REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

14 April 2025

DATE SIGNATURE

CASE NUMBER: SS70/2021

In the matter between:

THE STATE

and

MFALAPITSA THLOMEDI EPHRAIM **Accused 1**

RORICH CHRISTIAAN SIEBERT **Accused 2**

LEGAL RESOURCES CENTRE **Amicus Curiae**

JUDGMENT

DOSIO J:

Introduction

[1] This is an application in terms of s85(1) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'), brought by the accused against the intended charges upon which the accused are to be arraigned.

[2] The State intends to charge the accused with five main offences and three alternative Counts. The three alternative counts relate to the second to fifth counts. The charges are as follows:

(a) Count one -Kidnapping.

(b) Count two, is a crime against humanity namely, murder, read with s232 of the Constitution, (relating to the death of Eustice Madikela), allegedly committed on 15 February 1982. Alternative to count two, murder, read with the provisions of ss91, 92 and 258 of Act 51 of 1977.

(c) Count three, is a crime against humanity, namely murder, read with s232 of the Constitution, (relating to the death of Peter Matabane), allegedly committed on 15 February 1982. Alternative to count three, murder, read with the provisions of ss91, 92 and 258 of Act 51 of 1977.

(d) Count four, is a crime against humanity, namely murder, read with s232 of the Constitution, (relating to the death of Fanyana Nhlapho), allegedly committed on 15 February 1982. Alternative to count three, murder, read with the provisions of ss91, 92 and 258 of Act 51 of 1977.

(e) Count five, is a crime against humanity of apartheid read with s232 of the Constitution in that 0n 15 February 1982, the accused killed Eustice Madikela, Peter Matabane and Fanyana Nhlapo.

[3] This Court has allowed the family members of the deceased in the matter in casu to intervene as amicus curiae, for purposes of the objection raised by the accused in terms of s85 of Act 51 of 1977.

[4] Accused two, who is joined by accused one in this objection, takes issue with reference to the main counts set out in counts two, three, four and five, on the basis that the State's right to institute a prosecution against the accused on the mentioned charges has lapsed in terms of s18 of Act 51 of 1977. Accused one has in addition, objected to the title of the National Prosecuting Authority, ('NPA') to prosecute, given that the NPA and the Government of South Africa committed 'gross misconduct' by engaging in political

interference in the cases referred by the Truth and Reconciliation Commission, ('TRC'), to the NPA.

[5] The State contends that the basis of the charges on counts two, three, four and five, arise from the accused's conduct as being part of a systematic attack or elimination of political opponents of the apartheid regime, and further that they formed part of an institutionalised regime of systematic oppression and domination, by one racial group over other racial groups with the intention of maintaining that domination. The avenue the State has chosen to pursue this prosecution in this matter is section 232 of the Constitution.

Background

[6] The prosecution of the accused was instituted during 2021, which is approximately 40 years after the alleged crimes are alleged to have occurred, namely, on 15 February 1982.

[7] The accused contend that s18(1) of Act 51 of 1977 provides that the right to institute a prosecution for any offence, other than the exceptions referred to in paragraphs (a) to (j), shall lapse after the expiration of a period of twenty years from the time when the offence was committed. As a result, counts two, three, four and five do not fall within the ambit of the offences excluded from the operation of s18(1) of Act 51 of 1977, with specific reference to ss18(1)(a) to (j).

[8] Section 18(1) of Act 51 of 1977 was amended by s39 (Schedule 2) of the Rome Statute of the International Criminal Court Act 27 of 2002 ('the ICC Act'), to introduce s18(1)(g) of Act 51 of 1977. On 16 August 2002 the crimes of genocide, crimes against humanity and war crimes, as contemplated in s4 of the ICC Act were added. Prior to the relevant amendment there was no s18(1)(g) or any similar provision.

Contentions of the accused

[9] The accused contend that the State have an unsurmountable problem regarding the charges arraigned against them, in that the State is relying on customary international law and not the offence of a crime against humanity created in terms of s4 of the ICC Act.

[10] The accused argue that s18(1)(g) of Act 51 of 1977 provides for an exclusion from the general prohibition to prosecute with reference to prosecutions in terms of s4 of the ICC Act and the amendment that introduced s18(1)(g) in that the amendment only came into effect on 16 August 2002, which is more than 6 months after the State's right to prosecute had lapsed.

[11] The accused state even if it is to be found that s18(1)(g) of Act 51 of 1977 is also applicable to prosecutions in terms of the customary international law (which is disputed), the right of the State to prosecute has still lapsed on 14 February 2002.

[12] It was contended that there is no provision in s18 of Act 51 of 1977 for any revival of the right to prosecute relating to a crime against humanity after it has lapsed, resulting in no triable issue between the State and the accused, relating to the charges on counts two, three, four and five. This is because the legislature specifically dealt with the issue of the revival of certain offences that have lapsed prior to the amendment of s18(1) of Act 51 of 1977 in s18(2) of Act 51 of 1977 which states:

> '(2) The right to institute a prosecution that, in respect of any offences referred to in subsection (1)(eA) and (f), has lapsed before the commencement of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act,2020, is hereby revived.'

