IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(HELD AT CONSTITUTION HILL)

Case No.: CCT 02/14

On the roll: 19 May 2014

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First Respondent
ZIMBABWE EXILES FORUM	Second Respondent
and	
JOHN DUGARD	First *Amicus Curiae*
KEVIN HELLER	Second *Amicus Curiae*
GERHARD KEMP	Third *Amicus Curiae*
HANNAH WOOLAVER	Fourth *Amicus Curiae*
THE TIDES CENTRE	Fifth *Amicus Curiae*
THE PEACE AND JUSTICE INITIATIVE	Sixth *Amicus Curiae*

WRITTEN SUBMISSIONS OF THE FIRST TO FOURTH AMICI CURIAE

I INTRODUCTION

1. What is the role of South Africa in the fight against the most serious crimes under international law? Is it a neutral bystander, required only to assist that fight when it has no other choice? Or is it an active participant that takes proactive measures to further the investigation and prosecution of those guilty of torture and crimes against humanity?

2. Behind the technical arguments about the nature and limits of universal jurisdiction, the meaning of s 4(1)(c) of the ICC Act, and the facts of this particular docket, this case squarely raises the deep question about whether, and if so how, South Africa should act to prevent impunity and ensure accountability for serious international crimes committed outside its borders by non-South Africans.

3. The First to Fourth *amici curiae* ("**the Experts**") submit that international law permits, but does not require, South Africa to investigate allegations of torture, systematic or otherwise, committed in Zimbabwe, before the suspects are present in South Africa.

4. Although there may be no obligation under international law to investigate in the circumstances of this case, it is the type of case where investigation by South Africa is likely to serve the greater goals of the international criminal justice system. Moreover, South Africa's domestic law requires that the appropriate authorities investigate in order to promote the rights in the Bill of Rights.

5. These written submissions are structured as follows:

5.1. Part II considers what the Experts contend is the underlying basis for the determination of this case: the supremacy of the constitution and the promotion of human rights;

5.2. Part III briefly describes the nature of the relationship between the Constitution and international law;

5.3. Part IV explains the four sources of international law;

5.4. Part V summarises the basic principles of international criminal law and universal jurisdiction;

5.5. Part VI addresses the core question: the power to investigate before a suspect is present; and

5.6. Part VII demonstrates the relevance of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**CAT**")[1] and the Prevention and Combatting of Torture of Persons Act 13 of 2013 ("**Torture Act**").[2]

II SUPREMACY OF THE CONSTITUTION AND THE PROMOTION OF HUMAN RIGHTS

6. The Constitution is the supreme law of South Africa.[3] Law or conduct inconsistent with it is invalid.[4]

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[1] A/RES/39/46 (10 December 1984). As of Friday 9 May 2014, CAT had 81 Signatories and 155 state parties. South Africa assented to CAT on 10 December 1998.

[2] Assented to on 24 July 2013, commenced on 29 July 2013.

[3] Sections 1(c) and 2.

[4] Sections 2 and 172(1)(a).

7. The Bill of Rights[5] requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. At the same time, s 195 of the Constitution requires organs of state – including the Applicant – to make *"[e]fficient, economic and effective use of resources*".

8. Whenever and wherever the state takes action or declines to take action it must do so subject to the Constitution.[6]

9. With these principles in mind, the interrelationship between international law and the Constitution is now considered.

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[5] Section 7(2) and 8. In Glenister v President of The Republic of South Africa and Others 2011 (3) SA 347 (CC) the majority of this Court put it thus: "[189] The obligations in these conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere. In understanding how it does so, the starting point is s 7(2), which requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This court has held that in some circumstances this provision imposes a positive obligation on the State and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'. **Implicit in s 7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be <u>reasonable and effective</u>.**

[6] In Kaunda and Others v President of The Republic of South Africa and Others 2005 (4) SA 235 (CC) Chaskalson CJ accepted "[67] …..If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal **<u>with it consistently with the Constitution</u>**…", and at paragraph [78] " This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. **<u>The exercise of all public power is subject to constitutional control</u>**. Thus even decisions by the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection."

For a useful collection of the authorities dealing with the courts' constitutional powers of rationality scrutiny in the context of a decision to prosecute see Booysen v Acting National Director of Public Prosecutions and Others (4665/2010) [2014] ZAKZDHC 1 (26 February 2014).

III RELATIONSHIP BETWEEN CONSTITUTIONAL LAW AND INTERNATIONAL LAW

10. The Constitution came into force in 1997, after a lengthy constitution-making process involving widespread domestic and international consultation. Appropriately, given the role played by international law and international institutions in inducing strong international opposition to the apartheid regime, the Constitution gives international law a prominent role in the domestic law of South Africa.

11. Customary international law[7] and certain treaties are made directly enforceable in domestic law without the need for transformation[8] by the legislature, and international law can significantly influence the content of domestic law indirectly through various interpretative obligations imposed on the courts to interpret and develop domestic law compatibly with South Africa's international legal obligations.[9] The Constitution, seeks to align domestic law with international law wherever possible.[10]

12. International law is both directly and indirectly enforceable under the Constitution. Section 231 of the Constitution governs the relationship between domestic law and South Africa's treaty obligations. Treaty-making is the

[7] Section 232.

[8] President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases 2009 (2) SA 466 (CC).

[9] Section 39(1)(b) see generally Glenister v President of the Republic of South Africa 2011 (2) SA 347 (CC) ("Glenister")

[10] Section 233.

responsibility of the executive,[11] and most treaties require approval by Parliament before they are binding on the State.[12]

13. In contrast to treaty law, the South African Constitution establishes a monist approach to international obligations that derive from customary international law. As put in Section 232 of the Constitution, "*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*".

14. The place of international law in domestic law is perhaps most prominent in relation to the interpretative obligations imposed on domestic courts. Three key constitutional obligations of varying strengths require domestic law to be interpreted compatibly with international law.

15. First, s 233 imposes the strongest interpretative obligation on domestic courts, mandating that when interpreting any legislation, courts must adopt an interpretation of the legislation that is consistent with international law over any inconsistent interpretation, as long as the interpretation is a "reasonable" one.[13]

16. Secondly, courts are subject to a weaker obligation that they must 'consider' international law when interpreting the Bill of Rights.[14]

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[11] Section 231(1): "The negotiating and signing of all international agreements is the responsibility of the national executive".

[12] Section 231(2): "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

[13] Section 233 Final Constitution: "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.'

[14] Section 39(1)(b) Constitution: "When interpretation the Bill of Rights, a court, tribunal or forum… must consider international law".

17. Finally, s 39(2) of the Constitution requires courts to promote the 'spirit, purport, and object' of the Bill of Rights when interpreting any legislation or developing the common law.[15] Though this does not mention international law expressly, it has been held that determining the 'spirit' of the Bill of Rights will often require consideration of international law, as many of the rights in the Bill were intentionally drawn from various international human instruments.[16] These interpretative obligations have been used extensively by South African courts to give effect in domestic law even to provisions of international law that are not binding on South Africa and to untransformed treaty obligations.

