

EXPLANATORY MEMORANDUM ON THE INCLUSION OF INTERNATIONAL CRIMINAL CHARGES

In re: COSAS 4 Indictment

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INTRODUCTION

1. This memorandum explains why the proposed inclusion of crimes under international customary law in the indictment for the prosecution of Thlamedi Ephraim Mfalapitsa and Christiaan Siebert Rorich are competent under South African law and required to ensure proper justice for the offences committed.
2. The memorandum sets out the basis for the prosecution of international crimes under section 232 of the Constitution and then provides an overview of crimes against humanity. Finally, the relevant elements of each count are explained.

PROSECUTING CUSTOMARY INTERNATIONAL LAW CRIMES

3. In *S v Basson* 2005 (1) SA 171 (CC), the Constitutional Court held that:
 - 3.1. 'the state's obligation to prosecute offences...applies to all offences committed before [the Constitution] came into force',
 - 3.2. 'international law obliges the state to punish crimes against humanity and war crimes, and

3.3. 'the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes'.¹

4. In *National Commissioner v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC), the Constitutional Court confirmed that crimes under customary international law can be prosecuted directly under section 232 of the Constitution.²
5. This position was subsequently confirmed by the Minister of Justice and Correctional Services, the President and the National Director of Public Prosecutions, in their papers filed in the Constitutional Court in 2016.³
6. Furthermore, section 7(4) of the *Geneva Conventions Act 8 of 2012* recognises prosecutions of international crimes under Section 232 of the Constitution:⁴

'Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect'.

7. Accordingly, section 232 of the Constitution provides an independent legal basis for the State to fulfil its obligations under the Constitution and under international law to prosecute international crimes (including those committed before 1994). Hence, each count is "*read with section 232 of the Constitution*".

¹ *S v Basson* 2005 (1) SA 171 (CC), para. 37.

² Section 232 of the Constitution provides that '*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*'. In *National Commissioner v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) the Court stated that 'crimes against humanity [are] criminalised under section 232 of the Constitution' (para. 39). See further para. 37.

³ Where they stated that '*international crimes are crimes in South Africa by operation of Section 232 of the Constitution*'. '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), para. 89.

⁴ Gevers, Wallis & Du Plessis, 'Sixty Years in the Making, Better Late Than Never? : the Implementation of the Geneva Conventions Act', *African Yearbook of International Humanitarian Law* (2012), p. 185-200.

8. In prosecuting an international crime under section 232, the conduct in question must have been recognised as a crime under customary international law *at the time it was committed*.⁵ The applicable definition and elements of each of the crimes charged is set out clearly in case-law, which we set out below.

CRIMES AGAINST HUMANITY

9. Crimes against humanity have been prosecuted as crimes under customary international law since at least 1945, when they were first defined by the *International Military Tribunal* at Nuremberg. The Tribunal held that the term *crimes against humanity* ‘contains within itself the accumulated evil of the whole’.⁶
10. Crimes against humanity are defined by a set of ‘inhuman acts’ committed in a particular context, namely *as part of* a widespread or systematic attack directed against any civilian population. In this case the perpetrators committed their acts as part of a widespread and systematic attack against black civilians and opponents of the regime.
11. The charges have been formulated to identify the two *separate* constitutive elements of crimes against humanity:
- 11.1.** the general **Contextual Elements** of the crime (i.e., a regime of systematic oppression; a ‘widespread or systematic attack’); and
 - 11.2.** the specific **Underlying Acts** that an accused committed with the requisite intention (i.e., murder, persecution and other ‘inhuman acts’).

⁵ Section 35(3)(l) of the Constitution.

⁶ *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August 1946 to 1st October 1946)*, p. 421.

12. In a ‘crime against humanity’ prosecution, it is necessary to prove both elements. This memorandum addresses these in respect of each of the counts, beginning with the *crime against humanity of apartheid* (Count 7).⁷

THE CRIME AGAINST HUMANITY OF APARTHEID

13. Apartheid was declared a crime against humanity by the United Nations General Assembly in 1966.⁸ It was placed beyond any ‘statute of limitation’ (i.e., time bar) by an International Treaty in 1968,⁹ and comprehensively criminalised under the *Apartheid Convention* in 1973.¹⁰ These sources — all of which predate the crimes charged in this matter — were cited in support of the Constitutional Court’s finding that made it ‘*clear that the practice of apartheid constituted crimes against humanity*’.¹¹
14. The Truth and Reconciliation Commission (“TRC”) had also, in one of its final reports, emphatically endorsed the position that apartheid as a form of systematic racial discrimination and separation constituted a crime against humanity and that, in this context, the State, in the form of the South African government, the civil service and its security forces, was in the period of 1960 to 1994 its primary perpetrator.¹²

The Contextual Elements

15. The contextual elements of the charge of crime against humanity of apartheid (Count 1) incorporate the common elements of the definitions of the crime under the *Apartheid Convention* and the *Rome Statute of the International Criminal*

⁷ Symbolically it may be appropriate to move count 7 to count 1.

⁸ General Assembly Resolution 2202 (XXI) adopted on 16 December 1966.

⁹ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (1968)

¹⁰ *Convention on Suppression and Punishment of the Crime of Apartheid* (1973).

¹¹ *S v Basson* 2005 (1) SA 171 (CC), note 35.

¹² TRC Report, Vol 5 Ch 6, *Findings and Conclusions*, at p. 222.