[13] It was argued that the provision for the revival of certain offences that have lapsed, prior to the extension of the exclusions provided for in s18(1) of Act 51 of 1977 were limited to two subsections, or categories of offences, namely, those referred to in s18(1)(eA) which are the crimes of bribery and corruption, and those mentioned in s18(1)(f) of Act 51 of 1977, which are sexual offences.

[14] It was argued that because s18(2) of Act 51 of 1977 was introduced in 2020 by s3 of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020, ('Act 15 of 2020'), that it can be inferred that prior to 2020 there was no provision for revival of offences where the right to prosecute had lapsed in terms of s18 of Act 51 of 1977. Furthermore, that during 2020 when the Legislature considered and decided to amend s18 of Act 51 of 1977, to provide for the revival of certain offences that had already lapsed, s18(1)(g) of Act 51 of 1977, relating to crimes against humanity, existed and was part of s18(1) of Act 51 of 1977.

[15] The accused contend that when interpreting s18(1)(g) of Act 51 of 1977, there is a presumption against retrospectivity, reference was made to the Constitutional Court case of *S v Mhlungu and Others*.[1]

[16] It was argued that any Court must interpret the s18(1)(g) so as to render an interpretation least harsh to the affected persons.[2]

[17] It was contended that the wording of s18(1)(g) is objectively clear in that the Legislature elected to only refer to offences contemplated by s4 of the ICC Act, of which a crime against humanity is included and not to refer to offences in terms of the International Common Law and not to provide for the revival of any of the offences referred to in s18(1)(g) of Act 51 of 1977.

[18] It was argued that the State's contention that a proper interpretation of s18(1)(g) of Act 51 of 1977 is to include all crimes against humanity, including crimes in terms of the common international law, read with s232 of the Constitution, is clearly wrong and should be rejected. It was argued that if the Legislature intended to include the crime against humanity in terms of the customary international law, the Legislature would clearly have done so. The fact that the legislature did not include it, is because it clearly did not intend to.

[19] In addition, it was contended that the general rules and principles relating to the interpretation of statutes, do not support an interpretation to broaden the ambit of s18(1)(g) of Act 51 of 1977.

[20] Accordingly, the accused argue that the charges, as formulated in the present indictment, with specific reference to the main counts on count two, three, four and five do not fall within the ambit of s18(1)(g) of Act 51 of 1977 and this Court should uphold the objection in terms of s85 of Act 51 of 1977.

---

[1] *S v Mhlungu and Others* 1995 (3) SA 867 (CC

[2] see *R v Sachs* 1953 (1) SA 392 (A), *S v Kimberley a.o*. 2005 (2) SACR 663 (SCA) and *NDPP v Carolus a.o* 1999 (2) SACR 607 (SCA)

Contentions of the State and the amicus

[21] The State and amicus make the following contentions, namely:

(a) The customary international law binds the Republic, even in instances where South Africa has not ratified an associated treaty in terms of s231 of the Constitution.

(b) Section 233 of the Constitution requires any court interpreting legislation to:

'…prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

(c) International law is comprised essentially of treaties and customary laws. Treaties bind those states that are parties to them. Customary international law, on the other hand, is a collection of rules that have been accepted and practiced by the international community. Rules of customary international law are binding on all states. According to the International Committee of the Red Cross ('ICRC'), customary international law derives from 'a general practice accepted as law'. Such practice can be found in a variety of sources, including national legislation, regional and international instruments, domestic and international case law and scholarly works. It was argued that s7(4) of the Implementation of the Geneva Convention Act 8 of 2012, recognises prosecutions of international crimes under s232 of the Constitution in that:

'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'.

(d) The amicus contend that much of customary international law has evolved from norms proclaimed in international human rights instruments, which have their basis in the United Nations Charter, the Universal Declaration of Human Rights and other treaties of a universal character.[3] Furthermore, it is contended that to qualify as customary international law, an international norm must meet two requirements.[4] It must qualify as a constant and uniform usage ('usus')[5] and must be followed from a sense of legal obligation, opinio iuris.[6] Whether a norm qualifies as a norm of customary international law is a question to be decided by a court through the application of the criteria of usus and opinio iuris.[7]

---

[3] see Buergenthal, *International Human Rights in a Nutshell,* St. Paul, West Publishing Co. 1988 at 245. See generally: Andreas O'Shea, *International Law and the Bill of Rights*, Last updated October 2004 – SI 15).

[4] see Statute of the International Court of Justice, art 38(1)(b)

[5] (see Asylum case 1950 ICJ Rep 266; Case Concerning *Military & Para-military Activities in & against Nicaragua* 1986 ICJ Rep 14. In the South African context, see *S v Petane* 1988 4 All SA 88 (C); 1988 3 SA 51 (C); Dugard *International Law* page 24)

[6]see *North Sea Continental Shelf* cases 1969 ICJ Rep 3; Dugard *International Law* pages 51–53, 55.

[7] see *S v Petane* note 5 above; Dugard *International Law* 56–58.