18. As put by Ngcobo CJ:

> "*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….These provisions of our Constitution demonstrate that international law has a special place which is carefully defined by the Constitution.*"[17]

19. In relation to section 233, the SCA has interpreted "international law" to mean all international law that is *binding* on South Africa.[18] Thus, treaties to which South Africa is a party (both transformed and untransformed[19] by national

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[15] Section 39(2) Constitution: "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".

[16] [REFERENCE]

[17] Dissenting Opinion of Ngcobo in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6, para. 97.

[18] See *Progress Office Machines.CC v South Africa Revenue Services and Others 2008 (2) SA 13 (CC) at para [8]*

[19] S v Makwanyane 1995 (3) SA 391 (CC) at para [35]

legislation) as well as customary international law, have been invoked using this interpretative obligation.

20. Moseneke DCJ and Cameron J stated in *Glenister II* that s 233 "*demands any reasonable interpretation that is consistent with international law when legislation is interpreted*".[20] A similar result, giving domestic effect to untransformed treaty obligations by way of s 233 was reached in *Fick*.[21]

21. Under ss 39(1)(b) and 39(2), courts have considered both binding and non-binding international law to be relevant and therefore warranting of consideration.[22] This principle was first set out in *Makwanyane*,[23] concerning the constitutionality of the death penalty. These provisions of the Constitution have been interpreted to allow courts to consider international legal instruments, including treaties that are not binding on the State, and to give at least some measure of domestic effect to those treaties.

22. Similarly powerful effect was given to another untransformed treaty in the decisions of the SCA and the Constitutional Court in *Fick*. This case concerned the domestic enforceability of decisions of the Tribunal of the Southern African Development Community ('**SADC**') according to the terms of the Protocol of the SADC Tribunal, which was binding on South Africa by way of the SADC Treaty. In the case, two Zimbabwean farmers whose farms had

[20] *Glenister*, at para. 202.

[21] Government of the Republic of Zimbabwe v Fick and Others 2013 (5) SA 325 (CC) ("Fick")

[22] See Dugard, *International Law: A South African Perspective* (4th ed., 2011), chapter 4 ("Dugard").

[23] *S v Makwanyane and Another* [1995] ZACC 3. *Makwanyane* concerned s 35(3) of the interim Constitution (Constitution of the Republic of South Africa 200 of 1993), the quivalent of s 39(2).

been expropriated without compensation by the Zimbabwean government brought a complaint against Zimbabwe to the SADC Tribunal.

23. As with *Glenister*, provisions of the unincorporated treaty were essential to the outcome of the case. Both the SCA and this Court held that s 39(2) of the Bill of Rights required South African courts to develop the common law on the enforcement of foreign judgments to include the enforcement of decisions of the SADC Tribunal. The fact that the SADC Treaty was binding on South Africa, and included an obligation to "*take forthwith all measures necessary to ensure execution of decisions of the Tribunal*",[24] when considered in light of the constitutional right to access to court,[25] was crucial to this Court's decision that the spirit, purport, and object of the Bill of Rights required the common law to be developed in this manner.[26]

IV SOURCES OF INTERNATIONAL LAW

24. In order to evaluate the varying claims of the existence of international law rules, it is necessary to briefly summarise the sources of international law, particularly as they relate to custom as a source of law.

25. Article 38 (1) of the Statute of the International Court of Justice recognises four sources of international law:

    a) international treaties or conventions establishing rules expressly recognised by the contesting states;

[24] Fick at para [59] and following.

[25] Section 34 of the Constitution.

[26] "[A]n important factor is that certain provisions of the Constitution facilitate the alignment of our law with foreign and international law. …Article 32 of the Tribunal Protocol is an offshoot of the Amended Treaty that binds South Africa."

b) international custom (this refers to a general practice accepted by states as law);

c) general principles of law recognised by civilised nations; and

d) judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

26. In the *Lotus Case*,[27] the Permanent Court of International Justice emphasised the consensual nature of international law: the rules of law binding upon states emanate from their own free will as expressed in conventions or by practices generally accepted as expressing principles of law (custom). Any rule of international law rests on state consent, expressed either through treaty or custom.

27. Treaties are written agreements between states or between states and international organisations. Treaties may be multilateral, which means that they are binding on many states. They may also be bilateral, in which case they are only binding on the two states party to the treaty. Treaties are generally binding only on state parties. However, treaties that codify existing custom between states or create new law can "*evidence of a widespread customary rule, in which case they will provide the basis for a legal obligation under custom binding upon non-signatory states*".[28]

28. Consent of sates to a customary rule is inferred from their conduct or practice. This often raises difficult issues of proof. As a result, disputes over the existence of customary rules often feature in international law litigation. Courts have identified two main requirements for the existence of a customary

[27] France v Turkey 1927 PCIJ Reports, Series A, No 10 (at 18).

[28] Dugard at page 25.

rule: *usus* (settled practice)[29] and *opinio juris sive necessitatis* (the acceptance of an obligation to be bound).[30]

29. Settled practice requires that "*the conduct of States should, in general be consistent with such rules*"; perfect consistency is not required.[31] The practice should be "*very widespread and representative*" but need not be entirely uniform[32] As a South African judge put it, "*customary international law is founded on practice, not on preaching*".[33]

30. A settled practice must be accompanied by *opinio juris*; the belief on the part of the state that it is bound by the rule in question and that the general practice is accepted as law.[34] There must be evidence that the state acted in a particular way *because they felt legally compelled to do so* by reason of the existence of a customary law obliging them to do so. In her dissenting opinion in the *Arrest Warrant*[35] case, Judge Van den Wyngaert pointed out:

> *A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an* opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns*

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[29] Settled practice is derived from various materials including, but not limited to, treaties, decisions of international and domestic courts, national legislation, policy statements by government officers, etc.

[30] Dugard at 26.

[31] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (1986) ICJ Reports 14 at para 186 ("*In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.*")

[32] *North Sea Continental Shelf Cases* (1969) ICJ Reports 3 at para 73.

[33] *S v Petane* 1988 (3) SA 51 (C) at 59F-G.

[34] Dugard at 29

[35] *Arrest Warrant of 11 April 200 (Democratic Repubvlic of the v Congo v Belgium) 2002 ICS Reports 3; (2002) 41 ILM 536*

> *and lack of extraterritorial criminal jurisdictioni5. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law.*[36]

Acceptance of a settled practice as law by states must be general or widespread, but need not be universal.[37]

V BASIC PRINCIPLES OF DOMESTIC CRIMINAL JURISDICTION UNDER INTERNATIONAL LAW

31. Shaw neatly summarises the nature of criminal jurisdiction under international law as follows:

> "*International law permits states to exercise jurisdiction (whether by way of legislation, judicial activity or enforcement) upon a number of grounds. There is no obligation to exercise jurisdiction on all, or any particular one, of these grounds. This would be a matter for the domestic system to decide. The importance of these jurisdictional principles is that they are accepted by all states and the international community as being consistent with international law. Conversely, attempts to exercise jurisdiction upon another ground would run the risk of not being accepted by another state.*"[38]

32. There are three grounds[39] on which domestic criminal jurisdiction is founded in international law: territoriality, nationality and universality.[40]

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[36] *Arrest Warrant* Case (van den Wyngaert J, dissenting) at para 13.

