ZIMBABWE TORTURE CASE

Southern Africa Litigation Centre and Another

V

The National Director for Public Prosecutions and Others

Overview

On 8 May 2012 Judge Hans Fabricius of the North Gauteng High Court in Pretoria ruled that the South African National Prosecuting Authority (NPA), the Priority Crimes Litigation Unit (PCLU) and the South Africa Police Services (SAPS) acted unlawfully and unconstitutionally when they refused to initiate an investigation into acts of systematic torture, a crime against humanity, committed in Zimbabwe in 2007.

The judgment, the first to deal with South Africa's domestic International Criminal Court Act, provides substantive and practical content to South Africa's Rome Statute obligations, obligations which the court found were ignored by South Africa's prosecuting and investigating authorities in their initial refusal to investigate. The decision not only offers prospects of justice for those tortured in Zimbabwe but sends out a clear message that South Africa must and will investigate and prosecute perpetrators of international crimes regardless of where they are committed or by whom.

Background

This case has its genesis in a detailed dossier submitted by SALC to the PCLU, a specialist unit within the NPA responsible for the investigation and prosecution of international crimes. SALC requested the authorities to investigate these acts pursuant to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act).

The primary events, which the dossier documents, relate to events occurring in March 2007 when Zimbabwean police raided the MDC's headquarters, Harvest House, and detained and tortured a large number of individuals. The dossier also identified those responsible which included high ranking police officers and government officials. SALC's dossier demonstrated that the raid on Harvest House and the subsequent acts of torture were not isolated and formed part of a larger campaign of state sanctioned torture sufficient to fall within the ambit of the Rome Statute of the International Criminal Court (Rome Statute) and the ICC Act.

After more than a year the NPA and the SAPS notified SALC, without reasons, that they would not initiate an investigation into the allegations of torture as requested by SALC. SALC was of the view that the NPA, PCLU and SAPS had not dealt with the dossier properly and lawfully, and in accordance with South Africa's obligations in terms of the Rome Statute, incorporated into South African law by way of the ICC Act. SALC and the Zimbabwe Exiles Forum (ZEF), with the assistance of Lawyers for Human Rights, approached the High Court to review and set aside this decision.

In terms of the ICC Act, South African courts and prosecuting authorities have jurisdiction to investigate, try and prosecute crimes against humanity regardless of where they are committed or by whom. SALC submitted the dossier to the NPA, PCLU and SAPS on the basis that the alleged perpetrators regularly visit South Africa for official and personal reasons. In terms of the ICC Act, South Africa's obligation to prosecute perpetrators of international crimes domestically is triggered once an accused enters South Africa after the commission of the crime in question.

A detailed background to this case and the full judgment is available on the SALC website

www.southernafricalitigationcentre.org

What was the Court's Ruling?

Judge Hans Fabricius held that the NPA and the SAPS had not acted in accordance with their obligations under the ICC Act, as well as the NPA Act and the SAPS Act, and set aside the decision taken by the authorities not to initiate an investigation into the alleged torture in Zimbabwe. The Judge, in ordering that the NPA and the SAPS work together in assessing SALC's request to initiate an investigation anew, also set out the relationship between the different units within the NPA and the SAPS tasked with investigating priority crimes and emphasised that the various pieces of legislation require a multi-disciplinary approach to such crimes. Judge Fabricius also outlined what steps must be taken, what considerations must be taken into consideration and identified those that are not relevant.

What is the Significance of this Judgment?

The judgment is significant for a number of reasons:

1. It underlies that South Africa's adherence to its international criminal law obligations is in the public interest.

2. It provides content to South Africa's obligations in relation to international crimes in terms of the Rome Statute and ICC Act;

3. It holds out the strongest prospect yet of Zimbabwean officials having to account for their crimes, given the culture of impunity that prevails in Zimbabwe;

4. It affirms that South Africa will not be a safe haven for perpetrators of international crimes irrespective of the where the crime is committed or the nationality of the perpetrator

What must the PCLU, SAPS and NPA do?