(e) Reference was made to the Restatement of the Foreign Relations Law of the United States (Third) (1987), ('Restatement Third'). The Restatement Third characterizes some of the rights in the Universal Declaration of Human Rights as customary international law and lists the following practices as violating customary international law, namely, genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination and consistent patterns of gross violations of internationally recognized human rights. The amicus contend that the Restatement Third asserts that repeated failures to punish violations of rights protected under customary international law may constitute government condonation of such acts especially if such acts are repeated by officials, and no steps have been taken to prevent them or to punish the perpetrators.[8]

(f) It is trite that a court may find the accused guilty of a crime only where the conduct was recognised as a crime at the time of its commission which is referred to as the ius praevium principle. It is a known fact that crimes against humanity evolved under customary international law and were first charged under the Nurenberg Tribunal Charter of 1945. The United Nations General Assembly endorsed the concept of Crimes against Humanity in 1946. 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. It was contended that in the matter in casu, the accused committed these acts as part of a widespread and systematic attack against black civilians and opponents of the regime.

(g) The State contends that the charges have been formulated to identify two separate constitutive elements of crimes against humanity. These are:

1. The general contextual elements of the crime, which refers to a regime of systematic oppression or attack and
2. The specific underlying acts that an accused committed with the requisite intention, referring to the murder, persecution or other inhuman acts.

[22] As a result, both the State and the amicus contend that counts two, three, four and five are valid and can stand.

[8] see Restatement, §102(2) (1987) comment b. See also U.S. v. Mex., 4 REP. INT'L ARB. AWARDS 82 (1926) 89–90)

Evaluation

[23] The accused are charged with core offences based on customary international law, read with s232 of the Constitution and not in terms of s4 of the ICC Act. Accordingly, this Court must determine whether counts two, three, four and five, which are based on the alleged contravention of the customary international law, read with s232 of the Constitution, can be used as a self-standing basis for institution of a prosecution.

[24] The accused have a right to object to an indictment by the State which is provided for in s85 of Act 51 of 1977, provided that an accused has stated the ground upon which the objection is based.

[25] The essential objection raised by the accused is that the crimes against humanity referred to in counts two, three, four and five do not fall within the ambit of the offences excluded from the operation of s18(1) of Act 51 of 1977 and have prescribed.

[26] As argued by the State and the amicus, international law consists of specific treaties or conventions that specific countries consent to, which binds them and then there is customary international law that is binding on all countries. As a result, serious human rights violations are criminalized and can be prosecuted under both conventional international law and customary international law. In terms of the Constitution, both sources of international law form part of South African law.

[27] Section 231 of the Constitution governs the domestication of conventional international law, providing that once South Africa has signed a specific treaty or convention, it becomes law in the Republic when it is approved by Parliament and enacted into law by national legislation. It also states that the Republic is bound by international agreements which were binding on the Republic when this Constitution took effect

[28] Section 232 of the Constitution refers to the domestication of customary international law and states that:

‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’

[29] As a result, under South African Law, crimes against humanity, can be brought by the State either in terms of conventions that South Africa has signed, ratified and duly

implemented, example the ICC Act, or in terms of customary international law as stated by s232 of the Constitution.

[30] Customary international law is a source of international law developed through state custom or practice. In effect, it is the "common law" of the international legal system. A custom becomes a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation. In the matter of *Columbia v Peru*,[9] the International Court of Justice ('ICJ'), stated that for a practice to become a rule of customary international law, the practice must be 'constant and uniform'.[10]

[31] Customary International Law establishes the duty to investigate and prosecute international crimes, such as extrajudicial killings, torture and enforced disappearances.[11]

[32] Customary International law was recognised as being of direct application in South Africa even before the advent of the Constitution. In the matter of *Nduli and Another v Minister of Justice and Others*[12] ('*Nduli*'), the Appellate Division, as it then was, as per the judgment of Chief Justice Rumpff, accepted that customary international law was, subject to it not being in conflict with domestic law, directly operative in the national sphere. The learned Rumpff CJ noted that customary international law would have to be either universally recognised or need the assent of this country. Subsequent judgments, namely, *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique*[13] and *S v Petane*[14] ('*Petane*'), departed from this interpretation, however, in the matter of *Petane,*[15] the Court held that in that case, the distinction between universal and general recognition of customary international law made no difference and the Court held that 'where a rule of customary international law is recognised as such by international law it will be so recognised by our law'.[16] [my emphasis]

---

[9] Colombian-Peruvian asylum case I.C.J. Reports 1950, 266
[10] Idem page 276
[11] see Jeremy Sarkin, "Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law," *Nordic Journal of International Law* 81, no. 4 (2012): 537–584, 541)
[12] *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A)
[13] *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T)
[14] *Petane* 1988 4 All SA 88 (C) (note 5 above)
[15] Ibid
[16] Ibid page 92

[33] In the matter of *Law Society of South Africa and Others v President of the Republic of South Africa and Others*,[17] the Constitutional Court held that:

'Our Constitution also insists that [courts] not only give a reasonable interpretation to legislation but also that the interpretation accords with international law. And unless otherwise inconsistent with our Constitution, customary international law is law in this country.'[18]

[34] It is clear from the decision of *Petane*[19] that customary international law has been an integral part of South African law long before the Constitution came into effect.