[38] M Shaw*, International Law* (6ed) 2008 at 652

[39] In addition to these primary grounds, jurisdiction can also be claimed on the basis of protective jurisdiction (jurisdiction is necessary to protect national security) and passive personality (which holds that a state may assert jurisdiction if the victim is a national).

[40] *Wood Pulp Case* (1998) 4 CMLR 901 at 920; 96 ILR 148.

33. From the standpoint of international law, the jurisdictional competence of a state is primarily territorial.[41] As a result, a state may exercise its jurisdiction over all acts of a criminal nature that occurred within its territory and over all persons responsible for committing these acts, whatever their nationality. The converse of the concept of territorial jurisdiction is that the courts of one country do not, as a general principle, have jurisdiction with regard to events that have occurred or are occurring in the territory of another state.[42]

34. In the *Lotus Case*, the court expounded two complementary principles of jurisdiction. First: "*A state may not exercise its power in any form in the territory of another state – unless there is a permissive rule to the contrary*". Second, and conversely, a state retains a "*wide measure of discretion*" to exercise its jurisdiction within its own territory with regard to acts committed abroad.[43] These principles remains largely unchanged today.[44]

35. States may also exercise criminal jurisdiction based on nationality.[45] Nationality is not particularly relevant to this matter, and we say no more about it.

36. The third basis for jurisdiction is universality. The alleged crimes in question were committed solely within Zimbabwean territory and solely involve

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[41] Bankovic v Belgium et al (2002) 41 ILM 517; 123 ILR 94 at para 59.

[42] See *Kaunda v President of South Africa* 2005 (4) SA 235 (CC) and *R v Cooke* (1998) 2 SCR 597.

[43] Ibid at 19.

[44] States have sought to limit the exercise of extraterritorial jurisdiction in criminal matters to cases in which there is a direct and substantial connection between the state exercising jurisdiction and the matter in question. The failure of the state to establish the existence of such a connection is often regarded as an abuse of right. However, there is still no rule in international law prohibiting the exercise of this jurisdiction.

[45] See, for example, In *S v Mharapara* 1985 (2) ZLR 211 (SC) ("*a state has jurisdiction with respect to any crime committed outside its territory by a person or persons who is or are its nationals at the time when the offence was committed or when he or they are prosecuted and punished*").

Zimbabwean nationals, both as perpetrators and victims. Indeed, there is no link between South Africa and the alleged Zimbabwean crimes other than a sense of outrage at the nature of the events. The only possible basis on which South Africa could assert prescriptive and adjudicative jurisdiction over these events, therefore, is universal jurisdiction.

37. Under the principle of universal jurisdiction, each and every state has jurisdiction to try particular offences on the ground that the crimes involved are regarded as particularly offensive to the international community as a whole. Universal jurisdiction thus enables a state to prosecute a perpetrator no matter where or against whom the offence was committed and regardless of territory or nationality.

38. The exercise of universal jurisdiction only applies in the case of crimes committed under customary international law, which all states have the right to prosecute. Customary international law crimes are limited to piracy, slave-trading, war crimes, crimes against humanity, genocide and torture.[46]

39. In addition, a wide range of international and transnational crimes have been created by way of treaties that confer wide jurisdictional powers on state parties. However, the exercise of jurisdiction over such crimes depends on the terms of the treaty and do not flow solely from the abhorrent nature of the crime itself. Some of these treaties – such as CAT – impose obligations to prosecute crimes in certain circumstances.

40. The next Part addresses the details of rules relating to universal jurisdiction as they concern the location of the suspected offender.

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[46] Dugard at 154.

VII THE ROLE OF PRESENCE IN THE CONTEXT OF UNIVERSAL JURISDICTION

41. The central issue in this appeal is how a suspect's presence or absence affects the exercise of universal jurisdiction by South Africa. In this Part, we address make four interrelated submissions on this issue:

41.1. It is necessary to distinguish between the initiation of a non-coercive investigation and the use of coercive means to pursue that investigation;

41.2. The SAPS and the NPA are empowered, not obliged, to investigate allegations of crimes under the International Criminal Court Act 27 of 2002 ('the ICC Act'); and

41.3. Presence is not required to initiate an investigation, but it is a requirement in order to put a criminal charge to the accused.

The forms of jurisdiction and the meaning of investigation

42. There has been debate in international circles in recent years about the ability to try a person in absentia via universal jurisdiction.[47] However, the debate has largely centred on the legality of holding trials, rather than initiating and/or conducting investigations.

43. In terms of international law, there are three forms of jurisdiction: prescriptive (or legislative), adjudicative (or judicial) and enforcement (or executive). Prescriptive jurisdiction is the jurisdiction that is required for a State to prohibit certain conduct in its domestic criminal law. Adjudicative jurisdiction is

[47] Florian Jessberger in A Cassese et al (eds) *The Oxford Companion to International Criminal Justice* (OUP: 2009) esp 555-558.

exercised when the State carries out criminal proceedings against the accused by, inter alia, initiating an investigation against the accused and a criminal trial. Enforcement jurisdiction is the aspect of criminal jurisdiction that is exercised when the State's officials, usually the police, physically investigate suspected criminal offences, arrest the accused individual, or carry out the sentence after a finding of guilt.

44. Under international law, all three aspects of a State's jurisdiction are primarily territorial, though both prescriptive and adjudicative jurisdiction can be extended extraterritorially on the basis of several principles, including the proper assumption of universal jurisdiction. Enforcement jurisdiction, on the other hand, is strictly and solely territorial, meaning that the coercive activities of an investigation and the arrest of suspects can only be carried out within the State's own territory, unless a foreign State gives consent for these functions to be carried out on its territory.

45. When considering the power, rights and obligations of the state to investigate international crimes, it is thus unhelpful to talk about "investigation" as a single action. An investigation has multiple phases and can involve multiple activities, from merely opening a docket, to interviewing witnesses present in the investigating state, to making requests to another state for access to evidence, to coercively attempting to extract information from a state, whether surreptitiously or by force.

46. It is necessary to draw a clear distinction between: (a) the power to initiate an investigation and employ non-coercive steps to further that investigation; and (b) using coercive means – arrests, search warrants, subpoenas – to conduct

that investigation. The first step is an element of adjudicative jurisdiction. The second is clearly a matter of enforcement jurisdiction.

47. There is no doubt in international law that a state can only conduct the second set of activities within its territory or in another State's territory with its consent. When this Court considers whether SAPS can or should investigate the allegations made by the Respondents, the term "investigate" should be understood to include initiating an investigation, using non-coercive or consensual investigative techniques outside its territory, and employing coercive means within its territory. When we use the term "investigate", we do so with that meaning in mind.

48. The more difficult questions, addressed below, are: (a) Does international law permit a state to investigate a suspected international criminal who is not present in its territory, and if not, at what stage is the suspect's presence required? and (b) Do states have a discretion to decide which crimes to investigate and, if so, how should a state exercise that discretion?