Court,¹³ namely, that specific ‘inhuman acts’ (e.g., murder, persecution) were committed:

- 15.1.** as part of an institutionalised regime of systematic oppression and domination by one racial group over persons of another racial group, and
 - 15.2.** with the purpose of maintaining that systematic oppression and domination.
16. In addition to the Constitutional Court’s clear statement that the practice of apartheid constitutes a crime against humanity, there is ample evidence in the public domain substantiating the claim that the pre-1994 order amounted to ‘an institutionalised regime of systematic oppression and domination by the white racial group over the black racial group’. In particular, the records of the TRC set this out in detail. TRC records are, of course, admissible in criminal prosecutions.
 17. This charge is brought against Accused 2 only, on account of the very specific way apartheid was practised in South Africa - being the domination by the white racial group over the black racial group. Accused 2 is a member of the white racial group.
 18. Whether Accused 2 committed the inhuman acts charged with ‘the intention or purpose of maintaining that systematic oppression and domination’ is a matter for evidence; however, his official role as a Security Branch explosives expert in the formal, permanent employment of the State will be persuasive in supporting an inference that he intended, by his acts to maintain the oppression and domination of the white racial group over the black racial group.
 19. As far as the ***Underlying Acts*** of the crime of apartheid are concerned, both the *Apartheid Convention* and the *Rome Statute* definitions expressly list murder and

¹³ Article II, *Apartheid Convention*; and article 7(1)(j) & 7(2)(h), *Rome Statute*.

persecution as examples of 'inhuman acts'.¹⁴ These are discussed in more detail below.

COUNTS 1 - 3: THE CRIME AGAINST HUMANITY OF MURDER

20. The *crime against humanity of murder* has been recognised as a crime under customary international law since the Nuremberg Trial. The **Contextual Elements** of the crime have evolved since 1945. The sub-elements are:

20.1. an attack against any civilian population,

20.2. that is either **widespread**¹⁵ or **systematic**¹⁶.

21. This formulation is drawn from the following case-law of various international courts and tribunals:

21.1. The landmark 2010 decision of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in *Kaing Guek Eav alias Duch* ('the Duch case'), which is particularly instructive as it specifically identified the contextual elements as they stood *immediately before the 1980s* (the period during which the crimes charged in this case are alleged to have been committed).

21.2. The 2008 decision of the European Court of Human Rights Grand Chamber in *Korbely v Hungary*, which found that the 'widespread or

¹⁴ Article II(a)(i) & II(f), *Apartheid Convention*; and article 7(1)(h), read with article 7(2)(h), *Rome Statute*.

¹⁵ In international jurisprudence, **widespread** has been understood to be a question of *scale or degree*, which may be met by either: the scale of the attack itself (i.e., a 'massive, frequent, large scale action, carried out collectively with considerable seriousness', a 'singular massive attack of extra-ordinary magnitude', or the 'cumulative effect of a series of inhumane acts'), or the number of victims ('directed against a multiplicity of victims').

¹⁶ In international jurisprudence, **systematic** has been understood to refer to the *nature* of the attack; as one that is thoroughly organised and following a regular pattern, based on a common policy, and involving substantial public or private resources.

systematic' formulation was already part of the definition of crimes against humanity *as of 1956*.¹⁷

21.3. The 2010 decision of a Uruguayan court, which found that these contextual elements were part of the customary international law definition of crimes against humanity *in 1976*.¹⁸

21.4. Finally, the definition of the crime in article 7 of the *Rome Statute* (which is incorporated into our law under the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*).

22. In respect of each count, the prosecution will also have to show that there is a 'nexus' between the acts or omissions of the accused person and the 'widespread or systematic attack against civilians', and that the accused had knowledge of that attack.

23. As noted above, there is considerable evidence in the public domain supporting the assertion that these acts took place in connection with the widespread or systematic attack by the State against civilians, including black South Africans in particular, as well as the civilian political opponents of the apartheid state.

24. As far as the ***Underlying Act*** of murder is concerned, the customary international law definition is essentially the same as the common law definition.

COUNTS 4 – 6: THE CRIME AGAINST HUMANITY OF PERSECUTION

25. The *crime against humanity of persecution* has similarly been recognised as a crime under customary international law since 1945 (when it was defined at Nuremberg). Moreover, the ***Contextual Elements*** of the crime mirror those of the previous counts: namely, an accused must be shown to have committed the

¹⁷ *Korbely v. Hungary*, ECHR, Grand Chamber, Application no. 9174/02 (19 September 2008), para. 83.

¹⁸ *Bordaberry case*, IUE 1-608/2003, First Instance Criminal Court, 7th turn (9th February 2010).

'inhuman act' of persecution in the context of a widespread or systematic attack against civilians, and that the accused had knowledge of that attack.

26. The ***Underlying Act*** of persecution is an important international crime that is emblematic of discriminatory practices, which through section 232 of the Constitution is now clearly part of our law. It was defined by the Statute of the Nuremberg Tribunal as 'persecutions on political, racial or religious grounds'; while the *Apartheid Convention* defined it as the '*[p]ersecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid*'.¹⁹
27. More recently, the *Rome Statute* has defined the Underlying Act of the crime as 'the intentional and severe deprivation of fundamental rights contrary to international law *by reason of the identity of the group or collectivity*', and listed the grounds of 'political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as impermissible under international law'.²⁰
28. Accordingly, in counts 4, 5 and 6, in addition to the contextual elements of crimes against humanity, the specific elements of the victims being black and/ or a political opponent of the apartheid regime are included.

¹⁹ Article II(f), *Apartheid Convention*.

²⁰ Article 7(2)(g) & 7(1)(h), *Rome Statute*.