JOHANNESBURG ATTORNEYS ASSOCIATION FURTHER SUBMISSION ON AMENDING S25 OF THE CONSTIUTUTION

INTRODUCTION

1. On 26 October 2018 the Johannesburg Attorneys Association (JAA) presented an oral submission to the Constitutional Review Committee. During those submissions the JAA was requested to make further written submissions.

2. These further submissions will address four issues. The first and largest part of this submission pertains to the international law issues that would arise from amending the Constitution to allow for expropriation of land without compensation ("EWC"). Second, whether S25 of the Constitution requires compensation to be paid to those that directly stole land. Third, an explanation of why 92% of people that have received compensation for their land have chosen money instead of the original land. Fourth, the concern that EWC could be used by future governments to punish citizens as opposed to assisting the poor and vulnerable.

INTERNATIONAL LAW AND EXPROPRIATION

3. A number of questions arose during our oral submissions in respect of public international law.

4. These questions include, first, two fundamental questions about our legal order, including whether international law "*overrides*" the Constitution, and whether the obligation to comply with international law necessarily means compromising constitutional values — to the extent that EWC may reflect these values. In essence, these questions go to nature of the relationship between the South African state and the international legal order.

5. A second set of questions relate to the rules of international law on expropriation, and the consequences of breaching these rules. In particular, members of the Committee enquired about the compatibility of the international law rule that requires "*adequate compensation*" for expropriation of property with the South African Constitutional requirement of "*just and equitable compensation*", and the legal consequences at the international level, including the prospect of economic sanctions, that might result should South Africa be found to have breached the rules of international law.

6. The Constitution requires our courts to take account of international law in several significant ways.

7. Section 39(1)(b) is particularly relevant to the interpretation of section 25 or any potential amendment to that section, as it applies specifically to the Bill of Rights. Section 39(1)(b) provides that a court, when interpreting the Bill of Rights, must "*consider*" international law.

8. In this context, our courts have given a liberal interpretation to the term "*international law*", encompassing formally binding and non-binding sources, including the decisions of international and regional courts (such as the African Court on Human and Peoples' Rights, or the European Court of Human Rights), as well the expert committees that monitor compliance with international human rights treaties (known as "treaty bodies") and independent United Nations mandate-holders (variously referred to as "Working Groups", "Special Rapporteurs" or "Independent Experts").[1]

9. Three other sections of the Constitution shape the relationship between South Africa and international law. Section 233, for its part, requires a

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[1] See *S v Makwanyane* 1995 (3) SA 391 (CC) at para 35; *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), para 17.

court, when interpreting any legislation, to adopt any reasonable interpretation which is consistent with international law. Section 232 provides that customary international law is law in South Africa, if it is not inconsistent with the Constitution or national legislation. Section 231, in turn, provides that international treaties will only have the force of law in South Africa when these are enacted into law by Parliament, through national legislation. The same section recognises that certain treaty provisions may be "*self-executing*", and require only the approval of Parliament to have legal effect — as long as they are consistent with the Constitution or national legislation.

10. With regard to both customary international law and international treaties, the South African legal order requires coherence with international law, but on the basis that international law is a distinct legal system from our own.

11. Under this *dualist* approach, international law does not "*override*" the Constitution; rather, the proper interpretation of the Constitution — and specifically the Bill of Rights — must take account international law and be interpreted in a manner that is coherent with international law.

12. In **Glenister II**[2] the Constitutional Court confirmed this dualist approach (that is, recognising South African law and international law as two distinct legal systems), with reference to sections 231(2) and (3) of the Constitution:

> "*An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility toward other signatory*

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2 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("Glenister II"), para 92 (minority judgment) and para 191 (majority judgment).

states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligation."

13. From this perspective, international law regulates the conduct of South Africa "*on the international plane*", in relation of other States and the international community as a whole. The Constitution regulates the conduct of the State, its organs and indeed all people in South Africa, internally to the nation — that is, on the *domestic plane*.

14. Logically, the failure to comply with international law results in South Africa bearing international responsibility towards other States: whether *all States*, if a norm of customary international law is breached; or *States bound by a particular treaty*, if the norm that has been breached has its source in a treaty.