Presence: Investigation and Prosecution

49. In order to determine whether presence is a requirement for SAPS to investigate a crime, it is necessary to consider three factors:

49.1. The text of the ICC Act;

49.2. State practice; and

49.3. The underlying principles.

The ICC Act

50. The ICC Act includes personal jurisdictional restrictions on the exercise of universal jurisdiction. The Act specifies that South Africa can only exercise universal adjudicative jurisdiction over genocide, war crimes, and crimes against humanity if the accused comes to South Africa at some point after committing the crime. Section 4(3)(c) of the Act states:

> "*In order to secure the jurisdiction of a South African court for purposes of the Chapter, any person who commits a crime contemplated in subsection (i) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if… that person, after the commission of the crime, is present in the territory of the Republic.*"

51. The Act itself is ambiguous about whether presence is required for an investigation. Section 4(3)(c) merely states that the presence of the person is necessary "in order to secure the jurisdiction of a South African court". This is a clear reference to adjudicative jurisdiction. The Act does not specify whether the accused's presence is necessary to institute investigations concerning such crimes, or whether it is only necessary at a later stage of the prosecution of the crime, such as putting the charges to the accused,[48] or perhaps even only at the trial stage.

52. On a purely textual basis, then, there is a strong argument to restrict the presence requirement to a more advanced stage of the criminal proceedings

[48] CPA reference and explanation.

than mere investigation, as there is generally no court involvement in the investigative phase of the proceedings. However, the plain text of s 4(3) indicates that as soon as there is court involvement, the accused's presence would be required so as "to secure the jurisdiction" of the court. This would indicate that, under a purely textual reading, the accused's presence would be required in South African territory at the point where the charges are put to the suspect, rather than at the later stage of trial.

53. This differs slightly from the conclusion of the High Court and the SCA that presence is only required for the actual trial. The Experts submit that requiring presence for the charge to be laid is not only more consistent with the text of the ICC Act, but also with state practice and underlying principle.

State Practice

54. This section considers whether there is *usus* and *opinio juris* to establish any rules of customary law related to investigating international crimes in the absence of the accused. We conclude that there is no clear customary law rule prohibiting investigations *in absentia*.[49] In the absence of such a rule, the matter is left to the domestic law of individual states. However, the majority of state practice points towards the future crystallisation of a rule that only requires a suspect's presence for prosecution, not investigation.

55. Of the States that have exercised prescriptive universal jurisdiction over international crimes, the majority have interpreted the universality principle in a manner that does not explicitly require the accused's presence at the

[49] O'Keefe

investigatory stage of the exercise of adjudicative universal criminal jurisdiction. A significant number of States and international organisations explicitly adopt the same interpretation of the presence requirement that is limited to requiring presence at trial. For example, art. 4(1) of the African Union's Draft Model National Law on Universal Criminal Jurisdiction specifically requires only the accused's presence at the trial stage. This was approved by all AU Member States in May 2012, indicating their belief that such an interpretation of the presence requirement was consistent with international law. Similarly, the relevant provisions of Norwegian[50] and Spanish[51] domestic legislation explicitly confine the presence requirement to the trial stage.

56. Germany,[52] Trinidad and Tobago,[53] New Zealand,[54] and Armenia[55] explicitly allow even the trial of international crimes via universal jurisdiction *without the presence of the accused*. The German legislation, however, as discussed by the SCA, discourages even the initiation of investigations if the accused is not likely to be present in German territory for any resulting trial.

57. In addition, a significant number of States' domestic law require the accused's presence at some unspecified stage of universal jurisdiction-based prosecutions of international crimes. Such practice includes domestic legislation implementing the ICC Statute in Canada,[56] Kenya,[57] Uganda,[58]

[50] (art. 124 General Civil Penal Code)

[51] art. 23.4 Organic Law 6/1985)

[52] (s 1 Code of Crimes Against International Law and para 153f Criminal Procedure Code)

[53] (s 8 International Criminal Court Act 2006)

[54] (s 8 International Crimes and International Criminal Court Act, 2000)

[55] (art.15(3) Criminal Code 2003)

[56] (s 8(b) Crimes Against Humanity and War Crimes Act 2000, c.24 ('CCHWA')

Mauritius,[59] the Phillipines,[60] and the Netherlands.[61] Most of these provisions are best interpreted not to require the accused's presence to investigate an international crime committed extraterritorially. For example, s 8 of the CCHWA states that the accused's presence is required so that the (s)he "*may be prosecuted*" for one of the specified international crimes committed abroad. Section 4 of the Mauritian legislation has nearly identical wording. While the term "prosecution" is certainly wider than just the criminal trial, state practice regards the investigation stage as a distinct, prior phase that is not subject to a strict requirement of presence. As such, this wording indicates that the accused's presence is only required at a more advanced stage of criminal proceedings, when a "prosecution" can be said to have begun. The precise point where that occurs is discussed in the next section.

58. This is entirely consistent with the Rome Statute, which draws a clear distinction between investigation and prosecution.[62] Art 17 of the Rome Statute – which deals with the admissibility of cases – also distinguishes between investigation and prosecution, and implies that it is left to the state parties to determine where to draw the line between the two.

59. The statutes of other countries that do not expressly permit or prohibit investigations even more clearly indicate that the presence requirement is applicable only to an advanced stage of criminal proceedings. Section 8 of the

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[57] (s 8 International Crimes Act 2008)

[58] (s 18 International Criminal Court Act, 2010), Burkina Faso (art.15 Loi No. 052-2009/AN)

[59] (s.4 International Criminal Court Act 2011)

[60] (s 17 Act on Crimes Against International Humanitarian Law, Genocide, and other Crimes Against Humanity)

[61] (s 2(1) International Crimes Act 270 of 18 June 2003)

[62] Part V of the Rome Statute (arts 53-61).

Kenyan International Crimes Act states that the accused's presence in Kenya subsequent to the allegations is required so that he or she may be "*tried and punished*" in Kenya. Similarly, art. 15 of the Burkinian legislation states that presence is required to make "*national courts competent to hear*" the international crimes committed abroad,[63] rather than to give the investigatory or prosecuting authority jurisdiction over such crimes. While the Kenyan provision seems to require the presence only at the trial stage, the Burkinian provision, like the SA ICC Act, appears to require the accused's presence as soon as there is court involvement.

60. All of these provisions indicate that the presence requirement is most naturally interpreted to apply to stages of criminal proceedings more advanced than the mere initiation of an investigation. This approach is supported by the 2005 Resolution of the Institut de Droit International, which states that the accused's presence is required to exercise universal jurisdiction "*apart from acts of investigation and requests for extradition*", thus allowing investigations *in absentia* but requiring the accused's presence before the trial itself, likely at the time that judicial processes take place.[64]

61. Denmark is one of the only States that holds a universal jurisdiction–based investigation cannot take place without the accused being located in its territory. This is set out not in the relevant legislation,[65] but instead in the case

[63] The original French reads: "les jurisdictions burkinabè sont compétentes pour connaitre des crimes".

