IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal Court Case No: 1186/2019
High Court Case No: 76755/18 (GLD)

In the matter between:

JOAO RODRIGUES	**Appellant**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**First Respondent**
THE MINISTER OF JUSTICE & CORRECTIONAL SERVICES	**Second Respondent**
THE MINISTER OF POLICE	**Third Respondent**
IMTIAZ AHMED CAJEE	**Fourth Respondent**
and	
THE SOUTHERN AFRICAN LITIGATION CENTRE	**First *Amicus Curiae***

WRITTEN SUBMISSIONS OF THE FIRST *AMICUS CURIAE*

A. INTRODUCTION

> '*We must take up our rightful place in the community of nations with its concomitant obligations*. *We dare not be a safe haven for those who commit crimes against humanity*.'[1]

1. The essential issue before this Court is whether to grant a permanent stay of prosecution in favour of the Appellant and in respect of the murder of Mr Ahmed Timol (Mr Timol).

2. The Appellant is charged, at present, with the offence of murder at common law. Nonetheless, the murder of Mr Timol was one of the instances of the government's efforts to eliminate the political opponents of the apartheid state. It was, in other words, an act that occurred in furtherance of apartheid.

3. The killing of Mr Timol, if proven at trial, amounts to at least one category of crimes against humanity at international law, binding on South Africa.

4. Properly characterised as a crime against humanity, the killing of Mr Timol triggers the following international legal obligations binding on South Africa under conventional or customary international law:

    4.1. The duty to investigate and prosecute crimes against humanity, whereever and whenever they occur, or to extradite the persons allegedly responsible to a jurisdiction where they will be investigated and prosecuted;[2]

[1] National Commissioner of South African Police Service v Southern African Litigation Centre and Others, 2015 (1) SA 315 (CC), para 80 (SAPS v SALC).
[2] Mail and Guardian Media Ltd and Others v Chipu N.O. and Others 2013 (6) SA 367 (CC) para 23 and fn 21 (in respect of certain war crimes, torture, and offences proscribed in the Rome Statute of the International Criminal Court); SAPS v SALC para 74 (in respect of "torturers, genocidaires, pirates and their ilk, the so-called *hostis humani generis*, the enemy of all humankind" [emphasis added]; S v Okah 2018 (4) BCLR 456 (CC) (in respect of terrorism offences).

4.2. The inapplicability of statutes of limitations and time bars to prosecution;[3] and

4.3. The inapplicability and unlawfulness of so-called 'blanket' amnesties — the species of amnesty contended for by the Appellant.

5. Thus, international law binding on South Africa precludes our courts from granting a stay of prosecution in favour of the Accused on the basis of either a time bar, or the amnesty for which the Appellant contends.

B. STRUCTURE

6. These submissions comprise four parts:

6.1. First, we substantiate the proposition that the conduct charged — the intentional killing of Mr Timol — constitutes at least one category of crimes against humanity under international law, thus triggering South Africa's obligations under international law;

6.2. Secondly, we traverse the scope of the state's duty to prosecute crimes against humanity under international law;

6.3. Thirdly, we substantiate the proposition that, as a matter of both international human rights law and international criminal law, the lapse of time before prosecution of an international crime cannot, in itself, violate the right to a fair trial; and

[3] Co-Prosecutors v Kaing Guek Eav alias Duch, Case File no. 001/18-07-2007/ECCC/TC, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, para 288 (Duch); Attorney General v Adolf Eichmann, Supreme Court of Israel, Case number 336/61 (29 May 1962) (Eichmann).

6.4. Finally, we demonstrate that the recognition or enforcement of the amnesty for which the Appellant contends, would be unlawful under international law binding on South Africa.

C. THE KILLING OF MR TIMOL IS A CRIME AGAINST HUMANITY

1. The meaning and elements of crimes against humanity

7. The concept of 'crimes against humanity' was recognised for the first time in Article 6(c) of the Charter to the International Military Tribunal for the Trial of Major War Criminals.[4] Over time, crimes against humanity have become entrenched as part of customary international law.[5]

8. The various categories of crimes against humanity — acts such as murder, extermination, torture, persecution, rape, sexual slavery and apartheid itself — constitute the most serious attacks on human dignity, amounting to the degradation and subjugation of a civilian population and the individual human beings within that population.

9. In a real sense, these crimes are committed *both* against the direct and indirect victims *and* against humanity as a whole. Professor Cherif Bassiouni, a longstanding advocate for the prosecution of international crimes, and the first African legal scholar to conduct a systematic study on the subject, opined as follows:

> "*Crimes against humanity are not crimes against a single victim in an isolated context... All of humanity is affected by these*

[4] Article 6(c) of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945 (82 UNTS 279) (Nuremburg Tribunal).