15. International law provides for a range of remedies for other states — especially the states of nationality of individuals who have suffered loss by expropriation — to seek damages on their behalf from South Africa. International human rights law, in particular, recognises the legal standing of individuals to refer complaints about state conduct to a range of treaty bodies and independent experts. The United Nations Security Council retains the sole authority to impose multilateral economic sanctions on states under the Charter of the United Nations — a decision which is often politically-driven in practice. Our oral submissions have already taken the point that particularly serious violations of international law attract international condemnation and pariah status for the violator state, with its attendant reputational and diplomatic risk.

16. A possible consequence of amending the Constitution to allow for EWC would be the exclusion of South Africa from the African Growth and Opportunity Act (AGOA). AGOA is a United States Trade Act, that significantly enhances market access to the US for qualifying Sub-Saharan African countries. South Africa is a beneficiary of AGOA and in 2017 we exported over R 100 Billion worth of goods to the United States.[3]

17. In terms of S104 of AGOA South Africa would remain eligible to benefit from the Act provided that is has "established, or is making continual progress to establishing, a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimises government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets."[4]

18. The failure to comply with the Constitution, in contrast, has consequences internal to South Africa's legal order, reflected in the provisions of section 2 on constitutional supremacy:

> *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

19. In **Glenister II**, Ngcobo CJ characterises the significance of international law to the Constitution in the following terms:

> *"Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law.*

[3] https://agoa.info/profiles/south-africa.html

[4] https://agoa.info/about-agoa/country-eligibility.html

> [...]*These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."*[5]

20. As Ackermann J pointed out in *Bernstein and Others v Bester and Others NNO*,[6] "[t]*he internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights*".[7]

21. The High Court recently provided a clear and uncontroversial description of customary international law in *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another*:[8]

> "*The law concerning relations between nations is made up of treaties and customs* [...] *A custom or customary norm is a recognised well-established practice that nation-states adhere to in their dealings with each other. The basic premise of customary law is that rules and practices which can be derived from custom should be and are accepted as legal obligations by states. Therefore, in principle an international custom or rule assumes the mantle of a law. This principle is as old as the existence of states themselves. More recently the principle has been enshrined in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), which provides that international custom is accepted* "as evidence of a general practice accepted as law." *However, for the rule or practice to achieve the status of a legal obligation it has to be firstly, a settled practice (*usus*) that is widespread and*

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5 Ibid, para 97.
6 1996 (2) SA 751 (CC).
7 *Ibid*, para 106; cited with approval in *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235, para 35.
8 2018 (6) SA 109 (GP).

extensive and be recognised by a majority of states and, secondly, the action must occur out of a sense of legal obligation, i.e. it has to be carried out as a binding opinio juris. *Both elements have to be present*."

[footnotes omitted]

22. International treaties, in turn, are written agreements between two or more states. The Supreme Court of Appeal held that the approach to interpretation of treaties follows well-established customary international law codified in sections 31-33 of the Vienna Convention on the Law of Treaties, 1968. In *Krok v Commissioner, SARS*,[9] Maya JA (as she then was) applied these provisions of the Vienna Convention, noting that "*These rules* [...] *are essentially no different from those generally applied by our courts in construing statutes and agreements*."[10]

23. Resolutions of the United Nations General Assembly, to which we refer later in these submissions, are not formally binding sources of international law *in themselves*, but take on a binding character on the international plane to the extent that they reflect or codify customary international law. Such norms would then become binding in South African law by operation of s 232 of the Constitution.

24. As we have traversed above, the South African courts will also have regard to the norms of the African, European and other regional human rights systems as part of "*international law*" for the purposes of sections 39(1)(b) and 233 of the Constitution.

25. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,[11] the African Commission on Human and Peoples' Rights expressly

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9 2015 (6) SA 317 (SCA).
10 *Ibid* para 27.
11 *SERAC and Another v Nigeria* (2001) AHRLR 60 (ACHPR).

recognised that African States' duties to protect human rights extend to measures that provide effective remedies and protect against political interference in the enjoyment of rights. The African Commission emphasised as follows:

> "[T]*he state is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms*."[12]

26. In *Democratic Alliance v Minister of International Relations and Cooperation*[13] a Full Bench of the High Court summarised the constitutional position on international treaties as follows:

> "*From the exposition of s 231, there is no question that the power to conduct international relations and to conclude treaties has been constitutionally conferred upon the national executive in terms of s 231(1). But that power is fettered by s 231(2) and (4), which enjoins the national executive to engage parliament. The section therefore clearly delineates the powers between the national executive and parliament. The only power the national executive has to bind the country to international agreements without parliamentary involvement is in s 231(3), with which we are not concerned here. Any other international agreement must be approved by parliament in terms of s 231(2) to be binding on the*

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12 Ibid, para 45.