[64] (see Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', (2006) 4 Journal of International Criminal Justice 561, at p 576; Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2001) 10 Chinese Journal of International Law 503, at p 528-529).

[65] (s 8(5) Penal Code (Straffeloven) 1930)

law authorizing such investigations.[66] According to interviews conducted by Human Rights Watch with Danish officials, the voluntary presence of the accused is required both at the time of the initiation of the investigation and throughout the investigatory period; if the suspect leaves Danish territory, the investigation will be suspended. As we explain below, this position is practically unworkable and principally unnecessary.

62. In addition to the national legislation and international instruments examined above, recent municipal court decisions have authorized investigations *in absentia*, without protest from the State of nationality of those convicted. For instance, in the landmark *Guatemala Genocide* case, the Spanish Constitutional Court held that the presence of the accused was not required to initiate a universal jurisdiction investigation, applying the relevant provision of the Spanish Organic Law.[67] Guatemala did not protest that this was contrary to international law.[68]

63. Given the limited amount of State practice concerning this issue, and the absence of a treaty on universal jurisdiction, the international practice is insufficient to be determinative of a rule of customary international law prescribing when the accused's presence is required to exercise universal jurisdiction over international crimes. Therefore, there is at this point no clear rule of customary international law that can be said to be automatically a part

[66] (see Human Rights Watch, 'Universal Jurisdiction in Europe: The State of the Art' June 2006 at 46, available at http://www.hrw.org/reports/2006/06/27/universal-jurisdiction-europe, accessed on 23 August 2013, hereinafter 'HRW report').

[67] (Constitutional Court, Second Chamber, STC 237/2005, September 26, 2005).

[68] It should be noted that Spain has recently abrogated its universal jurisdiction. However, that does not negate the value of the Spanish practice pre-abrogation as demonstrating the legality of its actions under customary international law.

of South African domestic law under s 232 of the Constitution. Nonetheless, the bulk of the international practice demonstrates a clear trend towards allowing investigations of universal jurisdiction-based criminal proceedings *in absentia*.

64. When the words of s 4(3) SA ICC Act are interpreted in light of this international practice – as is required by s 1 SA ICC Act, and s 233 of the Constitution – they should be read to allow investigations *in absentia* of genocide, crimes against humanity, and war crimes, but require the accused's presence at more advanced stages of criminal proceedings, when formal criminal charges are instituted. This is a modest modification of the interpretation of s 4(3) put adopted by the High Court and the Supreme Court of Appeal.

Underlying principle

65. That interpretation also satisfactorily resolves the tension between two underlying principles: the prevention of impunity, and the rights of the accused.

66. While the Rome Statute does not contain provisions expressly governing the exercise of universal jurisdiction by domestic courts in general, nor concerning the specific issue of the requirement of the presence of the accused, the aims of the Statute, as expressed in the Preamble, are relevant. The Preamble expresses the determination of the Member States to end impunity for

international crimes and states that national prosecution and other national measures are essential to this aim.[69]

67. This is reflected in the Preamble of the SA ICC Act, which emphasizes South Africa's commitment to fighting impunity for international crimes through domestic prosecutions in South African courts, as well as cooperation with the ICC. Furthermore, s 3(d) SA ICC Act states that one of the objects of the Act is "*to enable, as far as possible… the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances*". This goal of fighting impunity through domestic prosecution encourages a generous interpretation of South Africa's universal jurisdiction over international crimes in s 4(3) SA ICC Act.[70]

68. However, this generally-phrased goal must also be considered alongside the consequences of an unrestricted exercise of universal jurisdiction *in absentia*, particularly the negative impact on the defendant's right to a fair trial if his or her presence at judicial proceedings is not guaranteed. Interestingly, neither the High Court nor the SCA judgments consider the impact of their interpretation of the jurisdictional provisions of the SA ICC Act on the

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[69] It reads, in relevant part:

"***Affirming*** *that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,*

Determined *to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,*

Recalling *that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*".

[70] SCA Judgment at para 66.

defendant's fair trial rights. Article 14(3)(d) of the International Covenant on Civil and Political Rights of 1966 ("**ICCPR**"), to which South Africa is a party, specifically protects the accused's right to be present at his or her criminal trial.[71] This right is recognised, in relation to proceedings before the ICC, in art. 63(1) of the Rome Statute.[72] Section 35(3)(e) of the Constitution guarantees the right of all accused "*to be present when being tried*".

69. Allowing universal jurisdiction-based investigations *in absentia*, but requiring the accused's presence from the time of any judicial proceedings, strikes an appropriate balance between the goal of combating impunity and the rights of the defendant and foreign States.

Focusing Investigation

70. In this section, we consider whether there are any principles that SAPS is entitled to use – under international or domestic law – to determine when it will investigate international crimes committed outside of its borders. First, we set out the general position under international law. Second, we explain content and role of the concept of subsidiarity. Third, we consider the relevance of the likely presence of the accused. Fourth, we describe South Africa's domestic obligations in this regard. And fifth, we apply those principles to the facts of this matter.

[71] It reads, in relevant part: "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:* (d) *To be tried in his presence*".

[72] It reads: "*The accused shall be present during the trial.*"

General Principles

71. As the SCA points out, the parties accept, and numerous academic authorities confirm,[73] South African authorities cannot be expected to investigate every suspected incident of genocide, war crimes or crimes against humanity committed around the world, or even all suspected international crimes committed in Africa. Investigations of international crimes require large financial, investigatory, and prosecutorial resources, usually involve complex factual scenarios as well as high numbers of victims and perpetrators, and often require travel to and cooperation of foreign States to enable evidence-gathering in the location where the crimes were committed. In addition, translators and political and military experts may well be required. The International Criminal Court, for instance, has completed two prosecutions in its first ten years of existence, and operates on an annual budget in excess of $140 million. It was reported that the UK's first successful universal jurisdiction prosecution, in the 2005 *Zardad* case, cost approximately £3 million.[74]

72. But do either international law or domestic law establish any principles that must guide a state in determining which universal jurisdiction crimes to investigate, and which crimes it can legitimately leave for other states to pursue?

[73] For a comparative survey, see M Langer 'The Diplomacy of Universal Jurisdiction: The political branches and the transnational prosecution of international crimes' (2011) 105 *American Journal of International Law* 1-49.

[74] HRW Report at 15.

73. There is a debate in international law about whether there are any principles or rules that restrict the exercise of universal jurisdiction. Some authors, and some states, contend that the exercise of adjudicative jurisdiction for universal jurisdiction crimes is unlimited under international law. States can legitimately investigate any universal jurisdiction crime, no matter the particular circumstances of the case.

74. Other authors and states contend that there are two primary considerations that states should properly consider in determining which universal jurisdiction crimes states may and should investigate: subsidiarity and likely presence. Few authors suggest that these are exclusionary rules; that is, their absence does not *prohibit* a state from exercising universal jurisdiction. They are better described as organizing principles that states should consider in order to ensure the most efficient use of resources in combatting universal jurisdiction crimes, and avoiding multiple, overlapping investigations and prosecutions.