[5] Affirmation of the Principles of International Law recognised by the charter of the Nuremberg Tribunal UN General Assembly Resolution 95(1) of 11 December 1946; International Law Commission Report on the Nuremberg Principles, 5 UN GA OR, Supp. No. 12, UN Doc. A/1316 (1950), principle VI at 376, 377; UN General Assembly resolution 2712 (XXV), 15 December 1970; UN General Assembly resolution 3074 (XXVIII), 3 December 1973; Brownlie, Principles of Public International Law, (Oxford University Press, 6th edition, 2003) at 561; Duch (note 3 above).

crimes because all of humanity is affected by the victimization of a given human group.'[6]

10. The one distinguishing element of any crime against humanity, beyond acts of isolated killing or mistreatment, is that of the specific context in which the prohibited conduct is carried out.

11. A crime against humanity involves the commission of specific inhumane acts '*in the context of a widespread or systematic attack directed against any civilian population*'.[7] The term 'attack' is not limited to a military attack but refers generally to a campaign or operation conducted against a population.[8] It is the contextual component of crimes against humanity that attracts international concern and thus criminalisation under international law.[9]

12. All crimes against humanity share a common set of features:

    12.1. The *actus reus* of crimes against humanity include underlying conduct such as murder, torture, racial, political or religious persecution, apartheid, intentionally causing great suffering or serious injury to body or to mental or physical health, and other inhuman acts of a similar character.[10]

    12.2. The requisite *mens rea* shared by all crimes against humanity is a subjective awareness of the broader context in which the crime is committed or

[6] Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application (Cambridge University Press, 2011), p 278.
[7] Article 7 of the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 200 (Rome Statute). This definition has been incorporated into the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, Part 2, Section 1.
[8] Triffterer and Ambos, Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article, Beck/Hart/Nomos (2016) Article 7, paras 92-94 (Triffterer and Ambos).
[9] Cryer et al, An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2nd Edition, 2010) at 230 (Cryer).
[10] Article 7 of the Rome Statute (note 7 above) and Article 6(c) of the Nuremburg Tribunal (note 4 above).

knowledge that the offence is part of a systematic policy directed against a civilian population.[11]

12.3. This distinctive *mens rea* reflects the reality that these crimes are not isolated or sporadic events. At least typically, they form part either of a governmental policy or of a widespread or systematic plan, actively promoted, tolerated or condoned by a government;[12] and

12.4. Crimes against humanity entail individual criminal responsibility, regardless of the responsibility of any state for such conduct.[13]

12.5. An individual may properly be held criminally liable for crimes against humanity where the contextual element is present. There is no requirement that the individual engage in a course of conduct. Even if the accused commits a single act, this is sufficient to constitute the *actus reus* of a crime against humanity.[14]

13. As charged, the intentional killing of Mr Timol would amount to at least three particular categories of crimes against humanity. Most obviously, his killing constitutes the crime against humanity of apartheid. It also fulfills the definitional

[11] Cassese, International Law, (Oxford University Press, 2nd Edition, 2005) at 442 (Cassese). Elements of Crimes of the Rome Statute of the International Criminal Court, Article 7(1)(j) elements 3, 5 and 7, p 8.
[12] Cassese (note 11 above), p 441.
[13] Article 25 of the Rome Statute (note 6 above); Article 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993); Article 6 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (ICTR), UN Security Council, 8 November 1994; Eichmann (note 3 above).
[14] Prosecutor v Kupreškić, (ICTY Trial Chamber), January 14, 2000, para 550 ["[I]n certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context. An isolated act, however – i.e. an atrocity which did not occur within such a context – cannot."]; Prosecutor v Kordić and Čerkez, (ICTY Trial Chamber), February 26, 2001, para 178 ["[A] single isolated act by a perpetrator, if linked to a widespread or systematic attack, could constitute a crime against humanity."]

elements of the crime against humanity of racial, political or religious persecution;[15] and the crime against humanity of murder.[16]

14. The submissions of the first *amicus curiae* before the Full Bench traversed the applicability of all three of these crimes against humanity to the facts charged in the indictment of the Appellant.

15. For the purpose of these submissions, and given the tenor of the grounds of appeal, we focus only on the crime against humanity of apartheid. It is this legal characterisation of the killing of Mr Timol that remains most relevant to South Africa's past, and to its future.

2. The crime against humanity of apartheid

11. At the time of Mr Timol's imprisonment and death, apartheid was prohibited under customary international law as a crime against humanity.[17]

