours the position that the private prosecutor need not furnish security for costs which will not be met by the accused personally.

15. In **Williams v Janse van Rensburg**,[4] which arose in the pre-constitutional era, Williamson J interpreted the wording of section 9(1)(b) to include only the costs of defence that the accused might "*probably*" bear or might "*reasonably be expected to*

[3] Section 15(2) CPA (second proviso); the DPP has no *locus standi* in any such determination (**Attorney-General v Van der Merwe & Bornman** 1946 OPD 197 202).
[4] [1989] 4 All SA 877 (C).

bear" personally, not such costs as will be borne by the State. The learned judge reasoned as follows:

> "*In these circumstances it seems to me that we have a situation in which the accused are not personally paying for their defence but the State is, and there is a risk that one or more or all of them might at a later date have to repay these legal costs to the State. It is impossible at this stage to quantify that risk. All I can really say is that there is a possibility not amounting to a probability that the accused may have to refund the State. What then does the law require of me in these circumstances?*
>
> *On the one hand, Mr Hattingh argued strongly that the words '... the costs which the accused may incur in respect of his defence' indicate costs which might possibly be incurred, however remote that possibility. He contended that the word 'may' in this context refers to possibilities and not probabilities. Mr Browde, on the other hand, argued that a Court should in this context not consider vague and intangible possibilities but should look really at the probabilities.*
>
> *After reflecting on the matter in the relatively little time at my disposal I have come to the conclusion that the words '... costs which the accused may incur' in s 9(1)(b) mean costs which the accused will probably incur personally or, to put it another way, the costs referred to are those which an accused might reasonably be expected to bear personally. In coming to this conclusion I am influenced by the decision of the Appellate Division in the case of Magida v Minister of Police 1987 (1) SA 1 (A), where the principles underlying the common law*

> *situations where security for costs arise are explained to be based essentially on considerations of equity and fairness to both sides. If I were to interpret the section as requiring me to order security for all costs which might possibly be incurred by an accused, however remote that possibility might be, I would be loading the scales of fairness unduly heavily in favour of an accused and correspondingly unduly heavily against the private prosecutor.*
>
> *If I have a discretion in the matter, as I think I have, then I think that a judicial exercise of that discretion would require me to order the provision of security only to the extent of the probable personal financial prejudice of an accused in defending the case*."
>
> [at 879; emphasis added]

16. Second, in circumstances where an accused would not be paying defence costs personally, we take the view that the principle of equality of arms favours a proportionate reduction in the financial burden of the private prosecutor.

17. We are instructed that the defence of the accused in this matter might well be funded by the State Attorney, as was the case in the matter of **S v Rodrigues**.

18. We assume, therefore, that were State funding to be provided for defence costs, the legal basis for such a decision would have to be the powers granted to the State Attorney under section 3(3) of the State Attorney Act, 1957, which provides as follows:

> "*Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the offices of State*

Attorney like functions in or in connection with any matter in which the Government or such an administration [of any province], *though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of a State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said offices*."

[emphasis added]

19. To exercise these powers, as interpreted by our courts, the State Attorney would have to consider that a "sufficiently close link"[5] exists between alleged criminal conduct and the official duties of the accused under the apartheid regime.

19.1. We open a parenthesis to venture — without wishing to stray beyond our brief — that such reasoning is at best tenuous.

19.2. As a matter of international law binding on South Africa, and as a presumption of law, an order to commit any crime against humanity is deemed manifestly unlawful.[6] It is thus a legal presumption that an accused's official capacity cannot be a cognisable defence to, or otherwise relieve the accused of criminal

[5] **President of the Republic of South Africa v Office of the Public Protector and another (Economic Freedom Fighters and others as Intervening Parties)** [2018] 1 All SA 576 (GP), para 54.

