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**Our reference:** Mr. Z. E. Patel / Mr. J. Philips (UCT)

**Your reference:** UCT - Academic & Cultural Boycotts

**Date:** 23 September 2019

**THE COUNCIL OF THE UNIVERSITY OF CAPE TOWN**

**TO WHOM IT MAY CONCERN**

**LEGAL OPINION ON THE LEGAL VALIDITY AND CONSTITUTIONALITY OF ACADEMIC AND CULTURAL BOYCOTTS AGAINST ISRAELI INSTITUTIONS**

**1. INTRODUCTION**

I was requested by students campaigning in support of academic boycotts at the University of Cape Town (UCT) to provide a legal opinion on the constitutionality of academic boycotts.

I am informed this campaign was launched in 2017 and has made considerable advances, whereby the boycotts proposal has already been passed by the UCT Academic Freedom Committee and UCT Senate. The UCT Council now ventilates the academic boycotts proposal for final adoption.

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For purposes hereof, I would add subject to the determination, “***academic and cultural boycotts of Israeli institutions and academics representative of these institutions***”.

Indeed, should the UCT Council adopt the boycotts resolution, this would be ground-breaking which would certainly reverberate across the academia spectrum, locally, regionally and internationally.

The UCT Council sits in the enviable position of changing the course of history, by executing upon an important advocacy campaign that would champion adherence to human rights and justice.

## **2. LEGAL DETERMINATION**

- 2.1. The writer has been mandated to determine the justification of the academic boycotts premised upon principles of lawfulness and constitutionality thereof. The overarching moral conscience of the *boni mores* of society too, must play a pivotal role in this critical determination.
- 2.2. Being in the field of international human rights and lawfare advocacy, for over a decade, I have been primarily involved with holding Israeli perpetrators accountable for the most egregious crimes that are *sui generis* to universal jurisdiction, which include *inter alia*: genocide (ethnic cleansing), war crimes, and crimes against humanity (torture apartheid) .
- 2.3. Rights activists, jurists and academics have tirelessly advocated the plight of the Palestinian people and the catastrophic situation which presently exists in the Gaza Strip. For purposes of brevity, this legal opinion is not to iterate what has been credibly reported by the UN and Rights Groups as they are quite easily accessible.
- 2.4. In light of the considerable weight of past UN fact finding mission reports, it is incontrovertible Palestinians are denied fundamental human rights relating to life, equality and dignity. Furthermore, Palestinian rights to academic freedom, freedom of association, movement and trade are severely restricted by a pariah regime which has imposed systemic colonial and apartheid practices which have been institutionalised for its own self-interest.
- 2.5. Israel has imposed a decade long stifling siege and blockade of the Gaza Strip. The Human Sciences Research Council of South Africa (HSRC) found that Israel is practicing both colonialism and apartheid in the Occupied Palestinian Territories (OPT's). The HSRC report compiled in 2009, already pronounced upon Israel's belligerent military occupation, colonial nature and apartheid practices.<sup>1</sup>

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<sup>1</sup> HSRC Report - *Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law, 2009*

2.6. Renown and respectable rights activist, Mr. Ronni Kasrils had previously provided to the National Director of Public Prosecutions in 2009, an affidavit averring to Israeli apartheid. The aforesaid affidavit is provided as a reference source to this legal opinion.

### **3. CRITICAL FINDINGS OF WAR CRIMES BY UN FACT FINDING MISSIONS**

#### **3.1. GAZA CONFLICT- 25 SEPTEMBER 2009 A/HRC/12/48, PARAGRAPH 28 <sup>2</sup>:**

*“The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and other goods to meet the humanitarian needs of the population of the Gaza Strip without qualification”.*

3.2. The Israeli Defence Force was also found to have perpetrated wanton destruction and applied a disproportionate use of munitions that constituted war crimes:

##### **3.2.1. PARAGRAPH 1886 <sup>3</sup>**

*“What makes the application and assessment of proportionality difficult in respect of many of the events investigated by the Mission is that deeds by the Israeli armed forces and words of military and political leaders prior to and during the operations indicate that, as a whole, they were premised on a deliberate policy of disproportionate force aimed not at the enemy but at the “supporting infrastructure.” **In practice, this appears to have meant the civilian population**”.*

##### **3.2.2. AD PARAGRAPH 1887 <sup>4</sup>**

*“The timing of the first Israeli attack, at 11.30 a.m. on a weekday, when children were returning from school and the streets of Gaza were crowded with people going about their daily business, appears to have been calculated to create the greatest disruption and widespread panic among the civilian population. **The treatment of many civilians detained or even killed while trying to surrender is one manifestation of the way in which the effective rules of engagement, standard operating procedures and instructions to the troops on the ground appear to have been framed in order to create an environment in which due regard for civilian lives and basic human dignity was replaced with disregard for basic international humanitarian law and human rights norms.**”*