[15] Eichmann (note 3 above).
[16] Prosecutor v Kordić and Čerkez, ICTY Appeals Chamber (17 December 2004) para 113; Prosecutor v Krnojelac, ICTY Trial Chamber (15 March 2002) para 324; Prosecutor v Rutaganda, ICTR Trial Chamber, (6 December 1999) para 80.
[17] Between 1952 and 1990 apartheid was annually condemned by the General Assembly as contrary to Articles 55 and 56 of the Charter of the United Nations; see UN General Assembly resolution 1961, A/RES/1663 (The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Republic of South Africa); UN General Assembly (UNGA) Res 2074 (XX), 20 UN GA OR, Supp. No. 14, UN Doc. A/6014 (17 December 1965) at 60; UNGA Res 2307 (XXII), 22 UN GA OR, Supp. No. 16, UN Doc A/6716 (13 December 1967) at 30; UNGA Res 2396 (XXIII), 23 UN GA OR, Supp. No 18, UN Doc A/7218 (2 December 1968) at 20; UNGA Res 2371 F (XXV), UN GA OR, Supp. No. 28, UN Doc. A/8028 (8 December 1970) at 34; UNGA Res 2202 (XXI), 21 UN GA OR, Supp. No. 21, UN Doc A/6316 (16 December 1966), at 21; UNGA Res 2307 (XXII), 22 UN GA OR, Supp. No. 16, UN Doc A/6716 (13 December 1967) at 30; GA Res 2775 F (XXVI), UN GA OR, Supp. No. 29, UN Doc. A/8429 (29 November 1971) at 43; AU Res 6(I), AU Doc. AHG/Res.6 (I) (21 July 1964) AU Res 34 (II), AU Doc. AHG/Res.34 (II) (25 October 1965). It was regularly condemned by the Security Council after 1960; see Security Council resolution S/RES/134 (1960) (Question relating to the situation in the Union of South Africa); UN Security Council resolution S/RES/181 (1963) (Policies of apartheid of the Government of the Republic of South Africa); UN Security Council S/RES/ 282, 25 UNSCOR (1970), p 12; UN Security Council resolution S/RES/556 (1984) of 23 October 1984. Slye concludes that "*by 1976 it was clear that much of the international community agreed that apartheid was a crime against humanity*'; see Slye R "Apartheid as a Crime against Humanity: A submission to the South African Truth and Reconciliation Commission, 20 Mich. J. Int'l L. (1999) 267, 295.

12. In 1966, the United Nations (UN) General Assembly condemned '*the policies of apartheid practiced by the Government of South Africa* <u>*as a crime against humanity*</u>'.[18]

13. This customary international law principle was later codified in the International Convention on the Suppression and Punishment of the Crime of Apartheid ('Apartheid Convention'),[19] which, reflecting the earlier position of customary international law, condemned apartheid as a crime '*violating the principles of international law.*'[20]

14. In 1998, the prohibition of apartheid as a crime against humanity in international law was reiterated, *inter alia*, through its inclusion in the Rome Statute of the International Criminal Court.[21] The only credible conclusion is that the Rome Statute declared the pre-existing prohibition of apartheid at customary and conventional international law, rather than criminalising apartheid for the first time.

15. Apartheid as a crime against humanity at international law consists in the commission of inhumane acts for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.[22]

16. There are several ways in which a perpetrator can be convicted of an inhumane act underlying the crime of apartheid. These include denial to a member of a racial group

[18] GA Resolution 2202 A (XXI) of 16 December 1966, para 1 [emphasis added].
[19] International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976, Article 1 (the Apartheid Convention).
[20] Article 1 of the Apartheid Convention. It should be noted that, although the Apartheid Convention only came into force in 1973, two years after the murder of Mr Timol, apartheid was already a crime against humanity under customary international law at the time of the death. The reasons for this are explicated in the first *amicus curiae's* submissions in the court *a quo*.
[21] Rome Statute (note 7 above). Triffterer and Ambos (note 8 above), paras 92-94.
[22] Article 2 of the Apartheid Convention (note 19 above).

of the right to life and liberty of person of that group by, *inter alia*, murder or by subjecting them to torture;[23] the arbitrary arrest and illegal imprisonment of the members of a racial group;[24] preventing a racial group from participation in the political life of the country;[25] denying to members of a racial group or groups basic human rights and freedoms;[26] and persecuting organisations and persons who oppose apartheid.[27]

3. The killing of Mr Timol constitutes a crime against humanity of apartheid

17. The intentional killing of Mr Timol fulfils the definitional elements of the crime against humanity of apartheid in that:

17.1. Mr Timol was arrested and murdered because of his opposition to apartheid;[28]

17.2. His murder was the result of governmental policies and practices of racial segregation and discrimination;[29]

17.3. He was killed in the context and for the purpose of establishing and maintaining domination by white persons over black persons and systematically oppressing them;[30]

17.4. All of the people involved in a common purpose to murder Mr Timol's, including the Appellant, were aware of the factual circumstances of

[23] Article II(a)(i)-(ii) of the Apartheid Convention (note 19 above).
[24] Article II(a)(iii) of the Apartheid Convention (note 19 above).
[25] Article II(c) of the Apartheid Convention (note 19 above).
[26] Article II(c) of the Apartheid Convention (note 19 above).
[27] Article II(f) of the Apartheid Convention (note 19 above).
[28] Summary of substantial facts, para 3 [Record: CB4 p 64]
[29] Summary of substantial facts, para 5 [Record: CB5 p 65]
[30] Article 2 of the Apartheid Convention (note 19 above); Summary of substantial facts, para 5 [Record: CB5 p 65].

apartheid and that Mr Timol was arrested because of his opposition to apartheid.