The order handed down by Judge Fabricius held that the decision of the NPA, PCLU not to initiate and investigation was "*unlawful, inconsistent with the Constitution and therefore invalid"*. He ordered that the dossier must be investigated in accordance with South Africa's international obligations. The PCLU, as the entity legally authorised to manage and direct the investigation of crimes contemplated in the ICC Act, must play a role in the investigation and assist the SAPS by providing expertise in relation to international crimes and their investigation. The Directorate of Priority Crimes Investigation (DPCI), a specialised investigative unit within the SAPS, is responsible for the investigation. SALC and ZEF must assist in making the witnesses available for questioning and in doing so the NPA, PCLU and SAPS will assist in securing visas for the witnesses and if necessary allow them to use emergency travel documents. The PCLU is responsible for making requests for mutual legal assistance from Zimbabwe. Upon completion of the investigation the PCLU must recommend to the National Director of Public Prosecutions (NDPP) as to whether a prosecution is warranted. The final decision rests with the NDPP and this decision, and the record of the decision, must be communicated to SALC and ZEF.

The investigation phase should therefore include the following:

1. The appointment of an investigating officer within the DPCI;
2. The opening of a docket;
3. Interviewing the witnesses identified by SALC's dossier;
4. The perpetrators, if they enter South Africa, must be questioned and if necessary arrested;
5. Requests for Zimbabwe's assistance must be made and the investigation must not be allowed to hinge on Zimbabwe's possible refusal;
6. The entire process must be carried out in good faith and with the cooperation of all relevant government departments and units therein.

What if the PCLU, NPA and SAPS do not Comply with the Court's Order

This court's order is mandatory and failure to adhere to it would place the PCLU, NPA and SAPS in contempt of court.

Can the PCLU, NPA and SAPS Appeal this Decision?

Yes. In terms of South African law, the PCLU, NPA and SAPS have 15 days to lodge an appeal. They must therefore make this decision by **29 May 2012**. If appealed, leave to appeal must be granted by Judge Fabricius. The matter will then be heard in all likelihood by the Supreme Court of Appeal although given the constitutional issues involved the NPA and SAPS may choose to appeal directly to the Constitutional Court.

Overview of the Judgment

South Africa's adherence to its international criminal law obligations is in the public interest

The respondents argued that SALC and ZEF did not have sufficient interest in this case to legally challenge the decision by way of review proceedings. Judge Fabricius dismissed this argument, noting that:

> *"The Act, read in the context of its purpose and Rome Statute, seems to require a broad approach to traditional principles of standing. Section 3(d) read with s2 requires the High Courts of South Africa to adjudicate cases brought by persons accused of a crime committed in the Republic, and even beyond its borders in certain circumstances. The relevant international imperative must not be lost sight of, and the Constitutional imperative that obliges South Africa to comply with its relevant international obligations. The complimentarity principle referred to in Article 1 of the statute must also not be lost sight of in this context. This states that the ICC has jurisdiction complementary to national criminal jurisdictions. Section 4(3) of the ICC Act is also relevant, as it goes beyond "normal" jurisdictional requirements. In the context of the purpose of that Act, s3 requires that a prosecution be enabled as far as possible ... It is my view that the Applicants are entitled to act in their own interest in the present context, and also in the public interest in particular. They do not have to be the "holders" of any human rights themselves. They certainly have the right, given their attributes, to request the state, in the present context, to comply with its international obligations on behalf of those who cannot do so, and who are the victims of crimes against humanity."* [para 13]

The Court acknowledged that:

> *"The magnitude of the crisis in Zimbabwe and the failure on the part of Zimbabwean authorities to introduce any ameliorating or reforming measures has required that SALC consider a variety of initiatives in support of human rights and public interest law defenders. SALC was accordantly not barred from bringing an application in its own interest, namely an interest in ensuring investigations and prosecutions of those suspected of having committed crimes against humanity."* [para 13]

In this regard Judge Fabricius found that to deny SALC and ZEF legal standing would -

> *"lead to the untenable situation that it would deny victims of international crimes standing in South African proceedings, and would shield decision-makers, like the Respondents, from accountability when faced with making decision regarding prosecutions of international crimes that had occurred outside South Africa. This would make a mockery both of the universal jurisdiction principle endorsed by Parliament when enacting the ICC Act, as it would render the legislative provisions redundant, as well as the principle of accountable governance to which the Constitution commits South Africa. This could not have been the intention of the legislators or of the Constitution drafters."* [para 13]

The Court concluded:

> *"I agree with the Applicants' argument that a number of groups are affected by the impugned decision nl. The Applicants' rights to have the decision made lawfully and in accordance with constitutional and statutory obligations has been infringed, the victims of the torture who had been denied the opportunity to see justice done, and the general South African public who deserve to be served by a public administration that abides by its national and international obligations. The public clearly has an interest in a challenge to the manner in which public officials discharge their duties under the relevant legislation."*[para 13]

Content to South Africa's obligations in relation to international crimes

The judgment is significant in that it provides content to the country's obligations under this Rome Statute and the ICC Act.