##### **3.2. UN Report - 27 September 2010 Flotilla Attack <sup>5</sup>:**

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<sup>2</sup> HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES - Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009

<sup>3</sup> Supra p 406 – 407

<sup>4</sup> Supra p 408

<sup>5</sup> UN Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, 27 September 2010

***“The fact - finding mission concluded that a series of violations of international law, including international humanitarian and human rights law, were committed by the Israeli forces during the interception of the flotilla and during the detention of passengers of Israel prior to deportation.”***

4. The belligerent conduct of Israel’s perpetration of international crimes with impunity, demands of the international community and Palestinian solidarity to strengthen civil society across jurisdictions including academia, to take a morally justified stance against Israel in gross violation of international law and international humanitarian law.

## **5. THE SOUTH AFRICAN LEGAL FRAMEWORK**

- 5.1. The South African legal framework has been previously applied by the legal fraternity in important cases levelled against Israeli impunity whether it be the 2008-2009 Gaza Conflict, or the 2010 deadly Flotilla Aid interception by the Israeli Defence Force (IDF) in international waters.
- 5.2. Principally the legal mechanisms for jurisdiction are derived from South Africa’s ratification of the Rome Statute in the *Implementation of the International Criminal Court Act (ICC Act)*<sup>6</sup> including the existing provisions of the *Regulation of Foreign Military Assistance Act*<sup>7</sup>, to be repealed by the *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act No. 27 of 2006*<sup>8</sup>.
- 5.3. The application of the ICC Act was decided in the Constitutional Court judgment, *National Commissioner of South African Police Services v Southern African Human Rights Litigation Centre*<sup>9</sup>. Justice Majiedt, refers to South Africa’s foreign policy, as an active participant in fostering peace and good relations. This comes with international obligations and part of which include the responsibility to investigate crimes against humanity.
- 5.4. International criminal law together with principles of universal jurisdiction have developed the legal framework that is critical to a determination of the constitutionality of academic and cultural boycotts.
- 5.5. It was aptly mentioned by Justice Majiedt, in the aforesaid judgement<sup>10</sup>:

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<sup>6</sup> No. 27 of 2002

<sup>7</sup> No. 15 of 1998

<sup>8</sup> No. 27 of 2006

<sup>9</sup> National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another [2014] ZACC 30

<sup>10</sup> Supra, Paragraph 1

During the course of South Africa's transition to a democratic state, former President Nelson Mandela outlined what was to become South Africa's future foreign policy.

*“South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations. . . . The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources and the commitment that will allow us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future.”*

## **5.6. WHY DID SOUTH AFRICA DOMESTICATE THE ROME STATUTE?**

5.6.1. The answer originates from South Africa emanating as a constitutional democracy post 1994 after the dark days of apartheid, to a nation state founded upon intrinsic entrenched values in a justiciable Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa.

5.6.2. Being a state party to the Rome Statute and by giving effect to our international obligations and fulfilment of responsibilities, required the enactment of the *Implementation of the International Criminal Court Act*.

**5.6.3. Section 231(4) and section 232 of the Constitution deal with the domestication of international agreements and the application of customary internal law in fulfilment of meeting South Africa's international obligations. Section 233 provides clear preference to application and interpretation of domestic legislation in line with international law.**

5.6.4. The pertinent constitutional provisions<sup>11</sup> are contained hereunder:

### **Section 231 - International agreements**

1. The negotiating and signing of all international agreements is the responsibility of the national executive.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by

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<sup>11</sup> No. 108 Of 1996 - The Constitution of the Republic of SA

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

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

#### **Section 232 - Customary international law**

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

#### **Section 233 - Application of international law**

**When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.**

### **6. RELEVANT PROVISIONS OF THE CONSTITUTION**

6.1. The provisions in consideration of the application of South African law to the question of constitutionality of an academic and cultural boycott, one must also consider the following constitutional provisions <sup>12</sup>, contained hereunder:

**Section 7: Rights** — (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

**Section 9: Equality** — (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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<sup>12</sup> Supra – The Constitution

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

**Section 10: Human dignity** - Everyone has inherent dignity and the right to have their dignity respected and protected.

**Section 11: Life** - Everyone has the right to life.

**Section 12: Freedom and security of the person** - (1) Everyone has the right to freedom and security of the person, which includes the right —

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.