[35] Unlike treaties, no specific action is required to incorporate customary international law into the Republic's legal system, its mere existence is sufficient[20] and customary international law automatically forms part of the law of the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

[36] Apartheid, was a system of racial segregation and discrimination, that was formally implemented in South Africa in 1948. This system, rooted in the country's history of settler-colonialism, was designed to maintain the domination of the white minority over the black majority. The apartheid regime, amongst others, enforced racial categorisations, segregation in all areas of life, and the disenfranchisement of black South Africans. Additionally, enemies or threats to the State were punished with imprisonment, kidnapping, torture, police and state brutality, and assassinations, to name a few.

[37] Apartheid was declared a crime against humanity by the United Nations General Assembly in 1966. It was placed beyond any 'statute of limitation', i.e time bar, by an International Treaty in 1968, and comprehensively criminalised under the United Nations Convention on the Suppression and Punishment of the Crime of Apartheid in 1973 ('the Apartheid Convention'). These sources all predate the crimes charged in the matter in casu.

[38] The transition to democracy which culminated in the first democratic elections of 1994 involved negotiations between the apartheid government and liberation

---

[17] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC),
[18] Idem para 5
[19] Petane (note 5 and 14 above)
[20] see WA Joubert, *Law of South Africa* (LAWSA), Annual Cumulative Supplement 2024, Lexis Nexis.at 451.)

movements, resulting in our current constitutional framework that enshrined human rights and the rule of law. A key element of this transition was the establishment of the TRC in 1995.

[39] The TRC 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.[21]

[40] The contextual elements of the charge of crime against humanity of apartheid incorporate the common elements of the definitions of the crime jointly under the Apartheid Convention and article 7 of the ICC Act, which include specific inhuman acts all committed as part of maintaining an institutionalised regime of systematic oppression and domination by one racial group over persons of another racial group.

[41] As far as the underlying acts of the crime of apartheid are concerned, both the Apartheid Convention and the ICC Act expressly list murder, inflicting physical and mental harm, arbitrary arrests, extermination, enslavement, persecution, torture, enforced disappearance of persons and apartheid as examples of 'inhuman acts. Accordingly, crimes against humanity have existed under customary international law for at least 79 years.

[42] If it can be demonstrated that apartheid as a crime against humanity passed into customary international law prior to the crimes committed in the matter in casu, namely on 15 February 1982, then the NPA is entitled to proceed with such charges.

[43] The Constitution acknowledges and incorporates these pre-existing principles automatically, without the need for specific legislative action, thus integrating the influence and relevance of customary international law within the South African legal framework. Therefore, even if these charges were non-existent offences in South Africa at the time of their commission, they were offences under customary international law which have been an integral part of South African law pre-1994.

[21] see TRC Report, Volume 5 Chapter 6, Findings and Conclusions, at p. 222

[44] South Africa would not be the first country to prosecute matters which occurred long after the commission of the crime. In Cambodia, for example, Courts were established in 2006 to prosecute the senior leaders of the Khmer Rouge responsible for atrocities in Cambodia and the trials began three decades after the commission of these atrocities.

The Constitutional Courts

[45] In the matter of *S v Basson*[22] ('*Basson 1*'), the Constitutional Court held that:

'…the State's obligation to prosecute offences…..applies to all offences committed before [the Constitution] came into force. It is relevant to this enquiry that international law obliges the state to punish crimes against humanity and war crimes.[23] It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.'[24]

[46] In considering s232 of the Constitution the Constitutional Court in *Basson 1,*[25] as per the judgment of Sachs J, confirmed that the rules of humanitarian law constitute an integral part of customary international law in that it applies and has 'to be observed by all states whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law' [26]

[47] The finding of the Constitutional Court in the matter of *Basson 1*,[27] confirmed that crimes against humanity under customary international law can be prosecuted directly under s232 of the Constitution.

[48] In the matter of *Basson 1,*[28] Sachs J raised three substantial constitutional questions in connection with the quashing of the charges against Mr Basson:[29]

(a) The first is whether the conduct charged could be characterised as a war crime as understood by international humanitarian law.

---

[22] *S v Basson* 2005 (1) SA 171(CC)
[23] (see Dugard "Is the Truth and Reconciliation Process Compatible with International Law? An unanswered question" 13 (1997) *SA Journal on Human Rights* 258 at 263. See also *Prosecutor v Dusko Tadic* (ICTY) (1996) 35 ILM 32 at 72
[24] *Basson 1* (note 22 above) at para 37 and Convention on Suppression and Punishment of the Crime of Apartheid, 1973, article 1; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968
[25] *Basson 1* (note 22 above)
[26] Ibid para 122
[27] Ibid
[28] Ibid
[29] Ibid para 116

(b) If the answer is affirmative, the second question is whether and to what extent this could impose a special constitutional responsibility on the state to prosecute the respondent.

(c) The third is whether the quashing of the charges without reference to the fact that the prosecution of war crimes was involved, manifested a failure to give effect to South Africa's international obligations as set out in the Constitution.