In respect of the NPA the Judge criticised the contention that they did not have any power, in law, to engage in investigations. The Judge explained that the unique nature of international crimes meant that procedures applicable to ordinary, domestic crimes could not be followed, and confirmed that the objects of the ICC Act had to be looked at in determining the role the NPA needed to play when faced with allegations of international crimes.

> *"Having regard to objects of that Act, there could be no doubt that the power incidental to or necessary for the achievement of the ICC Act's purposes includes the power of the PCLU to engage in investigation particularly in the multi-disciplinary manner envisaged under the SAPS Act and the NPA Act. The First Respondent's [the NDPP] contention that the Rome Statute did not provide the Second Respondent [the head of the PCLU] or himself with any power to initiate an investigation was therefore materially flawed. It ignored the special status according to international crimes, and the need for special procedures to be developed and adopted, and it ignored the very clear terms of the SAPS Act that had to be read together with the ICC Act and which, as was said, required multidisciplinary approach … It was therefore contended that in failing to ensure their continued involvement in the matter, the SAPS did not have the specialised guidance of the PCLU, and accordingly the NPA failed to manage and direct the investigation in a multi-disciplinary manner as required by law and under their own policy … First Applicant had therefore been perfectly entitled to submit the docket of the office of the Second Respondent, and the First and Second Respondents failure to manage and direct the investigation as required by law was a result of a material error of law, which according to the principle of legality stood to be reviewed and set aside."* [para 25]

The judgment also highlighted inconsistencies and ironies in the SAPS's approach. The Judge referred to statements in the SAPS's court papers where SAPS accepted that "the NGO reports relating to the situation in Zimbabwe in March 2007 and certain of the witness statements obtained by the First Applicant create a reasonable suspicion that crimes against humanity were committed in Zimbabwe during that period," and contrasted this with the SAPS' contention that the difficulties in accessing evidence within Zimbabwe meant that an investigation should not be undertaken. This aspect of the judgment is particularly enlightening as the Judge clarified that the threshold required by the ICC Act in initiating an investigation is whether there exists a ***reasonable basis*** for the initiation of an investigation. The Judge held that, on the SAPS's own version, it was clear that there was such a basis.

> *"The question ought to have been: Is there enough information to warrant an investigation in terms of the applicable law? The answer has to be, yes, and First Respondents have conceded that. Respondents had therefore laboured under an error of law in that context."* [para 28]

The judgment also clearly establishes that political considerations such as the diplomatic consequences of an investigation and the possibility of non-cooperation by the other state should not be taken into account when determining whether to initiate an investigation. The Judge confirms that taking these considerations into account at this stage would in fact render the purpose of the ICC Act nugatory, as a state under suspicion would hardly voluntarily offer support and cooperation to an investigation.

> *"The attitude of Respondents in this context was based on the pre-conceived refusal to do so [to investigate the dossier], and if Brigadier Marion's reasoning was correct, no prosecution could ever succeed or even be instituted, let alone investigated if the relevant government was complicit in the commission of such crimes, as it would obviously protect itself and the particular perpetrators. First and Fourth Respondents' view was therefore affected by irrelevant political considerations having regard to their duties. Their attitude trivialised the evidence. Diplomatic considerations were also not the business of Fourth Respondent, to put it bluntly."* [para 28]

In this regard the Judge criticised all the respondents for taking political considerations into account in a matter in which they were expected to uphold their independence.

> *"In the present context it was the duty of the First, Second and Fourth Respondents to investigate the docket. It contained sufficient information for purposes of such an investigation, in the context of the Rome Statute. At that stage, it was not their obligation to take political or policy considerations into account. These change in any event from time to time, whilst a proper jurisprudence remains a concrete basis for a stable society living under the twinkling but stern eyes of the Rule of Law. Any such considerations would affectively destroy the efficacy of the ICC Act. Respondents were required to act independently."* [para 29]

The judgment paves the way for some form of justice for victims of torture in Zimbabwe

In light of the current political situation in Zimbabwe there is little chance of perpetrators of crimes against humanity being brought before Zimbabwean courts to account for their actions. In this regard Judge Fabricius acknowledged that:

> *"The complainants of the torture have had their rights to dignity and freedom and security of the person violated in the most egregious manner; and they in an extremely vulnerable position because of the lack of avenues in Zimbabwe through which to challenge their rights infringements, and to ensure future protection."* [para 13]

Without investigations and prosecutions in foreign countries victims of these grave crimes will never achieve justice. Although this judgment does not mandate the prosecution of the perpetrators, it does create such possibility, and provides hope for the victims that their torturers will be held accountable for their actions. The judgment will put the perpetrators of the international crimes listed in SALC's dossier who have thus far enjoyed absolute impunity, on notice they who face the very real prospect of an investigation should they travel to South Africa.