[6] See Implementation of the Rome Statute of the International Criminal Court Act, 2002, section 4(b); Rome Statute of the International Criminal Court, article 33(2); **Kriel v Commissioner of Police** 1929 CPD 373 at 378: "As is said in the Manual of Military Law (*supra*), in case of doubt, the military knowledge and experience of officers will enable them to decide the lawfulness or otherwise of the command. In my opinion police officers must be given a wide discretion as to what orders they shall give to those under them and a Court of law should not interfere in such a case unless the order is manifestly unlawful." [emphasis added].

responsibility for a crime against humanity (such as apartheid, enforced disappearance, torture or murder).

19.3. In respect of offences of abuse of public office, in **Democratic Alliance v President of the Republic of South Africa and Others**,[7] the Full Bench of the Gauteng Division reasoned as follows:

> "*It is in the public interest that charges relating to the abuse of public office – corruption and fraud – are prosecuted to ensure public accountability, the promotion of good governance, the protection of the rule of law and the protection and advancement of the rights enshrined in the Bill of Rights. If the State is burdened with the high legal costs of those public office bearers who are charged with such crimes, the taxpayer bears that burden and poor communities continue to be denied access to essential services, as the State's resources are being diverted in funding the defences of public office bearers charged with such crimes…*"
>
> [para 69; footnotes in original]

19.4. The Full Bench went on to review and set aside a decision by the State Attorney to pay the legal costs of former President Zuma in respect of criminal prosecutions for offences of abuse of public office (and related or incidental civil proceedings).[8]

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[7] [2019] 1 All SA 681 (GP).
[8] **Democratic Alliance** para 88.

19.5. The opinions and memoranda of Duplessis SC and Gevers with which we are briefed, and the authorities they cite, establish that the State indisputably bears an international obligation to investigate and prosecute conduct amounting to crimes under customary international law and committed during the apartheid regime, where no lawful amnesty has attached.

19.6. There can be little doubt, then, that the prosecution of such crimes would also meet the four objectives set out by the Full Bench in **Democratic Alliance**. Prosecution of these crimes would ensure public accountability, promote good governance, the protection of the rule of law and the protection and advancement of constitutional rights.

19.7. The contrary position seems to be that the Constitution demands that the State fund the <u>private defence costs</u> of accused employed by the apartheid security services or police, beyond the scope of the ordinary provision of section 35(2)(c) — and through the State Attorney, insulated from the means test of the Legal Aid Board.

19.8. Stripped of its garb, this position appears to be no more than a demand for an apartheid-era privilege to be extended through the instrumentality of the Constitution.

19.9. In **Du Plessis and Others v De Klerk and Another**,[9] Mahomed CJ made the following, prescient remark:

> "…*those responsible for the enactment of the Constitution never intended to permit the privatisation of Apartheid or to*

[9] 1996 (3) SA 850.

> *allow the unfair gains of Apartheid or the privileges it bestowed on the few, or the offensive attitudes it generated amongst many to be fossilized and protected by courts rendered impotent by the language of the Constitution*"
>
> [para 85; emphasis added]

19.10. Thus, there are sound reasons of law and constitutional principle to support the proposition that the *ratio* in **Democratic Alliance** has equal force in the present matter.

19.11. We take the point no further, for the purposes of this opinion, and return to the main proposition — that, in addition to the pre-constitutional reasoning in **Williams**, there is a compelling constitutional argument that the source of the funds used to pay defence costs is a relevant factor in the exercise of the Court's discretion under section 9(1)(b) of the Act.

20. Should the State Attorney decide to meet the costs of an accused's defence on the basis of its statutory powers under section 3(3) of the State Attorney Act, the words of the enactment indicate that this decision rests on a finding that the defrayal of these costs is in the public interest. This determination would be relevant to the exercise of a court's discretion on costs of a private prosecution, because of the constitutional right to equality of arms.

21. The underlying "*considerations of equity and fairness to both sides*" in **Williams** are now all the more apparent in the principle of equality of arms expressed in sections 34 and 35 of the Bill of Rights.