[49] In dealing with the first question as to whether the conduct alleged in the quashed charges were war crimes, Sachs J referred to Cassese's definition that war crimes are 'serious violations of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict…'[30]

[50] Sachs J concluded that if the allegations in the *Basson* matter could be proved, it would be difficult to argue that they did not constitute war crimes.[31]

[51] In considering the second question, Sachs J questioned whether if the charges could establish the commission of war crimes, would such a finding signify a need to take account of international law in determining the issues. In this regard he concluded that the materials before him were sufficiently substantive to propel this question from the realm of the purely speculative into the universe of the real.[32]

[52] In the matter of *S v Basson*[33] (*Basson 2*'), the Constitutional Court concluded that certain violations, such as murdering captives held by the security forces fell squarely within customary international law prohibitions.

'…What matters is that regard had to be had by all those involved in the conflict to intransgressible principles based on elementary considerations of humanity. There can be no doubt that the use of instruments of state to murder captives long after resistance had ceased would in the 1980s, as before and after, have grossly transgressed even the most minimal standards of international humanitarian law.'[34]

---

[30] Ibid para 117 and Cassese *International Criminal Law* (2003) at 47
[31] Ibid para 120
[32] Ibid para 121
[33] *S v Basson* 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC) (9 September 2005)
[34] Ibid para 179

[53] In the matter of *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre* ('*National Commissioner*'),[35] the Constitutional Court confirmed that:

'The extent of our country's responsibilities as a member of the family of nations to investigate crimes against humanity lies at the heart of this case.'[36]

[54] In the matter of *National Commissioner*,[37] the Constitutional Court held that:

'…crimes against humanity [are] criminalised under section 232 of the Constitution'[38] [my emphasis]

[55] The reference in the matter of *National Commissioner*[39] is clearly the crime of torture, but the Constitutional Court accepted the proposition that other crimes, including apartheid, are also crimes in South Africa because of their prohibition under customary international law. The Constitutional Court endorsed the prosecution of international crimes and crimes against humanity under s232 of the Constitution, noting:

'Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because "all states have an interest as they violate values that constitute the foundation of the world public order. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.'[40] [my emphasis]

[56] The Constitutional Court in the matter of *National Commissioner,*[41] concluded that the SAPS not only had the requisite power to investigate crimes against humanity but also a duty to do so, which duty arises from the Constitution.[42]

[57] Accordingly, s232 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.

---

[35] *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC)
[36] Ibid para 3
[37] Ibid
[38] Ibid para 39
[39] Ibid
[40] Ibid para 37
[41] Ibid
[42] Ibid para 60

[58] South Africa is not alone in applying customary international law to pursue war crimes and crimes against humanity. Indeed, it is not even the first to do so on the African continent.

[59] Other African courts have also confirmed that crimes against humanity and war crimes may be prosecuted under customary international law, including the High Court of Uganda in *Uganda v Thomas Kwoyelo Alias Latoni*[43] and the Supreme Court of Gambia in the matter of *State vs Yankuba Touray*,[44] where the Supreme Court held that the common law, read with their Constitution, 'recognizes that customary international law is part and parcel of the common law',[45] insofar as its not inconsistent with local statute law.

[60] The Supreme Court of Gambia noted that the rights and duties flowing from the rules of customary international law will be recognized and given effect by the Gambian Courts without the need for any specific Act adopting those rules into Gambian law.

The principle of legality

[61] The accused have referred to the principle of legality as being a ground for the inability of the State to prosecute the accused. This principle is often expressed as nullum crimen sine lege, meaning that an accused cannot be prosecuted for an action unless it was defined as a crime and punishable at the time it was committed.

[62] This Court must determine whether apartheid was a crime under international law in 1982, because according to s35(3)(l) of the Constitution, an accused has a right to a fair trial which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed.

[63] It is true that the rule against retrospectivity prevents prosecutors from pursuing crimes created by treaties if the crimes were committed before the date the treaty was ratified. However, if the State can prove that these crimes had passed into customary

[43] *Uganda v Thomas Kwoyelo Alias Latoni* HCT-OO-ICD-CR-SC 2 OF 2010]UGHCICD 2 922 November 2017
[44] *State vs Yankuba Touray*, SC CR/001/2020
[45] Ibid pages 17-18

international at the time they were committed, then the NPA may pursue these crimes under customary international law.[46]

[64] This should not be a difficult exercise for the State in the matter in casu, as crimes against humanity have been crimes under international law since their codification in the 1945 Nuremburg Tribunal charter.[47]

[65] The International Covenant on Civil and Political Rights ('ICCPR'), which was adopted in 1966, stipulates in article 15(2) that a state party may indict, bring to trial, and punish any person for any conduct 'which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'.

[66] Accordingly, article 15(2) of the ICCPR allows prosecutors to pursue crimes proscribed under customary international law, even where such conduct was not domestically criminalized.

[67] There is considerable amount of foreign and regional case law that confirms that statutes of limitations do not apply to crimes against humanity and other core international crimes.