75. The Experts submit that there are no rules of international law that limit the right of states to investigate international crimes subject to universal jurisdiction. However, given that subsidiarity and likely presence are factors that states are entitled to consider in determining when to investigate, it is up to the individual state to decide when and when not to investigate. It would thus be for an individual state to decide how to weigh those factors in any particular case.

76. The SCA recognised the validity and relevance of these considerations when the Hawks undertake prosecutions of international crimes committed abroad. However, the SCA seems to hold that those considerations can be taken into

account when deciding whether or not to initiate an investigation, though the judgment is somewhat unclear on this point.

77. At one point, Navsa ADP states: "*if there is no prospect of a perpetrator ever being within a country, no purpose would be served by initiating an investigation*".[75] However, at another point, he held that the investigation into the alleged Zimbabwean crimes had to be initiated despite the NDPP's arguments that the accused are not likely to come to South Africa in the future, concluding that "*the investigation should first be initiated*" and that it was "*premature to consider and debate which factors might rightfully be taken into account in relation to instituting any future prosecution*".[76]

78. The SCA's conclusion, therefore, seems to be that considerations of subsidiarity and the likely presence of the accused may justify a decision by SAPS/the NPA not to prosecute, but not a decision to refrain from instituting a full universal jurisdiction-based investigation of international crimes committed extraterritorially. An alternative interpretation of the SCA's judgment – one that tries to read the two apparently contradictory statements together – is that SAPS/NPA must at least engage in a preliminary investigation in order to assess whether a full investigation is warranted. As we argue below, the latter interpretation better accords with SAPS's and the NPA's domestic legal obligations.

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[75] SCA Judgment at para 66. See also ibid at para 68 ("*considerations of comity and subsidiarity will intrude [during the course of any investigation], as of course will anticipated presence of the perpetrators in this country and resource allocation*").

[76] Ibid at para 69.

79. While the international law on this question remains undeveloped, there is support for the idea that subsidiarity and likely presence can legitimately be invoked at both the investigative and prosecutorial stages.

80. Of course, when the state does so, it must also comply with its domestic legal obligations. If a state's legislation or constitution oblige it to investigate or not investigate in particular circumstances, it must comply with that law. The possible existence of subsidiarity and likely presence as factors at international law cannot determine how a state complies with its domestic obligations – although those factors may also be relevant in terms of the proper interpretation of domestic law. This has important consequences in the South African context.

81. In what follows, we consider the content of subsidiarity, likely presence, and South Africa's domestic obligations. We then explain why, in our view, a proper application of those principles requires investigation.

The Principle of Subsidiarity

82. The principle of subsidiarity of universal jurisdiction indicates that, as a matter of policy, South Africa should exercise its universal criminal jurisdiction when there is no state with a closer link to the crime that is able and willing to prosecute. Subsidiarity is traditionally employed as a means to resolve situations where there is a clash of jurisdictions. That is, it is employed to decide which State should exercise jurisdiction when multiple States have jurisdiction over the same factual events constituting an international crime on different jurisdictional bases. Considering that it will be employed should a conflict arise, it is reasonable for states to rely on it to determine when to

initiate investigate. As put in the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case*: "*A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national [S]tate of the prospective accused person the opportunity itself to act upon the charges concerned.*"[77]

83. The place of commission of the crime is generally the best venue for prosecution for both principled and practical reasons. As a matter of principle, the community which is most greatly affected by the crime should have priority to prosecute. It is true that international crimes affect the international community as a whole, and indeed this is a key part of the justification for the existence of universal jurisdiction over these crimes. Nonetheless, the territory in which the crimes were committed, as well as the territory of the State of nationality of the perpetrator and victim, are most directly affected by these atrocities. Their right to come to terms with these crimes through prosecution should therefore be prioritized.

84. Regarding the practicalities, it will almost always be easiest for the State of commission to gather evidence concerning crimes committed in its own territory. A State investigating international crimes committed in its own territory will not encounter the restrictions concerning its enforcement

[77] At para 59. The subsidiarity of universal jurisdiction is also endorsed in art.4(1) of the AU's Draft Model Law on Universal Jurisdiction, which states: 'In exercising [universal] jurisdiction, the Courts hall (sic) accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that the State is willing and able to prosecute'. Article 3(d) of the IDI Resolution, and s 153f paragraph 2(4) of the German CCAIL also incorporate the subsidiarity principle into its definition of universal jurisdiction.

jurisdiction that a foreign State would have to remedy through obtaining the consent and cooperation of the State of commission.[78]

85. The location of the victims is also a relevant consideration on both a principled and practical basis. As a matter of principle, the state where the victims reside will generally owe duties – under both international and domestic law – to the victims to assist in pursuing those who violated their rights. At the level of practicality, the victims will often be one of the best – if not the only – source of evidence about the crimes. The state where they are located has the best access to them and thus a reason to investigate and prosecute a crime that may otherwise go unprosecuted.

86. For these principled and practical reasons, South Africa is entitled, under international law, to give a State with territorial or nationality-based jurisdiction, or a state where the victims of a crime are located, priority to prosecute crimes over which South African jurisdiction is based solely on the universality principle. Similarly, if the victims are present in South Africa, if no other country will prosecute the crime, or if South Africa has some other link to the crime that establishes a principled or practical reason for it to assert jurisdiction, there is no reason, under international law, for it not to do so. Applying universality as a subsidiary form of jurisdiction will mean that South African resources are used on universal criminal jurisdiction cases when it is unlikely the crime would be prosecuted without South African intervention.

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[78] As put by the German Federal Prosecutor in declining to initiate an investigation over allegations of torture in Iraq, 'This hierarchy is justified by the special interest of the State of the perpetrator and victim in criminal prosecution, as well as by the usually greater proximity of these primarily competent jurisdictions to the evidence.' ('Memorandum Re. Criminal Complaint Against Donald Rumsfeld et al.', February 2005, (2006) 45 International Legal Materials 119).

Likely Presence

87. The second principle is a determination of the likely presence of the accused in South African territory after the commission of the crime. In order to focus resources on investigations where there is a good possibility of prosecution, SAPS should consider the likelihood of obtaining custody of the accused, allowing the universal jurisdiction-based trial to go ahead should sufficient evidence be obtained during the investigation.

88. The German approach to universal jurisdiction provides an example of the application of this principle. The German CCAIL establishes an obligation to investigate and prosecute genocide, war crimes, and crimes against humanity that applies wherever the crime was committed and whatever the identity of the accused (i.e., mandatory universal jurisdiction). However, s 1 of the CCAIL and paragraph 153f of the German Criminal Procedure Code grants the prosecutor the discretion not to institute an investigation if the accused is not present and is not likely to be present in German territory in the future.[79]

89. Importantly, the "*likely presence*" test includes the possibility of obtaining custody of the accused via extradition. This would require an assessment of the extradition treaties that South Africa has entered into with the state where the suspect is currently residing.