The judgment will erode the perception that South Africa is a safe-haven for criminals of the worst kind

This judgment will demonstrate to perpetrators of international crimes in Zimbabwe, the rest of Africa and the world that South Africa is committed to upholding its obligations under the Rome Statute and the ICC Act and will take seriously allegations of serious crimes. The real possibility of investigation and prosecution should dissuade those suspected of committing the worst kind of crimes from visiting the country, and will make the world just that bit smaller for international criminals.

Q and A with SALC's Executive Director, Nicole Fritz

Nicole Fritz spoke to the Mail and Guardian newspaper. Here's what she had to say.

What's the mood at SALC after this victory?

We're elated at the verdict. We've been working on this case for over four years and so there is tremendous satisfaction in having our efforts vindicated by the judgment on Tuesday and in the ensuing recognition of our efforts. It's also tremendously poignant and sad to be receiving a stream of phone calls and emails from Zimbabweans saying that the judgment has given them hope and asking for help in securing justice in their individual cases, indicating just how far off genuine accountability efforts remain in Zimbabwe.

Do you think the ruling will be appealed or hindered?

The police have indicated that they're studying the judgment with a view to appealing it. But I'm not privy to any of the respondents' intentions, other than what they've said publicly.

I don't know that the ruling will be hindered. It wouldn't be worth our while taking up this case if we believed that we were only going to be met with bad faith on the part of the South African authorities. That said, arguments before the court by the prosecuting authorities and the police demonstrated that they fundamentally failed to understand the nature of their obligations in respect of the International Criminal Court and under South Africa's own ICC Act. The judgment provides clarification and direction and so hopefully there will no further failures to understand.

What are the short-term implications of this?

If it isn't appealed, and the order thus suspended, in the short term we should see a docket being opened by the authorities, a senior investigating officer assigned, serious consideration being given the material we've already placed before the authorities relating to widespread and systematic torture, an attempt to interview witnesses – the direct victims and those who can corroborate their testimony.

I think that any Zimbabwean official, who believes he might be implicated in the commission of systematic torture and is likely to be investigated, is well advised to steer clear of South Africa. The judgment has implications not only for Zimbabweans accused of the commission of international crimes but others who may have committed crimes against humanity, or war crimes elsewhere – like the Occupied Territories, Iraq, Libya. In making clear South Africa's obligations under the ICC Act, the judgment requires that authorities treat seriously well-substantiated allegations of international crimes where the perpetrators are likely to travel into South Africa. War criminals are put on warning. They shouldn't travel here.

What would SALC like to see happen to the authorities allegedly involved in the torture?

Because we at SALC believe that justice is best done and best serves those who have suffered when it is offered closest to home, ideally we'd like to see genuine accountability efforts happen in Zimbabwe. Whatever Zimbabwean Justice Minister Patrick Chinamasa is saying about this judgment and that it violates Zimbabwean sovereignty, it doesn't reach into Zimbabwe. It only upholds South Africa's rights and interests in ensuring that those accused of the most egregious crimes and who choose to spend time in our country meet justice. Zimbabweans are free to determine for themselves within their country how they wish to address past international crimes. Even if the process they decide upon is far from perfect in ensuring justice – as with SA's Truth and Reconciliation Commission – that process may well warrant respect and deference from the international community.

But that is not the case now. There are no accountability measures in Zimbabwe because those primarily responsible for the commission of international crimes are the very persons in control of the criminal justice process. As only one example, our dossier illustrates how the police-force – the enforcement arm of the justice process – inflicts crimes against humanity in the form of systematic torture. Until Zimbabwe offers the prospect of genuine accountability domestically, the next best alternative is justice before South African courts.

How would it work – can the NPA/police go into Zimbabwe to investigate – what would happen to their findings etc?