22. Section 34 of the Constitution enshrines the principle of equality of arms in the context of civil proceedings.[10] Both the common law[11] and a range of rights contained in section 35 of the Constitution reflect the same principle as applied to criminal proceedings.[12] In **S v S**,[13] the Constitutional Court says the following:

> "[40] …*Equality of arms has been explained as an inherent element of the due process of law in both civil and criminal proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensures they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality.*
>
> [41] *The equality of arms principle ensures that parties in a particular dispute receive equal opportunity.*"
>
> [paras 40-41; emphasis added]

23. The principle of equality of arms reflected in section 35 of the Constitution bears comparison to Article 6(1) of the European Convention on Human Rights (ECHR), which, on its face, is similarly couched in terms of the rights of the accused and not necessarily those of the prosecution.

24. The interpretation and application of Article 6(1) ECHR by the European Court of Human Rights ("European Court") makes plain that the right to equality of arms is a right

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[10] **Shilubana and Others v Nwamitwa** (Interlocutory decision in the application for postponement) [2007] ZACC 14 para 21.
[11] Hiemstra's Criminal Procedure 3ed vol 12 s 150 *sv* "Introduction".
[12] **Qozeleni v Minister of Law and Order and Another** 1994 (3) SA 625 (E) at 42.
[13] [2019] JOL 44978 (CC).

of both parties or litigants in the criminal process. The European Court adopted this reading of Article 6(1) in judgments specifically in respect of the adversarial system of criminal procedure in England and Wales, from which our current system of criminal procedure traces its roots:

25. In **Steel and Morris v United Kingdom**,[14] the European Court held:

> "*The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality…The Court recalls that the Convention is intended to guarantee practical and effective rights…It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.*"
>
> [paras 50, 59; emphasis added]

26. In **Edwards and Lewis v United Kingdom**,[15] the European Court stated:

> "*It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings*

[14] (2005) 41 E.H.R.R. 22 paras 50 and 59.
[15] (2005) 40 E.H.R.R. 24 para 52; see also **Dowsett v United Kingdom** 314 Eur. Ct. H.R. 259, P. 41 (2003).

> *which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence*."
>
> [para 52; emphasis added]

27. In the more recent matter of **Direcția Generală Regională a Finanțelor Publice Brașov v Vasile Toma**,[16] the European Court of Justice, interpreting the scope of the right of access to court under Article 47 of the Charter of Fundamental Rights of the European Union, has stated:

> "[36] *Article 47 of the Charter includes, as a component of the principle of effective judicial protection, the principle of equality of arms or procedural equality (see, to that effect, judgment of 17 July 2014 in Sánchez Morcillo and Abril García, C-169/14, EU:C:2014:2099, paragraph 48).*
>
> [47] *…the principle of equality of arms is a corollary of the very concept of a fair hearing, which implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent, the harm caused by that imbalance having as a general rule to be proved by the person who suffered it (see, to that effect, judgments of 6 November 2012 in Otis and Others, C-199/11, EU:C:2012:684,*

[16] Judgment of 30 June 2016, EU:C:2016:499.

paragraphs 71 and 72, and 17 July 2014 in Sánchez Morcillo and Abril García, C-169/14, EU:C:2014:2099, paragraph 49).

[paras 36, 47; emphasis added]

28. Thus, on the basis of both South African and applicable international human rights law which the court "must consider",[17] there is no principled reason to deny a private prosecutor a measure of equality of arms with the defence.

29. Whilst equality of arms does not necessarily mean a guarantee of absolute equality of resources,[18] the principle militates clearly in favour of recognising that a natural person acting as a private prosecutor — especially one acting in the public interest — should not be held to shoulder a financial burden disproportionate to that expected personally of the accused in the same proceedings.

30. Thus, were a private prosecution to proceed on the international crimes charges, we consider that no formal waiver of the requirement of section 9(1)(b) would be required.