90. The final issue is: how likely must the presence be? This is a matter of degree, not an absolute. If a suspect's presence is extremely likely – because he has confirmed an official visit – then it may be necessary to investigate

[79] See, e.g., Rumsfeld decision noted above. Similarly, the United Kingdom requires the presence or anticipated presence of the suspect in order to issue an arrest warrant or to lay criminal charges in cases concerning extra-territorial international crimes (see Workman J in Application for Arrest Warrant Against General Almog, Bow St. Mag. Ct. 10 September 2005)

even if other factors point away from investigation. Similarly, if presence is merely possible – he has previously visited the country and has some connections here – an investigation would still be justified if there is strong evidence and some connection.

Domestic Law

91. International law is unclear on the question of when states should investigate international crimes *in absentia*. Does domestic law provide a different answer?

92. The Respondents argue, rightly, that under domestic law SAPS and the NPA are required to investigate all crimes, including international crimes. The Experts endorse those submissions. However, they add two additional issues.

93. First, the investigation of international crimes – like domestic crimes – affects the constitutional rights of victims, particularly the rights to life, freedom and security of the person and dignity.[80] It does so in two ways. Where, as here, the victims of the crime are in South Africa, the state owes a duty to them to pursue the perpetrators of a crime, either by investigating it themselves or by ensuring another state or international body does so.

94. The state also has a duty to "*respect, protect, promote and fulfil*" those rights. It must always act in a way that furthers the advancement of those rights, both within South Africa and abroad. That duty is not limited to South African territory alone; the state has a duty to promote the rights in the Bill of Rights in

[80] Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC); Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)

the global sphere as well. Put differently, whenever the state acts, it must do so in a way that promotes and fulfils constitutional rights; that will almost always be better achieved by ensuring that allegations that international crimes have been committed are investigated.

95. In *Glenister* this Court held that courts are entitled to ensure that the steps organs of state take to meet their s 7(2) obligations are "*reasonable and effective*".[81] A court can legitimately require that any decision not to investigate, or any policy about how those decisions should be taken, meets that goal.

96. Second, as the Respondents again note, all organs of state must act rationally. That includes a requirement that the process that they follow is rational.[82] While SAPS and the NPA are entitled not to pursue a full-blown investigation into allegations of an international crime in some circumstances, they must act rationally in reaching that conclusion.

97. In order to rationally evaluate subsidiarity and likely presence, SAPS or the NPA must engage in a preliminary investigation into the relevant factors. It must determine which crimes have been alleged and which rules of jurisdiction apply. It must determine what other states have a link to the crime and inquire whether they intend to investigate or prosecute the crime, and whether they require assistance. It must consider whether it has access to relevant evidence that the other state would not be able to access – such as the victims of the crime, or relevant documents. It must consider whether any of the suspects have previously visited South Africa and whether there is any reason to believe they would visit again in the future. Only after it has done all

[81] Glenister .

[82] See the authorities referred to in *Booysen* above.

that can it make a rational decision whether to investigate the merits of the allegations.

Investigation on the facts

98. Given the above discussion – and assuming that subsidiarity and likely presence are legitimate issues to consider – was SAPS justified in refusing to investigate the Respondent's allegations?

99. Zimbabwe has territorial and nationality-based jurisdiction over the allegations before us, while South Africa has universality-based jurisdiction. However, South Africa has two clear links to the crime: the victims are here and we share a relatively porous border. Nonetheless, according to the subsidiarity principle, South Africa should first have made diplomatic enquiries with the Zimbabwean authorities about their intention to prosecute these crimes. If Zimbabwe was not investigating, SAPS and the NPA should have considered the likely presence of the suspects; no other state would have a better claim to investigate or prosecute the crime. If Zimbabwe was investigating, South Africa should have offered its assistance, considering that many of the victims are in South Africa. However, it appears to us that neither SAPS nor the NPA took this step before they decided not to investigate. It seems to be common cause that Zimbabwe was not investigating the crime and would not co-operate, so a formal request was unnecessary. In those circumstances, Zimbabwe's closer connection to the crime is irrelevant.

100. Given the proximity between South Africa and Zimbabwe, the fact that some of the suspects have previously been in South Africa, and the frequent travel to South Africa by Zimbabwean government officials, there is clearly some

prospect that some of the suspects will visit South Africa in the future. While their future presence is not certain, it is likely.

101. Accordingly, under international law there was no reason for SAPS and the NPA not to investigate. Similarly, under domestic law, the decision not to investigate was irrational and unreasonable. It was irrational because no proper preliminary investigation was conducted to determine whether further investigation was appropriate. It was unreasonable because (assuming as all the parties appear to that Zimbabwe would not investigate) no state had a closer link to the crime, nor a better opportunity to investigate. SAPS would also be failing in its obligations to the victims within its borders.

102. Accordingly, the High Court and the SCA were correct to conclude that the decision not to investigate should be reviewed and that an investigation should be conducted.

VII CAT AND THE TORTURE ACT

103. In this section, we address three issues related to the CAT and the Torture Act:

103.1. State practice under CAT that supports the position described in the previous section;

103.2. The reasons why this Court can and should consider the Torture Act; and

103.3. Why the Torture Act supports the Respondents' interpretation of the ICC Act.

CAT

104. CAT creates a clear obligation to prosecute or extradite any suspected torturer who is present within a state.[83] The fact that the obligation applies only when suspects are in the State territory, does not exclude pre-presence investigations. There is nothing in CAT that prohibits pre-presence investigation. Indeed, a holistic reading of CAT suggests that pre-presence investigations are necessary to achieve the objects of the treaty.

105. The underlying purpose of CAT is to ensure that all those guilty of torture are prosecuted and punished. The primary mechanism to achieve that end is the obligation on each state to prosecute a suspected torturer found in its territory. If every state were a party to CAT and every state met that obligation, there would be no need for investigations or prosecutions by other states. However, because not all states comply with obligations under CAT, investigations and prosecutions become necessary to achieve the purpose of precluding impunity for torturers.

106. Second, as we have already noted, customary international law doesn't prohibit pre-presence investigations in universal jurisdiction cases in general, and torture falls within the category of crimes subject to universal jurisdiction in international law.

107. In addition, the limited state practice under CAT supports the power to investigate *in absentia*. In Argentina, a judge-led investigation into allegations of torture by former Chinese President Jian Zemin and other officials was opened without their presence in the country.[84] This led to the issuance of

[83] CAT Art 7(1).

[84] See T Marsh 'Argentine Court Upholds Human Rights Commitments' (14 May 2013), available at http://www.theepochtimes.com/n3/55000-argentine-court-upholds-human-rights-commitments/.

arrest warrants. Although the decision was later quashed, the final court of appeal re-opened the investigations.

108. Similarly, before Spain abrogated its universal jurisdiction law in 2014, a court issued an international arrest warrant for former Chinese President Jian Zemin on the basis of universal jurisdiction. The charges appeared to have included torture. The arrest warrant followed on from a judge-led investigation that occurred without Zemin's presence in Spain.[85]

The Torture Act is Relevant

109. The Torture Act was only enacted in 2013 – long after the docket was provided to SAPS and the NPA, and after those institutions decided not to investigate the matter further. It is not, therefore, strictly relevant to the question whether the decision not to investigate was lawful. Nonetheless, the Experts submit that the Torture Act is relevant to this Court's decision for four reasons.