**Section 18: Freedom of association** — Everyone has the right to freedom of association.

**Section 29: Education** - (1) Everyone has the right—

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, considering—

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

- (a) do not discriminate on the basis of race;
  - (b) are registered with the state;
  - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

**Section 31: Cultural, religious and linguistic communities** — (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

- (a) to enjoy their culture, practise their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

**Section 36: Limitation of rights** —(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is **reasonable and justifiable** in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the relation between the limitation and its purpose; and**
- (e) less restrictive means to achieve the purpose.**

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

**Section 39: Interpretation of Bill of Rights** - (1) When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) **must consider international law;** and
- (c) may consider foreign law;



- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

## **6.2. SECTION 18 - RIGHT OF FREEDOM OF ASSOCIATION VERSUS RIGHT NOT TO ASSOCIATE**

Whilst advocating a converse position of the right **not to associate** with Israeli academic and cultural institutions, that sustain the *status quo* responsible for gross violations of human rights in Gaza and the Occupied Palestinian Territories (OPT'S), the legal argument holds also equally valid broached from the inalienable and entrenched right by UCT to exercise its section 18, constitutional right to freedom of association.

This right must be considered within the current contextual and factual matrix of the culture of impunity that exists including the lack of academic freedom accorded to Palestinian academics and scholars.

The disturbing collaboration amongst Israeli institutions and those within the European Union, UK and US in the “Western world” increasing into Africa and Asia is equally disturbing, whereby scientific knowledge in military advancement and development in security technology, lies inextricably linked to the gross violation of Palestinian human rights. This must form the pretext for any academic and cultural boycotts campaign.

In this regard, I found the work by Irish academics against apartheid invaluable, providing pertinent and incontrovertible facts in support for an adoption of an academic boycotts campaign.<sup>13</sup>

### To elaborate further.

In application of the constitutional provisions by this Council as the highest regulating body of the university, it shall have the authority associated to its autonomy, to execute upon such resolution emanating therefrom of the right to freely and voluntarily associate and/or collaborate with only those academic institutions and scholars locally and internationally, whereby entrenched rights, constituted in CH 2: Bill of Rights, are respected, protected, promoted and advanced which are inalienable to the constitution and the universal declaration of human rights.

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<sup>13</sup> Academia for Palestine, The Case for an academic boycott of Israel February 2014 ([www.academicsforpalestine.ie](http://www.academicsforpalestine.ie))

The UCT Council is once again in the enviable position to both claim and exercise the inalienable section 18 right of freedom of association and chart the academic discourse for other institutions to follow suit.

We must be reminded of the fact that people of conscience in the international community of scholars and intellectuals have historically shouldered the moral responsibility to fight injustice as exemplified in their struggle to abolish apartheid in South Africa through diverse forms of boycott.<sup>14</sup>

This approach makes sense in that it shall form the *rational* of a moral strategic plan that shall attract a broader spectrum of interest and public support, whereby collaboration is supported with only those academic institutions and scholars who respect fundamental human rights, both locally and internationally.

An interesting but poignant comment from Dr. Mustafa Barghouti<sup>15</sup>, in allaying fears of antisemitism states, *“academic boycotts are not levelled against the Jewish people or identity, but rather the justification lies against those institutions and individuals who perpetuate apartheid leading to such atrocities and gross violations of human rights”*.

I must agree with Dr. Barghouti in this regard whereby punitive boycott measures must be applied to force behavioural changes which are harmonised with international law, rather than the culture of impunity which exists that are inextricably linked to the root causes of systemic discriminatory Zionist policies aimed at the liquidation and ethnic cleansing of Palestinian rights, culture, heritage and collective Palestinian memory.<sup>16</sup>

### 6.3. THE APPLICATION OF THE AFORESAID PROVISIONS WITH THE CONSTITUTIONAL LIMITATION CLAUSE

I would argue in light of the constitutional provisions stipulated above, including section 39 (1)(b) interpretation of the Bill of Rights, section 231 – international agreements, section 232 – customary international law and section 233 – application of international law, we are obliged to consider and interpret international law favourably, which must be applied both in its vertical axis (amongst the state and private individuals / entities and *vice versa* of holding state institutions to account) or horizontally at state level, inter-governmentally and amongst organs state.

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<sup>14</sup> (PACBI - Palestinian Campaign for the academic and cultural boycott of Israel)

<sup>15</sup> Mustafa Barghouti is Palestinian physician, activist, and politician who serves as General Secretary of the Palestinian National Initiative (PNI), also known as al Mubadara

<sup>16</sup> See the work of Ramzy Baroud - renown Palestinian journalist, author and scholar

The vast resource of Rights Reports and international resolutions, including the advisory wall opinion by the International Court of Justice (ICJ) in 2002 regarding Israel's unlawful construction of an 'apartheid wall', which further cantonises Palestinian neighbourhoods under occupation, or such resolutions passed by the United Nations Human Rights Council (UNHRC), regarding the ill treatment and plight of Palestinian prisoners and child prisoners must necessitate urgent constitutional measures to be implemented by the state and civil society at large including academic and cultural institutions.