13 *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53.

country. Thus, once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by parliament enacting such international agreement as national law in terms of s 231(4)."

27. Once an agreement is incorporated under section 231(4), the rights and obligations contained in the international agreement have the force of ordinary domestic statutory obligations.[14]

28. Again, in *Democratic Alliance v Minister of International Relations and Cooperation*,[15] the High Court set out clearly the legal position of individuals in South Africa in relation to obligations in international agreements:

> "*It is thus provided for in the scheme of section 231 (1), for the executive to do what is in effect exploratory work: negotiate and conclude an agreement but not bind the country. As stated already, the executive does not have the power to bind South Africa to such agreement. The binding power comes only once parliament has approved the agreement on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that the executive must ordinarily go to parliament (the representative of the people) to get authority to do that which the executive does not already have authority to do*." […]
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> [T]*he approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa,*

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14 *Claassen v Minister of Justice and Development* 2010 (6) SA 399 (WCC), para 36, in which the Court noted that a non-self-executing legal instrument will not amend domestic law without enacted legislation.

15 *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53, para 55.

through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement."[16]

29. A range of bilateral and multilateral international investment treaties entered by South Africa recognise the duty to pay compensation when the state expropriates the property of a foreign investor. However, these submissions are primarily concerned the proposal to amend the Constitution to expropriate without compensation the property of South African citizens and permanent residents, not foreign nationals.

30. We address briefly the growing trend among a wide range of states to recognise market-related standards of compensation in their investment treaties. We do so not to establish a binding legal obligation on South Africa under international law with respect to compensating *its own nationals* for expropriating their property, but to demonstrate the extent to which the common legal standards of the international community cohere around market-related compensation, even if imposing a standard less than full market value.

31. A 2012 study of state practice by the United Nations Conference on Trade and Development — once again, in the distinct context of a foreign investors facing expropriation — says the following about the requirements of international law: "[F]*ailure by a State to pay any compensation for a direct expropriation can be seen as rendering such an expropriation unlawful*".[17]

32. The UNCTAD statement reflects a compromise between two competing views of the position of a foreign investor whose property is directly expropriated by a state other than its state of nationality. The first view is

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16 *Ibid* para 52.

17 UNCTAD Series on Issues in International Investment Agreements II, "Expropriation" (2012), p 44.

that payment of compensation is an absolute legal requirement for the lawfulness of any form of expropriation under international law. The second view is that payment of compensation is a more accurately described as duty of the state triggered in cases of otherwise lawful expropriation, that is, where the expropriation is done for a public purpose, in a non-discriminatory manner and in accordance with the due process of law.[18] Under this second position, the failure to pay compensation is a wrongful act under international law, but does not itself render the underlying expropriation *unlawful*, in the sense of having no legal effect. Rather, the wronged party must then approach a court (usually an international arbitral tribunal) with jurisdiction to claim damages.

33. The United Nations General Assembly has adopted a requirement of "*appropriate compensation*" for all forms of direct expropriation of natural resources, of which land is unquestionably a part. It did so in the context of the struggle for decolonisation. Its **Resolution on Permanent Sovereignty over Natural Resources** 1803 (1962) ("**Resolution 1803**") states that:

> "*Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by*

18 *Ibid*, p 27.

sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."

34. South Africa, under the *apartheid* regime, was one of only two Member States of the General Assembly to vote against this Resolution (the other being France).[19] The Resolution passed with 87 votes in favour out of a voting membership of 110 Member States.