17.5. The Appellant was a member of the Security Branch of the South African Police, which gathered intelligence to assess threats to the apartheid system.[31] As such, were the allegations in the indictment and its summary of material facts to be proven at trial, they invite the inference that the members of the common purpose intended to maintain the apartheid regime by their conduct and clearly knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population, namely black persons and political opponents of the apartheid regime.

18. It is respectfully submitted that the designation of the killing of Mr Timol as a crime against humanity of apartheid is a cognisable and proper characterisation of this crime. Mr Timol's murder falls within the scope of South Africa's duty under international law to prosecute crimes against humanity.

D. SOUTH AFRICA HAS A DUTY UNDER INTERNATIONAL LAW TO PROSECUTE CRIMES AGAINST HUMANITY

1. Duty to prosecute international crimes

19. The duty to prosecute international crimes can be found in multiple sources of international law.[32] It is formally framed as the obligation to prosecute or extradite (*aut dedere aut iudicare / aut dedere aut prosequi*) and finds expression in foreign

[31] Summary of substantial facts, para 5 [Record: CB5 p 65].
[32] Cryer (note 9 above) at 69.

legislation[33] and foreign case law.[34] This obligation is well-settled in international law, and upheld by the Constitutional Court in **SAPS v SALC** and, as we submit later, in **S v Basson**.

20. Only the obligation to prosecute is relevant to this appeal. The extradition of South African nationals suspected of apartheid offences to foreign states for trial raises complex, extraneous issues of law and policy.

21. The Geneva Conventions and the Additional Protocol 1 impose a duty on states both to search for persons alleged to have committed a war crime and to prosecute them before their courts.[35] The Preamble of the Rome Statute '*recall[s] the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes*'. The Apartheid Convention obliges states to '*prosecute, bring to trial and punish... persons responsible for, or accused of*' acts of apartheid.[36]

22. It is widely accepted that the duty to prosecute international crimes emanates not only from treaties but is also a principle of customary international law.[37] In the case of **Prosecutor v Blaškić**, in respect of war crimes, the International Criminal Tribunal for the Former Yugoslavia (ICTY) confirmed that states '*are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law.*'[38]

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[33] See eg Swiss Penal Code, Art. 6 bis, 1; the French Penal Code, Art. 689-1; Canadian Crimes against Humanity and War Crimes Act (2000), Art. 8.
[34] E.g. for Denmark, see Public Prosecutor v. T., Supreme Court (Hojesteret), Judgment, 15 Aug. 1995, *Ugeskrift for Retsvaesen*, 1995, p. 838, reported in *Yearbook of International Humanitarian Law*, 1998, p. 431 and in R. Maison, "Les premiers cas d'application des dispositions pénales des Conventions de Genève: commentaire des affaires danoise et française", *EJIL* 1995, p 260; for France, see Cour de Cassation (Fr.), 26 Mar. 1996, *Bull. Crim*., 1996, pp 379-382; for Germany, see Bundesgerichtshof 30 Apr. 1999, 3 StR 215/98, *NStZ* 1999, p 396.
[35] Cryer (note 9 above) at 69.
[36] Article IV(b) of the Apartheid Convention (note 19 above). Whilst South Africa is not a signatory to the Apartheid Convention, this treaty constitutes a codification of the customary international law principles in respect of apartheid. The provisions of the Apartheid Convention therefore bind South Africa at customary international law.
[37] Cryer (note 9 above) at 71-73.
[38] Prosecutor v Blaškić (ICTY Appeals Chamber), 29 October 1997, para 29.

23. Both the Trial Chamber and Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) have confirmed the customary status of the prohibition of crimes against humanity; that is, their binding character on all states, not only those bound by a particular treaty.[39]

24. The African Commission has also confirmed the existence of a duty to prosecute gross human rights violations.[40]

25. It is clear, therefore, that international law imposes an obligation on states to prosecute acts of apartheid. This obligation is, of course, subject to the international law on amnesty, a point we deal with later in these submissions.

2. South Africa would violate international law by staying a prosecution for conduct amounting to crimes against humanity

26. It is only through the prosecution of individuals that there can be accountability for crimes against humanity. A failure to prosecute individuals in the position of the Appellant constitutes impunity. Thus, a stay of prosecution has the potential to place South Africa in violation of its international obligations.

27. South African courts must consider international law when interpreting the Bill of Rights. [41] Section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights. Section 232 of the Constitution provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Section 233 of the Constitution provides that when a court is interpreting any legislation, it must prefer

[39] Duch (note 3 above) paras 281-296; Duch Appeal Judgment (Supreme Court Chamber, 3 February 2012) paras 93-104.
[40] See ACHPR Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (2003), para 206.
[41] Section 39(1)(b) of the Constitution; see Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC) paras 4-5.

a reasonable interpretation that accords with international law over any alternative interpretation that is inconsistent with international law.