This can also entail the isolation of apartheid Israel through state institutionalisation processes, whereby solidarity legislation is enacted to advance boycotts, divestment and sanctions and lawfare to uphold human rights.

The implementation and protection of Palestinian solidarity rights legislation is already envisioned with statutory initiatives such the IPPSRA Citizens Bill <sup>17</sup>, provided as a reference source.

Furthermore, the adoption and implementation at institutional level by university councils across the Republic of an advanced and strategic academic and cultural boycotts programme, shall serve to further isolate Israeli apartheid academic institutions and scholars' representative of these institutions.

It is my view that *section 36: Limitation of Rights (Limitation clause)*, shall constitute **reasonable and justifiable** means within the context of impunity that prevails, that the right to freedom of association (section 18) or any other constitutionally entrenched rights as provided above, South Africa's international obligations consistent with international law, customary norms and standards must trump over academic institutions and scholars representative of these institutions, found to support and advance discriminatory Zionist Israeli apartheid practices. The time for accountability must dawn.

Like the anti-apartheid movement that worked tirelessly to advocate academic and cultural boycotts in the 1980's and earlier, we too must resonate with those endeavours of our predecessors for a punitive campaign against Israeli apartheid academic / cultural institutions and scholars' representative of these institutions.

**The succinct United Nations Security Council Resolution 2334<sup>18</sup> must be reaffirmed against apartheid Israel:**

***“Condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, *inter alia*, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of***

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<sup>17</sup> IPPSRA – Implementation and protection of Palestinian Solidarity Rights Act (Citizens Bill)

<sup>18</sup> Resolution 2334 (2016) Adopted by the Security Council at its 7853rd meeting, on 23 December 2016

**homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions, .....**"

It is my opinion that there are no imposing constitutional legal obligations in South African law, which **preclude** this Council from implementing the academic and cultural boycotts campaign.

Indeed, the constitutional provisions elucidated above, empower the university Council to undertake bold and just measures which pass constitutional muster, by isolating discriminatory Israeli institutions under a strategic boycotts programme, whereby its implementation thereof must be unapologetic in support for a free and democratic Palestine, and in holding Israeli perpetrators to account for egregious crimes in violation of human rights and international law.

Such measures shall serve to honour the thousands of victims and their families of a decade of horrendous wars inflicted by Israel. We remember too ordinary civilians who courageously march in their aspiration for the right of return in Gaza's buffer zone, or like South African, Cape Town journalist, Gadija Davids, who experienced an eyewitness account of the inhumane brutality and impunity of Israeli aggression upon the Gaza Flotilla Aid Mission in international waters, whilst aboard the Mavi Marmara in May 2010.

I urge UCT Council members to deliberate carefully and to vote with your conscience in this important matter advocating the rule of law in honouring the victims, condemning Israel's disdainful conduct, so that we may achieve a future world of justice, regional peace and harmonious relations in a region requiring urgent demilitarisation. A positive global environment for our children and future generations to grow and prosper in the thread of our common humanity.

This can only be achieved with your important actions in acknowledgement of the dire and precarious situation of Palestinians living in Gaza and the occupied Palestinian territories and the West Bank, where justice remains long overdue.

I look forward to your required contribution in building a constructive global academic and cultural boycotts programme of action at tertiary institutional level, appealing to our collective human conscience and enveloping of a culture inculcating mutual respect for life, equality, dignity in adherence to international law and the constitution.

## **7. ABOUT THE AUTHOR**

Attorney Ziyaad Ebrahim Patel is an admitted attorney with right of appearance in the High Court of the Republic of South Africa. A component of his professional advocacy work relates to the field of constitutionalism, lawfare, international human rights, environmental law and sustainable development.

## **REFERENCED WORKS IN SUPPORT OF THIS LEGAL OPINION**

1. The affidavit by former Minister Ronnie Kasrils in support of the Gaza Docket - 23 May 2009.
2. Academia Against Apartheid: The case of an academic boycott of Israel – February 2014, [www.academicsforpalestine.ie](http://www.academicsforpalestine.ie)
3. HSRC Report - Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law – 29 May 2009.
4. The IPPSRA Bill together with executive summary in support of an institutionalised approach to BDS and Lawfare mechanisms in the Implementation and Protection of Palestinian Solidarity Rights - Edition January 2019.
5. UN Security Council Resolution 2334 (Resolution 2334 (2016) - Adopted by the Security Council at its 7853rd meeting, on 23 December 2016.