[68] Multiple other countries around the world have invoked customary international law to pursue the most serious international crimes, including crimes against humanity, without offending the principle of legality. Examples include cases from national courts in

[46] see M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge, UK: Cambridge University Press, 2011), 300.)

[47] See generally 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, *International Law Commission Report on the Nuremberg Principles*, 5 UN GAOR, Supp. No. 12, UN Doc. A/1316 (1950).

Argentina,[48] Australia,[49] Canada,[50] Chile,[51] Estonia,[52] Germany,[53] Latvia,[54] Spain,[55] United States,[56] Uganda and Uruguay.[57]

[69] The accused claim that crimes against humanity committed before the commencement of the ICC Act do not fall within the exception as set out on s18(1) of Act 51 of 1977.

[70] It is a well-known rule of customary international law that the core international crimes of genocide, crimes against humanity and war crimes never prescribe. Given the peremptory nature (jus cogens), or compelling law governing customary international law, all states are under a duty to recognise and respect a jus cogens norm. Rule 160 of the International Committee of the Red Cross ('ICRC') rules on Customary International Humanitarian Law, which pertains to statutes of limitation, states that 'The principle that statutes of limitation do not apply to war crimes is set forth in many military manuals and in the legislation of many States, including those of States not party to the UN or European Conventions on the Non-Applicability of Statutory Limitations to War Crimes or Crimes against Humanity.'[58] Rule 160 states further prescription shall not apply to crimes under international law that are by their nature imprescriptible.

[71] Due to many perpetrators of crimes against humanity and war crimes that escaped the auspices of the Nuremberg and Tokyo Tribunals after World war two, the United Nations adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in 1970 ('the Convention on Statutory Limitations'). The Convention on Statutory Limitations, as the name implies, prohibits the application of statutory limitations, including the principle of undue delay, to crimes against humanity.

---

[48] see Arancibia Clavel case, Case no. 259, Supreme Court of Justice of the Nation (Corte Suprema de Justicia de la Nación)
[49] see *Polyukhovich v. The Commonwealth of Australia and Another*, [1991] HCA 32; (1991) 172 CLR 501 F.C. 91/026 (High Court of Australia)
[50] see *Her Majesty The Queen v. Imre Finta*, File Nos.: 23023, 23097, Supreme Court of Canada, 24 March 1994; *Her Majesty The Queen v. Désiré Munyaneza*, Case no. 500-73-002500-052, Superior Court, Criminal Division, 22 May 2009)
[51] see *Molco de Choshuenco*, Case no. 559-2004, Supreme Court of Chile, Criminal Chamber
[52] see *Kolk and Kislyiy v. Estonia*, Applications nos. 23052/04 and 24018/04 , European Court of Human Rights
[53] see Streletz, Kessler and Krenz v. Germany, Applications nos. 34044/96, 35532/97 and 44801/98, European Court of Human Rights; Jorgic v Germany, Application no. 74613/01, European Court of Human Rights
[54] see *Kononov v. Latvia*, Application no. 36376/04, European Court of Human Rights)
[55] see Pinochet case, Investigation no. 19/97, Spanish National Court, Central Court of Investigation no. 5; Indictment against 98 Argentinian military, investigation no. 19/97-L, Spanish National Court, Central Court of Investigation no. 5; Guatemalan genocide case, Case no. 331/99, Spanish National Court, Central Court of Investigation no. 1; Adolfo Scilingo case, Judgment 16/2005, Spanish National Court, Third Criminal Chamber)
[56] see *Demjanjuk v. Petrovsky et al*., 776 F.2d 571 (No. 85-3435) (United States Court of Appeals, Sixth Circuit
[57] see Bordaberry case, IUE 1-608/2003, First Instance Criminal Court, 7th turn
[58] see Rule 160, ICRC International Humanitarian Law Databases, Vo II, Ch 44, Section E

[72] The Convention on Statutory Limitations, recognized in its preamble that it is necessary and timely to affirm in international law, through this Convention on Statutory Limitations, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application.

[73] The Convention on Statutory Limitations applies to certain war crimes and crimes against humanity, including inhuman acts resulting from the policy of apartheid, irrespective of the date of their commission and even if such acts do not constitute a violation of domestic law of the country in which they were committed.[59]

[74] The Inter-American Court of Human Rights in *Almonacid Arellano et al v Chile*[60] held that jus cogens transcends the law of treaties to include general International Law and it could not be otherwise because of its conceptualization as peremptory law. Even though the Chilean State had not ratified the Convention on Statutory Limitations, the Chilean State had to comply with this imperative rule and could not invoke the statute of limitations.

[75] The non-applicability of statutory limitations to war crimes and crimes against humanity has been confirmed by multiple regional and domestic courts in France, Argentina, Italy, Spain, Belgium, the United States and elsewhere, as well as the European Court of Human Rights.

[76] South Africa has not ratified the Convention on Statutory Limitations. However, as mentioned supra, since the non-applicability of statutes of limitations to serious international crimes has become a peremptory norm of international law, South Africa is bound by such norm whether or not it has ratified the Convention on Statutory Limitations or not.

[77] Whilst South Africa is not a signatory to this treaty, the principles in the Convention on Statutory Limitations are part of customary international law. This is clear from the preamble to the Convention on Statutory Limitations.