31. For this reason, too, the question of a frontal challenge to section 9(1)(b) does not arise.

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[17] Section 39(2) of the Bill of Rights; see **S v Makwanyane** 1995 (3) SA 391 (CC) para 35; **Residents of Bon Vista Mansions v Southern Metropolitan Local Council** 2002 (6) BCLR 625 (W) para 17; **National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and Another** 2015 (1) SA 315 (CC) paras 22-23.

[18] In the international criminal tribunals, see eg **Prosecutor v Kayishema & Ruzindana** Case No. ICTR 95-I-T, Judgment (May 21, 1999) para 69: ["The Appeals Chamber observes in this regard that equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources. In deciding on the scope of the principle of equality of arms, [the] ICTY Appeals Chamber in *Tadic* held that 'equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case'"]; see *contra* **Cary v Cary** 1999 (8) BCLR 877 (C) at 76-77, where equality of arms was held to encompass access to equal resources to prosecute and defend divorce proceedings, on grounds of gender equality and non-discrimination.

32. Rather, the private prosecutor should proactively seek a determination by the Court that a nil or nominal amount of security should be paid into Court in respect of the private prosecution, both on the basis of the interpretation of section 9(1)(b) adopted in **Williams** and in light of the constitutional principle of the equality of arms.

33. We turn to traverse the prospects for obtaining a certificate *nolle prosequi* in respect of charges for crimes under customary international law, which are absent from the existing indictment.

THE DPP WOULD BE COMPETENT TO GRANT A CERTIFICATE *NOLLE PROSEQUI* IN RESPECT OF INTERNATIONAL CRIMES CHARGES OR OFFENCES

34. Section 7(2)(a)-(c) of the Act provides the following:

> "*(a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.*
>
> *(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).*
>
> *(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the*

> *issue of the process referred to in paragraph (a) within three months of the date of the certificate.*
>
> [emphasis added]

35. The crisp question is whether these provisions of the Act grant statutory power to the relevant DPP — being the successor office to that of "attorney-general" — to grant a certificate *nolle prosequi* in respect of a specific "*charge*" and/or an "*offence*"; or rather whether the DPP may properly consider that the conduct underlying that "*charge*" or "*offence*" is being prosecuted at the instance of the State under another cognisable legal characterisation, and so decline to grant the certificate.

36. In interpreting this provision, our courts adopt the **Endumeni** approach, to which we have already referred above.

37. Section 1 of the Act provides that a "*charge*" "*includes an indictment and summons*". The learned authors of Hiemstra's Criminal Procedure comment that "*The charge is the formulation of the offence, stating the time, place and other particulars prescribed by law, sufficient to inform the accused of the case to be met.*" They further refer to "*the requirements for a valid charge*" in section 84 of the Act.

38. Section 84(1) and (3) of the Act state:

> *(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the*

> *offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.*
>
> […]
>
> *(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.*
>
> [emphasis added]

39. The term "*offence*" is not expressly defined in the Act.

40. The learned authors of Hiemstra's Criminal Procedure add the following points from the leading, pre-constitutional authorities, while referring expressly to the protection of section 35(3)(a) of the Bill of Rights:

    40.1. The heart and soul of a charge is that it has to inform the accused of the case the state wants to advance against him or her.[19]

    40.2. The touchstone is and remains the question whether the accused got a fair chance by being informed about what called for a response. That presupposes that an accused with normal intelligence will also be able to see things which are tacitly implied.[20]

[19] **S v Hugo** 1976 (4) SA 536 (A).
[20] **R v Jones and More** 1926 AD 350 at 355; **R v Preller** 1952 (4) SA 452 (A) at 461.