28. The constitutional imperative to comply with international law is applicable both internationally and domestically. International law regulates the conduct of South Africa on the international plane, in relation to other States and the international community as a whole.

29. Compliance with international law is also important for the implementation of the South African constitutional framework domestically. In **Glenister v President of the Republic of South Africa and Others**,[42] the Constitutional Court upheld the importance of international law in the implementation of the South African constitutional framework. The **Glenister** Court also confirmed that South Africa's failure to comply with international agreements may result in South Africa incurring responsibility toward other signatory states.[43]

30. South Africa's obligation to prevent impunity and to combat international crimes is not only an international law obligation but is also confirmed in a number of cases decided by the Constitutional Court.[44] The obligation was most clearly stated in the Constitutional Court case of **S v Basson**.[45] Dealing specifically with crimes in furtherance of apartheid, the Constitutional Court found that '*international law obliges the state to punish crimes against humanity and war crimes.*'[46]

[42] Glenister v President of the Republic of South Africa and Others 2011 (3) (SA) 347 (CC) at paras 95 and 192.
[43] Ibid at para 92.
[44] Minister of Justice and Constitutional Development and others v Southern Africa Litigation Centre 2016 (3) SA 317; SAPS v SALC (note 1 above), para 80.
[45] S v Basson 2005 (1) SA 171 (CC) at para 37 (Basson).
[46] Ibid at para 37.

31. The Constitutional Court amplified this position in **SAPS v SALC**.[47] Its holding concerned the international obligation to investigate allegations of torture, both as a so-called 'ordinary' crime (that is, when committed in an isolated manner) and as a crime against humanity (that is, when committed in the context of a widespread or systematic attack against a civilian population).

32. The Constitutional Court underlined South Africa's international obligations when it held that:

> '*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.*'[48]

33. The language of the Court evokes the preamble of the Constitution, which recognises '*the injustices of our past*' and commits itself to a society that is able 'to *take its rightful place as a sovereign state in the family of nations*'.

34. South Africa therefore is obliged, both in terms of constitutional law[49] and international law,[50] to prosecute crimes against humanity, whereever and whenever they occur.

35. The granting of the stay of prosecution, absent an amnesty that accords with international law would, therefore, violate South Africa's obligations under international and the Constitution.

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[47] SAPS v SALC (note 1 above) at para 80.
[48] SAPS v SALC (note 1 above) at para 37.
[49] Ibid at para 80; Basson (note 45 above) at para 32.
[50] Roht-Arriaza, Impunity and Human Rights in International Law and Practice, (OUP, New York 1995) at 4-6; Garner Black's Law Dictionary 9 ed (Thomson Reuters, New York 2009); I Bantekas, International Criminal Law, (Hart Publishing, 4th Edition, 2010) p 379.

36. In accordance with international law, the Appellant's arguments that (i) the prosecution is time-barred from prosecuting him; and (ii) he has been granted an alleged amnesty, must fail.

E. INTERNATIONAL LAW PROHIBITS TIME BARS TO THE PROSECUTION OF CRIMES AGAINST HUMANITY

1. General principles

37. Both international conventions and the practice of states in establishing international and internationalised criminal tribunals demonstrate that statutory time bars to prosecution are inapplicable to crimes against humanity. These crimes are of international concern. Practically, because such crimes are often committed through the means and machinery of the state, their effective investigation and prosecution may well be unachievable during transitions from oppressive regimes to a fully-functioning, independent prosecutorial authority and judiciary.

2. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

39. In the aftermath of World War Two, many perpetrators of crimes against humanity and war crimes escaped the Nuremberg and Tokyo Tribunals. As many perpetrators had gone into hiding, states were concerned that the opportunity to find and prosecute those responsible would disappear with the passage of time.

40. In order to exclude an intolerable situation of impunity, the UN 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.[51]

41. Article 1(b) of the Convention on Statutory Limitations provides that:

> '*No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: ... (b) Crimes against humanity, ... and inhuman acts resulting from the policy of apartheid, ... even if such acts do not constitute a violation of the domestic law of the country in which they were committed.*'

42. According to article 2, the Convention on Statutory Limitations applies to state representatives who need not be actively involved in any of the crimes mentioned, but who passively tolerate the commission of such crimes. Inaction, as distinct from active involvement, on the part of state authorities in not preventing the commission of international crimes is sufficient to bring the persons suspected of such crimes within the ambit of the Convention on Statutory Limitations.

43. Whilst South Africa is not yet 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 Convention on Statutory Limitations, which states:

> *'...it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application.*'[52] [emphasis added]

46. German, which had been supine in prosecuting of perpetrators of atrocities in World War II, did not initially vote in favour of the Convention on Statutory Limitations. In less than a decade, though, by 1979, it had abolished its domestic statute of

[51] The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2391 (XXIII) of 26 November 1968; came into force on 11 November 1970.

[52] This point was made by many states during the drafting of the Convention. Robert Miller, The Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity [article] American Journal of International Law, Vol. 65, Issue 3 (July 1971), pp. 476-501, p 482.

limitations in respect of the crimes of the Nazi regime. Germany continues to date to pursue a policy of prosecution of those suspected of World War II-era crimes, including low-ranking perpetrators.