---

[59] see Art.I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the General Assembly resolution 2391 (XXIII) of 26 November 1968, entered into force on 11 November 1970) .
[60] see *Almonacid Arellano et al v Chile, del Rosario Gómez Olivares and ors* (on behalf of Almonacid Arellano) v Chile, Preliminary objections, merits, reparations and costs, IACHR Series C No 154, IHRL 1538 (IACHR 2006), 26th September 2006, Inter-American Court of Human Rights)

[78] In the matter of *Government of the RSA v Grootboom and Others*[61] ('*Government of the RSA*'), the Constitutional Court held that international treaties that have not been signed, ratified or enacted into South African law remain persuasive sources of law in the interpretation of the provisions of the Bill of Rights, by virtue of the operation of s 39(1)(b) of the Constitution.

[79] Section 39(1)(b) and (c) of the Constitution requires a court to:

'When interpreting the Bill of Rights, a court, tribunal or forum…

(b) must consider international law; and

(c) may consider foreign law.'

[80] The Constitutional Court in *Government of the RSA*[62] quoted and applied the earlier dictum in the Constitutional matter of *S v Makwanyane*[63] ('*Makwanyane*') dealing with section 35(1) of the interim Constitution and stated that:

'[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood …'[64]

[81] The 2000 Final Report of the Special Rapporteur on Civil and Political Rights concluded that '[s]tatutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law'.[65]

[82] The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('Right to a Remedy Principles') adopted unanimously by the United Nations General-Assembly, on 16 December 2005, provides in Chapter IV that:

'6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights

---

[61] *RSA v Grootboom and Others* 2001 (1) SA 46 (CC)

[62] Ibid

[63] *S v Makwanyane* 1995 (3) SA 391 (CC)

[64] see *Government of the RSA* (note 61 above) at para 26; and *Makwanyane* ibid at para 35

[65] see Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity -right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms', ECOSOC, Commission on Human Rights, E/CN.4/2000/62, 18 January 2000. Part IV, at §6.)

law and serious violations of international humanitarian law which constitute crimes under international law.'[66]

[83] The crimes which the accused are charged with are imprescriptible. Based on South Africa's international obligations there can be no time bar for the prosecution of crimes against humanity. The seriousness of crimes against humanity must be prosecuted irrespective of when they occurred. Therefore, there is no period within which charges must be brought. A delay in prosecution is not a defence in law to these crimes, nor does it waiver the State's right to prosecute.

[84] The Constitutional Court decisions[67] have already found that:
(a) The state is obliged to prosecute crimes against humanity, including apartheid-era crimes that occurred before the Constitution came into force,
(b) international law obliges the State to punish crimes against humanity, and
(c) the practice of apartheid constituted a crime against humanity.

[85] There are arguments before this court that s18(1) of Act 51 of 1977 should not be interpreted to mean that crimes against humanity committed before the commencement of the ICC Act have prescribed under the 20-year rule. Furthermore, that s18(1)(g) of Act 51 of 1977 must be interpreted to encompass all core international crimes, not only those that took place after the ICC Act's implementation in 2002, as reading the exception in any other way would render the provision completely irrational. It was argued that s18(1)(g) of Act 51 of 1977 must also include all core international crimes even before 2002.

[86] Interpreting s 18(1)(g) of Act 51 of 1977 in a manner that excludes war crimes, crimes against humanity and genocide that occurred before the 2002 enactment of the ICC Act, is unfortunate, as it would fly in the face of accepted and established international law. It would effectively mean that only those who commit the crime of apartheid in democratic South Africa but not before, would be able to be prosecuted for it. Not only is this absurd, but it would be plainly unconstitutional, going against the values set out

---

[66] see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 para 6 chapter iv Statutes of Limitations, Dec. 16, 2005)

[67] see Basson 1 (note 22 above), Basson 2 (note 33 above), *National Comissioner* (note 35 above), *Government of RSA* (note 61 above) and *Makwanyane* (note 63 above)

in our own Constitution, international law, and the interests of justice, in that Parliament would effectively have provided immunity for all persons who committed the crime of apartheid during apartheid, because evidently, all those crimes would have happened in apartheid South Africa which was obviously before 2002.

[87] However, as stated supra, the accused in this matter are not charged in terms of s4 of the ICC Act but rather in terms of s232 of the Constitution which 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. The crimes for which the accused are being charged with were crimes under customary international law at the time they were committed in 1982. As a result, this Court has focused on s232 of the Constitution and the application thereof to the present charges.

[88] For crimes committed before 2002, s232 is the primary avenue for prosecution. Therefore, section 232 allows for the prosecution of apartheid-era crimes under customary international law and this Court finds that s232 of the Constitution is a self-standing basis for prosecuting international crimes. The ICC Act as it stands explicitly prohibits prosecutions for acts committed before its entry. However, s232 allows for prosecutions of apartheid-era crimes under customary international law.

[89] The accused assert their entitlement to a fair trial, one that is conducted in a procedurally fair manner and not prosecuted with any unfair, improper, or unlawful motive. However, they fail to provide any basis for the claim that their fair trial rights will be violated. The only reference to their claim is that the charges have prescribed under section 18(I) of Act 51 of 1977.