41. What is immediately apparent from the case-law is that a mere set of allegations of fact, describing acts or omissions of the accused will not pass muster, absent a legal characterisation of the conduct in question. The ordinary meaning of section 84 requires that the relevant legal characterisation may be the name of a known offence at common law, unless the particulars are unmistakeable;[21] or the words of a statutory provision creating an offence, or similar words; but avoiding literalism and trifling considerations where criminal procedure should be simple and comprehensible.[22]

42. It must follow that the legal characterisation of given conduct as amounting to a common law offence is conceptually and practically distinct from its characterisation as an international crime, for at least three reasons:

    42.1. First, the opinions and memoranda of Duplessis SC and Gevers with which we were briefed make plain that the crimes against humanity relevant to the conduct charged in this matter contains at least one distinctive, contextual element not present in the analogous common law offence — that the conduct occurred as part of a widespread or systematic attack directed against a civilian population; and with the accused's knowledge of that attack.

    42.2. Second, the Constitutional Court has recognised the legal distinction between a common law or statutory offence under South African law and an international crime at customary international law.[23]

    42.3. Third, in the law of the international criminal tribunals, there is also a significant conceptual and legal distinction between crimes under international and

[21] **S v Rosenthal** 1980 (1) SA 65 (A); **R v Kleynhans** 1959 (3) SA 576 (C).
[22] **R v Kharibe** 1958 (1) SA 191 (T); **S v Rautenbach** 1991 (2) SACR 700 (T) at 702F.
[23] **National Commissioner** paras 33–37.

domestic law. In **Prosecutor v Bagaragaza**,[24] the Appeals Chamber of the International Criminal Tribunal for Rwanda provided the following, salient rationale for an internal procedural rule allowing the case to be transferred to domestic authorities of Norway for prosecution:

> "*The Appeals Chamber agrees with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal. In addition, the Appeals Chamber appreciates fully that Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the "ordinary crime" of homicide. That the legal qualification matters for referrals under the Tribunal's Statute and Rules is reflected inter alia in Article 9 reflecting the Tribunal's principle of* non bis in idem*. According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for "acts constituting serious violations of international humanitarian*

[24] Prosecutor v Bagaragaza (ICTR-05-86-AR11bis) Rule 11*bis* Decision (30 August 2006).

> *law" if the acts for which he or she was tried were "categorized as an ordinary crime". Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives*."
>
> [para 17; footnotes omitted; emphasis added]

43. For these reasons, in our view, the proper interpretation of section 7(2) requires the DPP seized of an indictment to grant a certificate *nolle prosequi* to a private prosecutor if that DPP has declined to prosecute in respect of a "*charge*" or "*offence*" under international law binding on South Africa.

44. In other words, it is not the conduct charged in the indictment, but the legal characterisation of that conduct which is determinative. Where the indictment does not disclose a charge or offence to which attaches individual criminal responsibility under binding conventional or customary international law, that indictment cannot cognisably amount to decision to prosecute an international crime.

45. We turn, finally, to the speculative question of whether our law would permit the prosecution of an indictment charging international crimes to proceed concurrently with the prosecution of a separate indictment charging statutory or common law crimes, in respect of the same conduct by the same accused.

AN APPLICATION FOR CONCURRENT PROCEEDINGS IS A NOVEL REMEDY

46. The scheme of the Act would appear to envisage public and private prosecution as mutually-exclusive proceedings in which either the State or the private prosecutor is *dominus litis*. This appears from the following provisions:

    46.1. Section 7(2)(a), which requires that the DPP positively decline to prosecute before a private prosecution can be instituted or commenced;

    46.2. Section 10, which prohibits joinder of multiple private prosecutors except "*where two or more persons have been injured in the same offence*", and which has been interpreted restrictively in **Williams** to prevent joinder where two murders arose from the same incident; and

    46.3. Section 13, which affords the DPP the right to intervene on notice of motion in a private prosecution to "*stop all further proceedings in the case*"; "*in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State*";

47. However, nothing in the Act prohibits concurrent proceedings by a private prosecutor. It appears this scenario was not within the contemplation of the legislature, despite the amendment of the Act to take account of the Implementation of the Rome Statute of the International Criminal Court Act, 2002.