47. After democracy, South Africa also evidenced its compliance with the customary international law principle on the non-applicability of time bars, through the adoption of a similar posture in its domestic law. Section 18 of the Criminal Procedure Act, 1977, as amended, imposes a statutory limitation of 20 years on all crimes *except* murder and the crime of genocide, crimes against humanity and war crimes.[53] On its face, the exception in Section 18 encompasses international crimes, including crimes against humanity.

48. The Appellant is to be tried for <u>conduct</u> which, as charged and particularised by the state, would necessarily amount to crimes against humanity, including apartheid.

49. In our respectful submission, it is the <u>conduct charged</u>, and not the <u>crime charged</u> which must bring the Appellant within the ambit of the customary international law rules on the inapplicability of time bars. To find otherwise would be to open a back door to impunity for international crimes, as states would be able to 'shield' perpetrators from justice for violations of international law by means of selective charging practices.

3. International and Foreign Cases

50. The longstanding principle that time bars are inapplicable to international crimes is adopted in the case-law of the International Criminal Tribunal of the Former

[53] Section 18(a) and (g) respectively.

Yugoslavia, in the case of **Prosecutor v Furundžija**;[54] the US District Court in the case of **Demjanjuk**;[55] and the Supreme Court of Israel in the **Eichmann** case.[56]

51. Prosecutions for crimes against humanity have been instituted decades after the conduct charged, in the following situations:

    51.1. The ECCC were established in 2006 with the cooperation of the United Nations, to prosecute the senior leaders of the Khmer Rouge responsible for atrocities in Cambodia amounting to crimes against humanity under customary international law. The trials began over three decades after the commission of the atrocities and multiple convictions for crimes against humanity have reached finality.

    51.2. The Statute of the Extraordinary African Chambers within the courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 was adopted in cooperation with the African Union and '*in accordance with Senegal's international commitments*.'[57] Article 9 of that Statute provides:

    > '*The crimes within the jurisdiction of the Extraordinary African Chambers shall not be subject to any statutory limitations.*'

52. South Africa has a continuing obligation under international law not to apply time bars to the investigation, prosecution or punishment of crimes against humanity.

53. On this basis, the delay between the killing of Mr Timol and the indictment of the applicant cannot, in itself, constitute an unfair delay or lead to an unfair trial as a matter of international law.

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[54] Prosecutor v Furundźija, ICTY Trial Chamber Judgment (10 December 1998), paras 156-7 (Furundźija).
[55] In the Matter of the Extradition of John Demjanjuk, 612 F. Supp.544, 558 (N.D. Ohio 1985) at 564.
[56] Eichmann (note 3 above).
[57] Article 2 of the Statute of the Extraordinary African Chambers.

F. INTERNATIONAL LAW DOES NOT ALLOW BLANKET AMNESTIES FOR CRIMES AGAINST HUMANITY

1. General

> '*Amnesty is no longer accepted as the natural price to be paid for transition from repression to democracy*.'[58]

51. Even though the Appellant did not apply for amnesty before the Truth and Reconciliation Commission (TRC), he claims that:

> *'an amnesty had been granted to perpetrators or alleged perpetrators of unlawful conduct of a political nature alternatively that there was an agreement with the authorities to the effect that no prosecutions would be instituted for political offences of this nature*'.[59]

52. Even were this Court to conclude that the alleged amnesty did exist, it would constitute a blanket amnesty for crimes against humanity, which is impermissible under international law. As such, the alleged amnesty cannot cognisably found a permanent stay of prosecution.

2. Lawful and unlawful amnesties

53. At international law, a bright line exists between lawful amnesties, on the one hand, and 'blanket' or unlawful amnesties, on the other.[60] In particular, it is widely accepted by states and commentators alike that the application of blanket amnesties in relation to crimes against humanity would be unlawful under international law. The amnesty described by the Appellant, to the extent that it is found to exist, would necessarily fall into the category of unlawful amnesties.

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[58] Dugard, 'Dealing with crimes of a past regime. Is amnesty still an option?' 1999 (12) LJIL 1001.
[59] Founding Affidavit by Joao Rodrigues in the Application for Leave to Appeal to the Supreme Court of Appeal, 15 October 2019, para 29 [
[60] Cryer (note 9 above) at 563. Black's Law Dictionary defines the term amnesty as 'A pardon extended by the government to a group or class of persons, usually for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted. ' Garner, Bryan A., and Black, Henry Campbell Black's Law Dictionary 10th ed. (2014) 103.