35. There is longstanding international authority that Resolution 1803 reflects customary international law. In *Texaco Overseas Petroleum v Libya*,[20] an international arbitrator (Professor René-Jean Dupuy, a French national) was selected by the International Court of Justice to rule on Libya's liability under various concession agreements signed between the parties. The arbitrator held that Resolution 1803 was adopted by "*a great many States representing not only all geographical areas but all economic systems*".[21] This, he found, established both the practice and *opinio juris* elements of customary international law, and reflected the acquiescence of states to certain customary rules regarding the nationalisation of *foreign* property specifically. The customary law status of Resolution 1803 was later confirmed in the arbitral award in *State of Kuwait v The American Independent Oil Company*.[22]

36. The United Nations General Assembly later adopted Resolution 3281 (1974) on the Charter of Economic Rights and Duties of States ("Resolution 3281"). South Africa, under the *apartheid* regime, *abstained from the* vote.[23]

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19 UN Doc A/PV.1194.
20 1979 53 ILR 487 ("**Texaco**").
21 Ibid, 489.
22 1982 21 ILM 976 ("**Aminoil**").
23 UN Doc. A/PV.2315.

37. Although limited to expropriation of property owned by foreigners, and confirming the right to "*adequate compensation*", Article 2(2)(c) of Resolution 3281 sought to characterise compensation as a purely internal matter for each State. This Article provides that:

> *Each State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.*

38. In **Texaco**, the arbitrator was unable to conclude that the Resolution 3281 reflected customary international law. He held as follows in respect of Article 2(2)(c):

> "*The conditions under which Resolution 3281 [...] was adopted also show there was no general consensus of the States with respect to provisions and in particular those concerning nationalisation. Having been the subject-matter of a roll-call vote, the Charter was adopted by 118 votes to 6, with 10 abstentions. The analysis of votes on specific sections of the Charter is most significant insofar as the present case is concerned. From this point 2(c) of Article 2 of the Charter, which limits consideration of compensation to the State and does not refer to international law was voted by 104 to 16, with 6 abstentions, all of the industrialised countries with market economies having abstained or having voted against it.*"

39. The consequence of rejecting the customary law status of Resolution 3281, in the view of one eminent scholar and practitioner, was to preserve the "*sacrosanct character of the right to property* [...] *in conformity with customary international law, and the expropriating State was required to pay compensation*."[24]

40. Whilst the facts and reasoning in the **Texaco** and **Aminoil** arbitral awards confine the customary law content of Resolution 1803 to the nationalisation or expropriation of the property of foreign nationals by a state, the inference remains that "*adequate compensation*" for expropriation is the international customary law benchmark. The position in international treaties have developed even further. For example, a 2012 study of international investment treaties by the United Nations Conference on Trade and Development ("UNCTAD") found a range of states adopt terms such as "*just*", "*equitable*" and/or "*fair*", "*real value*" and "*genuine value*" to describe compensation payable to foreign investors whose property has been expropriated. The most common reference point in the investment treaties surveyed is clearly market value on a "*willing buyer, willing seller*" basis.[25]

41. Current standards of international human rights law extend the duty of the State to pay market-related compensation to a state's own nationals whose property is expropriated, not just to foreign nationals.

42. The European Court of Human Rights ("ECtHR") has held unequivocally that expropriation without market-related compensation will fall foul of international human rights standards. For instance, in *Pincová and Pinc v Czech Republic*,[26] the applicants, who were Czech nationals, had their

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24 S K (Charles) Chatterjee "The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years", 1991 40(1) ICLQ 669, 675.

25 UNCTAD Series on Issues in International Investment Agreements II, "Expropriation" (2012), pp 41-43.

26 Application No 36548/97, 2002 (3) ECHR 712.

private residence, barn and cowshed expropriated under laws that provided for the restitution of property seized by the former communist regime in the Czech Republic.

43. The applicants were reimbursed the purchase price they paid to the State in 1967, which represented about one-fiftieth of the current market value of their home. Finding that the State had violated the right to property under the European Convention on Human Rights, the ECtHR held that any measure which interferes with the right to peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The ECtHR held as follows:

> *"In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see Pressos Compania Naviera S.A. and Others v. Belgium, judgment of 20 November 1995, Series A no. 332, p. 23, § 38, and The former King of Greece and Others, cited above, § 89). Thus the balance to be maintained between the demands of the general interest of the community and the requirements of fundamental rights is upset if the person concerned has had to bear a "disproportionate burden" (see, among many other authorities, The Holy Monasteries v. Greece, judgment of 9 December 1994, Series A no. 301-A, pp. 34-35, §§ 70-71)."*

44. Consequently, the Court has held that the person deprived of his property must in principle obtain compensation "*reasonably related to its value*", even though "*legitimate objectives of 'public interest' may call for less than reimbursement of the full market value*". The Court found that the appropriate balance of rights and interests is generally achieved where the compensation paid to the person whose property has been taken is

reasonably related to its "*market*" value, as determined at the time of the expropriation.