South African authorities cannot go into Zimbabwe and conduct investigations without the authorization of Zimbabwe and so it's unlikely that investigations will be conducted there. But much of the evidence can be weighed and tested here in South Africa. For example, the many witnesses can be interviewed – direct victims, medical practitioners, family and friends – and their testimony used to determine corroboration.

And what does this precedent mean in the wider context?

South Africa started off as a leader of the international criminal justice project, leading efforts to secure a strong, independent International Criminal Court and fending off the attempts by other states which wanted a much more politicised, beholden body. It enacted legislation – the ICC Act – that is exemplary in its allocation of competences and powers to ensure South Africa carried out its obligations under the ICC. This precedent reinstates South Africa as a world leader on international criminal justice matters. It also puts all international criminals – not just Zimbabweans – on notice that South Africa should not be their preferred destination.

Would SA have to choose which international cases to investigate?

As with domestic cases, investigating and prosecuting authorities will have to be satisfied that reasonable grounds exist for initiating an investigation. Because we're talking about the gravest, most large-scale crimes they'll need to be presented with credible and meaningful documentation.

What would the limit be for these investigations?

I don't know that there is reason to fear that our criminal justice system will be flooded with cases of this kind. South Africa can only prosecute if persons responsible for international crimes are present on its territory after the commission of these crimes. One single serious investigation and prosecution of persons under SA's ICC Act – for crimes against humanity, war crimes or genocide – is the best security that other international criminals won't be coming into the country.

How would people be tried – how does the jurisdiction work?

They would be tried by ordinary South African courts applying the ICC Act, in exactly the same way they apply our domestic criminal law.

The 'Landmark' Zimbabwe Torture Docket Decision

*Christopher Gevers**

On 8 May 2012 the High Court in Pretoria handed down a landmark decision in the case of *South African Litigation Centre and Others v The National Director of Public Prosecutions and Others* that has indelibly altered the international criminal justice landscape in South Africa (and possibly beyond). My colleague and co-blogger, Max du Plessis, was one of the advocates involved in bringing the case on behalf of the applicants (the Southern Africa Litigation Centre and Zimbabwe Exiles Forum) – while we share this blog, he has refrained from commenting on the case and these comments are my own, flowing from my position both as an academic international lawyer and as a legal adviser to the applicants during the hearing on matters of international law.

In a wide-ranging, yet at times tersely-worded, 95-page judgment the Court found that the decision taken by the South African National Prosecuting Authority and Police (the Respondents) "refusing and/or failing to accede to the First Applicant's request that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act), into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe" was unlawful, inconsistent with the Constitution and therefore invalid. In light of "South Africa's international law obligations as recognised by the Constitution", the Court ordered the Police's 'Priority Crimes Investigation Unit' (in cooperation with the National Prosecuting Authority) "in so far as it is practicable and lawful, and with regard to the domestic laws of the Republic of South African and the principles of international law, to do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket". Having done so, the Prosecuting Authority must then decide whether or not to institute a prosecution *de novo*.

As expected, a significant portion of the judgment was directed at the (for want of a better word) 'domestic' aspects of the case, such as the Applicants' standing to bring the review application and the standard of review or review to be applied. The Court made short work of the Respondents' objections in this regard. Notably, in respect of standing, while the Applicants were on fairly solid ground regarding their right to bring the case under South African law generally, the specific nature of this case (and its importance) was not lost on the Court, which noted:

"*I agree… with the Applicants' contentions that the decisive factor in the present context is the ICC Act. In the present instance the quality of* locus standi *has to be decided, not by mere reference to prior decisions of the Constitutional Court and the Supreme Court of Appeal, which both adopt a broad approach in constitutional litigation, but more importantly in the context of the Rome Statute and the domestic Act of 2002, the ICC Act. The former emphasises in its preamble that it is the duty of every state to exercise its jurisdiction over those responsible for intentional crimes. In the preamble to the ICC Act, Parliament committed South Africa, as a member of the international community, to bringing persons who commit such crimes to justice under South African law where possible. The Act, read in the context of its purpose and Rome Statute, seems to require a broad approach to traditional principles of standing. Section 3(d) read with s2 requires the High Courts of South Africa to adjudicate cases brought by persons accused of a crime committed in the Republic, and even beyond its borders in certain circumstances. The relevant international imperative must not be lost sight of, and the Constitutional imperative that obliges South Africa to comply with its relevant international obligations. The complimentarity principle referred to in Article 1 of the statute must also not be lost sight of in this context. This states that the ICC has jurisdiction complementary to national criminal jurisdictions. Section 4(3) of the ICC Act is also relevant, as it goes beyond "normal" jurisdictional requirements. In the context of the purpose of that Act, s3 requires that a prosecution be enabled as far as possible. Seen holistically therefore, all the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute, crimes against humanity within the ambit of the provisions of s4(3) of the ICC Act, and it is in the public interest that the State does so. In the context of that Act it is not decisive that the crimes contemplated by that act were not committed in South Africa. Section 3 of the South African statute makes this abundantly clear in my view, and I therefore hold that Applicants have* locus standi *in the litigation before me. It is my view that the Applicants are entitled to act in their own interest in the present context, and also in the public interest in particular. They do not have to be the "holders" of any human rights themselves. They certainly have the right, given their attributes, to request the state, in the present context, to comply with its international obligations on behalf of those who cannot do so, and who are the victims of crimes against humanity.*"