54. The formal position of the United Nations ("UN") is that it opposes all amnesties for international crimes.[61]

55. The UN further defines the features of both lawful and unlawful amnesties in international law. Lawful amnesties have the following features:

55.1. They are created by law;

55.2. Individuals who want to benefit from an amnesty must apply for it;

55.3. Amnesty is usually subject to conditions, such as the full confession of the crime; and

55.4. Usually the amnesty will apply to instances where the motivation for the crime was political.

56. Unlawful or blanket amnesties, on the other hand:

56.1. Exempt a broad category of perpetrators from prosecution, without distinction;

56.2. Do not require any application on the part of the alleged perpetrator; and

56.3. Do not demand an inquiry into the facts of each application for amnesty.[62]

57. The South African TRC process is, in the academic literature, a paradigmatic example of lawful amnesty.[63] The Promotion of National Unity and Reconciliation

[61] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915, 4 October 2000, para 24.
[62] See Office of the United Nations High Commissioner for Human Rights, 'Rule of Law Tools for post-conflict states', U.N. Doc. HR/Pub/09/1, 2009, at 8; see also G Meintjes and Méndez JE, Reconciling amnesties with universal jurisdiction (2000) 84; Alexandra Garcia, 'Transitional (In)Justice: An Exploration of Blanket Amnesties and the Remaining Controversies around the Spanish Transition to Democracy ' (2015) 43 Int'l J. Legal Info. 75, at 77.
[63] Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act). Cryer (note 9 above) at 563-4. Scott Veitch, 'The Legal politics of amnesty 'in Emilios Christodoulidis and Scott Veitch (eds.), Lether's Law: Justice Law and Ethics in Reconcliation (Oxford, 2001) 33 at 37-8.

Act, 1995 (the Reconciliation Act) sets out two main prerequisites for amnesty: (i) any person who wishes to benefit from an amnesty in respect of any criminal act had to submit an application to the TRC;[64] and (ii) the applicant had to make full disclosure of all relevant facts.[65]

58. The TRC expressly distinguished its granting of amnesty from blanket amnesties:

> '[*O*]*ur nation, through those who negotiated the transition from apartheid to democracy, chose the option of individual and not blanket amnesty. And we believe that this individual amnesty has demonstrated its value. One of the criteria to be satisfied before amnesty could be granted was full disclosure of the truth. Freedom was granted in exchange for truth.* […].'[66]

59. Consonant with the United Nations position, the Constitutional Court held in **Azanian People's Organization (AZAPO) v President of the Republic of South Africa***,* in reference to the type of amnesty granted by the TRC:

> '*The amnesty contemplated is <u>not a blanket amnesty</u> against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia... It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past.*'[67]

3. Jurisprudence of international courts and tribunals

59. The position that international law opposes blanket amnesties in relation to international crimes is amplified in the decisions of several international tribunals and courts.

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[64] Section 18 and 20(1)(a) of the Reconciliation Act.
[65] Section 20(1)(c) of the Reconciliation Act.
[66] Truth and Reconciliation Commission of South Africa, Final Report, Vol. 1, Chapter 1, para 29.
[67] Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 672, para 32 (AZAPO).

60. The UN Human Rights Committee, which monitors state compliance with the International Covenant on Civil and Political Rights, has held that amnesties for State officials for torture were '*generally incompatible*' with obligations to investigate, prosecute and prevent human rights violations.[68]

61. In 1998, in **Furundźija**, the ICTY refused to recognise blanket amnesties specifically for the crime of torture.[69]

62. On our continent, in 1999, the warring factions signed the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Agreement), which granted:

> '*absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signed of the present Agreement*'.[70]

63. The amnesty in the Lomé Agreement was challenged in the Special Court for Sierra Leone (SCSL), established to prosecute crimes committed during the conflict. In the 2004 matter of **Prosecutor v Kallon and Kamara**, the SCSL held that there is '*a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law*'.[71] Therefore, the SCSL found that amnesties for international crimes that are subject to universal jurisdiction are unlawful as:

> *'A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.*'[72]

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[68] UNHRC, General Comment 20: Article 7 Prohibition of Torture, or other cruel, inhuman or degreading treatment or punishment (1992) UN Doc. HRI/GEN/1/Rev.9, para 15.
[69] Furundźija (note 54 above) at para 155.
[70] Article IX of the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Abidjan on 30 November 1996.
[71] Prosecutor v Kallon and Kamara (SCSL Appeals Chamber), 13 March 2004, para 82.
[72] Ibid at para 67.

64. In 2014, the ECCC Trial Chamber undertook a detailed analysis of the lawfulness of amnesties for the most serious international crimes committed between 1975 and 1979 by the Khmer Rouge. The Trial Chamber, comprising both international and Cambodian judges, held that:

> '*[A]n emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators.*'[73]

65. In the 2019 matter of **Prosecutor v Saif al-Islam Gaddafi**, Pre-Trial Chamber I of the International Criminal Court found evidence of a '*universal tendency*' that amnesties do not apply to '*grave and systematic human rights violations*' and crimes against humanity.[74] It reasoned that:

> '[G]r*anting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognised human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. Besides, they deny victims the right to truth, access to justice, and to request reparations where appropriate.*'[75]

66. This trajectory of international jurisprudence makes plain that an amnesty, in particular a blanket amnesty, can find no proper application to crimes against humanity. This same position is evident in the jurisprudence of African regional human rights bodies.