45. The Court also held that the reimbursement of the purchase price paid by the applicants in 1967 "*could not be reasonably related to its value thirty years later*."[27] Additionally, it held that the "*compensation*" awarded to the applicants "*did not take account of their personal and social situation*",[28] as moving them from their home — which they were obliged to rent from the respondents under extortionate conditions — would have left them without accommodation.

HISTORY OF LAND AQUISITION

46. In terms of S25(3) of the Constitution:

> The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
> (a) the current use of the property;
> **(b) the history of the acquisition and use of the property;**
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation.

47. The section makes it clear that the history of the acquisition of a piece of land plays a role in determining the amount of compensation that is payable.

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27 *Ibid*, para 61.
28 *Ibid*, para 63.

48. In a case were land was directly stolen and the thief is still in possession of the land, the Constitution would justify paying that person no compensation when the land is returned to its rightful owner.

49. For example, Germany engages in a compensation process for land that was stolen from Jews by Nazis. They follow a process that does not pay compensation to the particular Nazis that stole land. However, the German government recognise that in many cases land that was stolen has been sold on to a string of good faith purchasers who had no knowledge that the land was stolen. In these cases, justice requires that those in possession of the land restore it to the rightful owners, but also that they receive compensation from the German state.

50. The founding provision of our Constitution states that South Africa is a nation founded on the value of non-racialism. This means that people shall be treated as individuals and not as proxies for racial groups. Individual perpetrators must be held accountable and individual victims must be compensated. It would be unjust and unconstitutional to treat an entire race as land thieves on the basis that some land thieves were members of that race.

51. In other words, we cannot make broad claims that white people stole the land and black people must be the beneficiaries. The idea that all people who have a particular level of melanin in their skin are equally vicious and equally land thieves goes against what our constitution demands, which is the value of non-racialism. We must look at the individuals that stole the land and individuals that were stolen from and justice must be done between those two sets of people. This investigation is already underway and is precisely what is being done in the land claims process.

CHOOSING MONEY INSTEAD OF LAND

52. In some cases, a person seeking compensation for land that was unjustly taken from them will want that particular piece of land back on the basis that it has ancestral or historic significance. For example, the land may have a sacred status because family members are buried on the land. In such cases, efforts should be made to ensure that claimants receive that land back. However, it must be acknowledged that not all land has this special status. A piece of land may be poorly located, difficult to farm and hard to sell. This may explain why in 92% of cases, claimants chose to receive money as compensation, as opposed to land.

53. The advantage of money over land is that it is liquid and fungible. Money can be used to start a business, pay off debt or buy a piece of land that is most suited to the needs of the claimant. Instead of receiving land in the Karoo, a claimant may prefer money to purchase land in Natal or Gauteng.

54. A beneficiary of a piece of land that is valuable only for a stated purpose (for example farming) may be a burden to a beneficiary who does not want land for that stated purpose. It may also result in a drain on that individual's finances when the costs of the ownership of that land is taken into account (for example rates and taxes, insurance costs, etc). The higher the value of the land, the greater the "holding costs". This may even result in some beneficiaries not being able to afford the monthly "holding costs" if they are given land of high value, when they have little or no income to satisfy the holding costs with.

USING LAW AS A WEAPON

55. South Africa has a dark history of state sanctioned land theft. The law was used as a weapon against citizens to take their land. It has been used as a weapon against poor, vulnerable black citizens for a long time. As South

Africans we need to say, never again, never again shall the poor and vulnerable be subject to the whims of the State and for the law to be used against them to perpetrate further injustice. It's important that the law is used in a just manner.

56. When drafting the law, we must bear in mind that positions of power change over time. Legislators should always bear in mind that the laws they craft are like weapons, which can be used against them by their opponents across the aisle. If the Bill of Rights is changed, for the first time ever, to allow for expropriation without compensation, there is no guarantee that in future this power won't be abused by those that inherit the law from those that made the law.

57. South Africa is governed by a range of different political parties who may use it in all sorts of ways. It will not always be the noble that expropriate. They may use it as a weapon to punish people and who don't share their political views or their ethnic backgrounds.

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