48. Thus, the question of concurrent proceedings is properly characterised as one of first impression.

49. Private prosecutions are rare. We have not found any case in South Africa or in any comparable common-law system of criminal procedure in which a private and public prosecution have run concurrently, in respect of partially-overlapping but distinct legal characterisations of the same conduct.

50. Such concurrent proceedings are nonetheless routine under the "*civil party*" model that prevails in legal systems which follow the civil law tradition. This model has been adapted and applied to the prosecution of international crimes at the Extraordinary Chambers in the Courts of Cambodia and the Extraordinary African Chambers; and, to a lesser extent, through the victim's participation provisions of Article 68 of the Rome Statute of the International Criminal Court.

51. As a matter of first impression, any application by the families of victims in this matter to pursue a concurrent private and public prosecution would proceed through multiple levels of appeal.

52. We anticipate a reluctant or combative posture from the legal representatives of the accused. What is more, the State, through the National Prosecuting Authority, can be expected to guard jealously its monopoly over prosecution and defend a restrictive interpretation of Chapter 1 of the Act.

53. On the assumption that our consultant is granted a certificate *nolle prosequi* in respect of international crimes charges, there are nonetheless compelling reasons of principle to approach the trial court to authorise concurrent proceedings.

54. Such an application would, at a minimum:

    54.1. set out the legal basis for a purposive interpretation of Chapter 1 of the Act to permit concurrent proceedings; on the basis of a comprehensive analysis of the duty of the State to prosecute international crimes committed during the apartheid regime; and the rights of victims to meaningful justice under the Bill of Rights, together with relevant binding and non-binding international law;

54.2. demonstrate that while concurrent proceedings depend on a certificate *nolle prosequi* in respect of a distinct "*charge*" or "*offence*"; consecutive proceedings against the same accused and in respect of the same "*act or omission*" would *ipso facto* violate the protection against double jeopardy in terms of section 35(3)(m) of the Bill of Rights;[25]

54.3. further demonstrate that, even if section 35(3)(m) would not be violated by consecutive proceedings, South Africa's international obligations to prosecute crimes at customary international law; and the rights of victims to meaningful justice would be rendered nugatory if the Court was to require a private prosecutor armed with a certificate *nolle prosequi* to await the finalisation of trial and appeal proceedings against ageing accused;

54.4. set out practical and reasonably precise proposals for, amongst other issues, the management of the number of fact witnesses and expert witnesses; the additional documentary evidence to be adduced by the private prosecutor; the mode and sequencing of questioning of witnesses; the number of additional trial days required for the involvement of the private prosecutor; the rights of interlocutory and final appeal of the private prosecutor; and the preservation of the position of the State as *dominus litis* in the proceedings*;* and

54.5. conclude that the right of the accused to a fair and speedy trial is best-served by concurrent and not consecutive proceedings.

55. In essence, nothing in the Act expressly prohibits a concurrent private prosecution. Indeed, there are compelling reasons of principle to permit such an arrangement.

[25] **S v Parkins** 2017 (1) SACR 235 WCC; **S v Sayed and Others** 2018 (1) SACR 185 (SCA).

However, in order to achieve this outcome, our consultant, through the families of the victims, would be inviting the Court to craft a novel remedy — a victims' participation arrangement *sui generis*.

56. There is certainly an argument to be made in favour of such an arrangement, but it is novel, and departs fundamentally from the foundations of our system of criminal procedure.

57. Such a strategy poses inevitable and substantial legal risks, not least the risk of multiple appeals on two fronts: the accused and the State.

58. We consider that any decision to adopt such a strategy requires polycentric and interdisciplinary assessment beyond the scope of our expertise. Such a decision should only be undertaken on the basis of a sound, holistic and realistic assessment of the costs involved, in terms of professional and financial resources; available witnesses; the prospects of cooperation from the National Prosecuting Authority and the defence; and the very real risk of raised and dashed hopes, and consequent re-traumatisation, of the families at the heart of the matter.

59. We advise accordingly.

[M CHASKALSON SC]
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