4. Jurisprudence of regional courts, commissions and tribunals

66. The African Commission on Human and Peoples' Rights (African Commission) has consistently critiqued the use of amnesties on the basis of the duty of the state to

[73] Decision on Ieng Sary's R89 Preliminary Objections, ECCC Trial Chamber (3 November 2011) paras 38-39, 53.
[74] Prosecutor v Saif Al-Islam Gaddafi, ICC Pre-Trial Chamber I (5 April 2019), para 61
[75] Ibid at para 77.

provide effective remedies for human rights violations.[76] In the matter of **Zimbabwe Human Rights NGO Forum** case, the African Commission held that:

> '*Clemency, it is believed, encourages* de jure *as well as* de facto *impunity and leaves the victims without just compensation and effective remedy.* ' *De jure impunity generally arises where legislation provides indemnity from legal process in respect of acts to be committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, as in the present case, by way of clemency (amnesty or pardon).*[77]

67. The African Commission reaffirmed this point in the matter of **Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire**. This African Commission held that:

> '[G]*ranting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy*' and encourages impunity.[78]

68. Most importantly, the African Commission held that '*an amnesty law… cannot shield that country from fulfilling its international obligations under the* [African] *Charter.*'[79]

69. The approach of the Inter-American Court of Human Rights is similar to that of the African Commission in that amnesties are deemed to violate the right to an effective remedy for human rights violations.[80]

70. In **Gomes Lund**, the Inter-American Court referenced the fact that the domestic courts of Argentina, Chile, Peru, Uruguay and Colombia had invalidated their domestic amnesty laws. The Inter-American Court concluded that Brazil, by

[76] ACHPR Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (2003) at 5.
[77] Zimbabwe Human Rights NGO Forum, ACHPR Decision, 15 May 2006, paras 196, 200.
[78] Mouvement Ivoirien des Droits Humains (MIDH) v Cote d'Ivoire, ACHPR Decision, 29 July 2009, paras 96-98.
[79] Case of Malawi African Association and Others v Mauritania, ACHPR Decision, 11 May 2000, paras 82-83.
[80] Case of Barrios Altos v Peru, IACHR Judgment, 14 March 2001, para 43.

applying amnesty laws in cases of gross human rights violations, had violated its international obligations to prosecute such crimes.[81]

71. In **Massacres of El Mozote**, the Inter-American Court disallowed an amnesty, rooting its decision on three bases:

71.1. Amnesty laws are an obstacle to states' ability to comply with their international obligation to investigate and punish grave human rights violations.[82]

71.2. The prosecution of international crimes is of great importance to the survivors and the victims' next of kin.[83]

71.3. Amnesties have been rejected in the Inter-American Court's previous jurisprudence and by:

> '*the Inter-American Commission on Human Rights, the organs of the United Nations, other regional organisations for the protection of human rights, and other courts of international criminal law.*' *These decisions were reached on the basis of the incompatibility of amnesty law in relation to grave human rights violations with international law and the international obligations of States.*'[84]

72. The jurisprudence of the European Court of Human Rights (ECtHR) follows similar reasoning. In **Abdulsamat Yaman**, the ECtHR pointed out that:

> *'[I]t is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.*'[85]

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[81] Case of Gomes Lund et al. v Brazil, IACHR Judgement (24 November 2010), paras 163-168, 172, 180; see also Almonacid Arellano et al. v Chile (Preliminary Objections) IACHR Judgement (26 September 2006) paras 110-111.
[82] Case of the Massacres of El Mozote and Nearby Places v El Salvador, IACHR, Judgement, 25 October 2012, para 283.
[83] Ibid, para 295.
[84] Ibid.
[85] Abdulsamet Yaman v Turkey, ECtHR Judgment, 2 November 2004, para 55; see also Okkali v Turkey, ECtHR Judgment, 17 October 2006, para 76.

73. On this basis, the ECtHR concluded in the **Margus** case that:

> *'Granting amnesty in respect of "international crimes" – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.'*[86]

74. The jurisprudence of international, regional and national courts and tribunals is clear: there may be no amnesties, particularly blanket amnesties, recognised in respect of or applied to crimes against humanity.

G. CONCLUSION

76. The murder of Mr Timol amounts to the crime against humanity of apartheid and other crimes against humanity. As such, it triggers South Africa's duty under international law to prosecute crimes against humanity.

77. International law positively bars the application of time bars in respect of crimes against humanity and does not recognise blanket amnesties for such crimes.[87]

78. Granting the Appellant a stay of prosecution based on a time bar, including the mere operation of delay, or on grounds of an alleged blanket amnesty would place South Africa in violation of its international obligations.

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8 October 2020

[86] Margus v Croatia, Application no. 4455/10, ECtHR Judgement, 13 November 2012, para 74.
[87] AZAPO (note 67 above), para 32.