[90] This Court finds that crimes against humanity are part and parcel of South African law and are not subject to any statute of limitation. The prosecution of the accused complies with the principle of legality under section 35(3)(I) of the Constitution in that, prosecution through s232 does not violate the principle of legality as it does not retroactively create new crimes. Instead, it recognises and enforces pre-existing crimes under customary international law, ensuring that perpetrators are held accountable for actions that were already considered criminal at the time.

[91] Accordingly, the objection raised by the accused, based on the principle of legality as being a ground for the inability of the State to prosecute the accused for a crime against humanity of murder, read with s232 of the Constitution, is without merit and is dismissed. Furthermore, the contention that the State's right to prosecute them for crimes against humanity under customary international law having lapsed is also without merit.

Objection to title to prosecute

[92] The matter in casu was referred by the TRC to the NPA and it is clear there have been delays for many decades to prosecute this matter.

[93] Accused one objects to the title of the NPA to prosecute, given that the NPA and the Government of South Africa committed 'gross misconduct' by engaging in political interference in the cases referred by the TRC to the NPA. While accused one is justified in being offended by the past conduct of the authorities in suppressing the TRC cases he does not explain how such conduct has violated his right to a fair trial.

[94] This same point was addressed by the full court in *Rodrigues v National Director of Public Prosecutions of South Africa and Others*[68] ('Rodrigues 1') and by the Supreme Court of Appeal in *Rodrigues v The National Director of Public Prosecutions and Others*[69] ('*Rodrigues 2*'). M Rodrigues contended that the lengthy delay in commencing criminal prosecution, allegedly caused by political interference, caused him trial-related prejudice in terms of s35(3)(d) of the Constitution, which justified a permanent stay of prosecution. Both courts expressed their dismay at the political interference but concluded that the political interference in no way impinged on the right of Mr Rodrigues to a fair trial. The appeal was dismissed.

[95] Accused one's counsel held a different view. He argued that in the matter of *Rodrigues,* [70] the court dealt with a permanent stay in a civil application which was denied, and left the criminal court with the duty to address the issues. His argument is that the challenge in the matter is casu is different, as it is based on the jurisdiction of the court and not on a permanent stay or crime.

---

[68] *Rodrigues v National Director of Public Prosecutions of South Africa and Others* [2019] 3 All SA 962 (GJ)
[69] *Rodrigues v The National Director of Public Prosecutions and Others* [2021] 3 All SA 775 (SCA)
[70] Rodrigues (note 68 above) and Ibid

[96] This Court does not agree, while the Rodrigues case addressed the question of a permanent stay of prosecution, it also involved attempts to compel the NPA to make prosecutorial decisions in TRC-related cases. Whether the delay is caused by the State or not, the fundamental principles of the Constitution and s232 of the Constitution still apply to the matter in casu.

[97] The NPA's handling of the referrals from the TRC have been marked by delays and challenges despite the TRC's mandate being to promote accountability and justice. The failure to prosecute those responsible for apartheid-era atrocities has cast a long shadow over our efforts at reconciliation, especially for families of the victims.

[98] In the matter in casu, the political interference, as regrettable and wrongful as it has been, will not deny accused one a right to a fair trial, nor has it deprived the NPA the title to prosecute this case or future cases arising from South Africa’s past.

[99] Trial fairness is not confined to the position of the accused, but extends to society as a whole, precisely because society has a real interest in the outcome of a case. Section 7(2) of the Constitution mandates that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights. This duty extends beyond the rights of the accused to include the rights of victims.

[100] Accordingly, this objection is also dismissed.

Conclusion

[101] The charges on counts two, three, four and five are not problematic as the indictments include the crime of apartheid as a reference to the crime under customary international law in terms of s232 of the Constitution and not to the crime of apartheid as a crime against humanity as conceived in the ICC Act.

[102] Section 232 of the Constitution and the ICC Act are both mechanisms for prosecuting international crimes in South Africa. Although they work in conjunction to ensure a comprehensive framework for addressing international crimes, they have different scopes and applications. The automatic incorporation of customary international law through s 232 of the Constitution provides a basis for prosecuting any crime recognised under customary international law at the time of its commission, regardless of whether

specific legislation exists for that crime. The result is that it covers crimes committed before and after the adoption of the ICC Act.

[103] This court accordingly allows the State to put the charges to the accused as per the indictment.

_____

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF ACCUSED 1:	Adv. I Mthembu Instructed by Legal Aid SA, Johannesburg
ON BEHALF OF ACCUSED 2:	Adv. J.G Cilliers SC (with him Adv. W.S Jungbluth) Instructed by Du Plooy Incorporated, Johannesburg per Kobus Muller
ON BEHALF OF THE STATE:	Adv. H.S Ngobeni (with him Adv. M.M Maleleka) Instructed by the Office of the National Director of Public Prosecutions, Johannesburg
FOR THE AMICUS CURIAE:	Adv. H Varney Instructed by Legal Resources Centre, Johannesburg