110. First, the position under the Torture Act is consistent with the position under the ICC Act. As we explain below, although the wording is different, the effect of s 4(1)(c) of the ICC Act and s 6(1)(c) of the Torture Act are the same. Read together, the two statutes demonstrate a uniform position adopted by the legislature with regard to the investigation and prosecution of international crimes.

[85] Associated Foreign Press 'China anger over Spanish arrest warrant for Jiang Zemin' (11 February 2014) available at http://www.news.net/article/880989/china-anger-over-spanish-arrest-warrant-for-jiang-zemin/?

111. Second, government should be responsive to litigation. If the law changes during the appeal process in a way that requires an organ of state to alter its stance, it should do so.[86] The Torture Act should have caused SAPS to alter its stance. To the extent that there was any doubt about the meaning of the ICC Act, the Torture Act significantly reduces (if not completely eliminates) that doubt.

112. Third, one of the issues before this Court is the nature of the relief it should order. It is important for the Court to be aware that the legal landscape in which a decision will be taken now is different from the landscape when the decision was originally taken. In order for this Court to decide whether to allow SAPS to take a fresh decision (as SAPS contends) or mandate SAPS to investigate (as the SCA did and SALC/ZEF request), it should know what the law is now, as well as what it was when the decision not to investigate was originally taken.

113. Fourth, the Torture Act expands SAPS' and the NPA's powers by increasing South Africa's prescriptive jurisdiction. Torture only constitutes a crime under the ICC Act if it is part of a widespread or systematic attack against a civilian population amounting to a crime against humanity. Under the Torture Act, individual acts of torture as well as attempting, inciting, instigating, commanding torture, participating in or conspiring in torture, are all criminal offences. It may well be that some of the crimes alleged in the Respondents'

[86] See *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) at para 163 (This Court applauded the City of Johannesburg for amending its policy in response to litigation. SAPS should similarly have amended its approach to this application in light of the enactment of the Torture Act.)

docket would be better investigated and prosecuted under the Torture Act than the ICC Act.

114. Fifth, South African courts should interpret the jurisdictional provisions in the Torture Act compatibly as with ICC Act to make a sensible holistic approach to prosecution of international crimes in SA. It is particularly important to interpret the jurisdictional provisions of the ICC and the Torture Act in unison because of the potential overlap between the crime of torture and other international crimes, particularly crimes against humanity and genocide.[87]

The Torture Act

115. The preamble to the Torture Act records South Africa's commitment to fighting torture throughout the world.[88] The objects of the Act, recorded in s 2, similarly

[87] Acts of torture constitute a cumulative legal element of the commission of crimes against humanity, as defined in the Rome Statute of the ICC and the SA ICC Act, when carried out in the context of a widespread or systematic attack against a civilian population. Similarly, the infliction of serious bodily or mental harm on an individual, which is clearly a possible consequence of acts of torture, constitute genocide when committed with the intention to destroy, in whole or in part, an ethnic, national, racial, or religious group, as such. It can be seen, therefore, that suspected acts of torture could form the basis of a prosecution for the crime of torture per se, as well as for crimes against humanity or genocide, depending on the surrounding circumstances in which the acts of torture were committed.

[88] It reads, in relevant part:

"*SINCE section 12 (1) (d) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way;*

AND MINDFUL that the Republic of South Africa-

* *has a shameful history of gross human rights abuses, including the torture of many of its citizens and inhabitants;*

* *has, since 1994, become an integral and accepted member of the community of nations;*

* *is committed to the preventing and combating of torture of persons, among others, by bringing persons who carry out acts of torture to justice as required by international law;*

demonstrate an intention to take all steps to combat torture in and out of South Africa. The section reads:

"*(1) The objects of this Act are to-*

(a) give effect to the Republic's obligations concerning torture in terms of the Convention, in particular-

(i) the recognition that the equal and inalienable rights of all persons are the foundation of freedom, dignity, justice and peace in the world;

(ii) the promotion of universal respect for human rights and the protection of human dignity;

(iii) that no one shall be subjected to acts of torture;

(b) provide for the prosecution of persons who commit offences referred to in this Act and for appropriate penalties;

(c) provide for measures aimed at the prevention and combating of torture; and

(d) provide for the training of persons, who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, on the prohibition and the combating of torture.

(2) When interpreting this Act, the court must promote the values of Chapter 2 of the Constitution and the achievement of the objects referred to in subsection (1)."

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* *is committed to carrying out its obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*"

116. The section on jurisdiction must be interpreted against the background of this clear commitment to global fight against torture, wherever it occurs, and to the promotion and advancement of human rights.

117. The relevant provision is s 6(1)(c), which reads:

> "*(1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence under section 4 (1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the accused person-*
>
> *…*
>
> *(c) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention*"

118. The provisions of the Torture Act relating to jurisdiction are worded differently to the ICC Act but have the same effect. The key purpose is to afford jurisdiction to South African courts. The provision is, like s 4(1)(c), necessary only to permit a court to become involved in the prosecution of the suspect. It is not necessary for the investigation of the suspect which should be governed by the same regime described above.

119. There is an additional reason to interpret s 6(1)(c) of the Torture Act consistently with s 4(1)(c) of the ICC Act – the need for a consistent approach between overlapping statutes. This overlap is immediate apparent in this case, the very first case brought under the ICC Act. This case concerns allegations of torture committed by Zimbabwean government officials that the

Respondents claim were sufficiently widespread to constitute crimes against humanity. If this Court upholds the SCA's order and SAPS and the NPA initiates a formal investigation into these allegations, it will now presumably have to elect whether to proceed under the Torture Bill or the SA ICC Act.

120. If the two pieces of legislation are interpreted to have different conditions for exercise of jurisdiction, SAPS and the NPA must make this decision not only on the basis of the most appropriate legal characterisation of these allegations, but also by considering the impact that a stricter presence requirement of the Torture Bill might have on the NPA's legal authority to initiate an investigation, as well as the possibility of bringing the case to trial. Cases such as this illustrate the problems inherent in creating distinct jurisdictional regimes for international crimes that, by definition, will frequently be committed simultaneously.

121. It will often be the case that prosecutors will only be able to determine whether the allegations are best characterised as torture, crimes against humanity, or genocide after an investigation is initiated to establish the circumstances in which the crimes were committed. It therefore seems nonsensical to establish a different jurisdictional scope for torture than other international crimes over which South Africa asserts universal jurisdiction, when this is not required by, and in fact runs counter to, South Africa's international obligations. Again, this will simply add unnecessary confusion and difficulty to the South African regime regulating the investigation and prosecution of international crimes committed abroad.

IX CONCLUSION

122. In conclusion, the Experts support the relief sought by the Respondents. The decision not to investigate is unsustainable as a matter of both international and domestic law. Far from preventing an investigation, international law – read with South Africa's domestic statutes and case law – supports a decision by SAPS to investigate.

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12 May 2014