Immediately, the Court's finding that the ICC Act demands a broader notion of standing will be of consequence to those in the process of utilizing the ICC Act to initiate prosecutions in South African courts (or planning to do so). Beyond this, the recognition of the obligation to investigate and prosecute international crimes under both international and domestic law, and the finding that 'prosecution be enabled *as far as possible',* will have potentially far-reaching consequences for the prosecution of international crimes in South Africa generally.

When it came to what I'd previously identified as the three high-points of the case – sufficiency of evidence, jurisdiction and comity-related concerns – the judgment did not disappoint.

The sufficiency of evidence for the purposes of investigation

The Court agreed with the Applicants' submissions that the Respondents had relied on the incorrect evidential threshold in deciding not to initiate an investigation. Based on the Respondents' contention that the Rome Statute's thresholds should be applied *mutatis mutandis* to a domestic decision, the Court accepted that "the said Respondents had confused different thresholds for different steps that had to be taken in terms of the Statute". According to the Court:

> "*Article 53 of the Rome Statute only required that a reasonable basis existed for the decision whether or not to initiate an investigation. It was common cause in the present proceedings that the standard was met…. There were other standards for an arrest, and the confirmation of charges. The sufficiency of material for prosecution purposes was therefore not the proper threshold that was required, and accordingly, Brigadier Marion, as I have already pointed out, was asked the wrong question and gave the wrong answer. The question ought to have been: Is there enough information to warrant an investigation in terms of the applicable law? The answer has to be, yes, and First Respondents have conceded that [the] Respondents had therefore laboured under an error of law in that context.*"

While the Court's conclusion is correct, unfortunately it itself errs in its explanation (albeit without significant consequences) by stating that there are "other standards for *an arrest"* under the Rome Statute: article 58, like article 53, requires that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" in order for an arrest warrant to be issued. Nevertheless, the salient point here is that the Court has endorsed the position that in order for a domestic investigation to be initiated under the ICC Act in South Africa the correct question is whether there is a 'reasonable basis' to proceed. This is a point the Court repeats later more explicitly (at paragraph 31):

> "*In my view it is clear that when an investigation under the ICC Act is requested, and a reasonable basis exists for doing an investigation, political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act.*"

The 'Gordian knot' of jurisdiction

The issue of jurisdiction, or the absence thereof, formed a large part of the Respondents' 'defence' (in fact it was the sole argument relied on by Counsel for the Police). The fulcrum of the parties' jurisdiction submissions was the proper meaning to the ascribed to section 4(3)(c) of the ICC Act, which states:

"*In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if –*

> *(c) that person, after the commission of the crime, is present in the territory of the Republic"*

The Respondents argued (i) that this provision established a so-called conditional universal jurisdiction regime in terms of which South Africa could not exercise jurisdiction *in any form* over crimes until the accused was present in the Republic, and (ii) the absence of jurisdiction on the part of South African courts vitiated the 'jurisdiction' of the police to investigate the torture docket, the two being co-extensive.

The Applicants responded: (i) Section 4(3)(c) merely conditioned the exercise of *enforcement jurisdiction* by the courts on the presence of the accused while South Africa's *prescriptive jurisdiction* was provided for by section 4(1) of the ICC Act – which states: "Despite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence" – and was not conditional on the presence of the accused: therefore South African courts did have 'jurisdiction' over the offence. (ii) Furthermore, and in any event, the competence of the Police to investigate crime was not territorially limited.

Although the point could have been made more clearly, the Court in substance accepted the Applicants' submission that section 4(3)(c) of the ICC Act relates to the exercise of enforcement jurisdiction.

> *"Mr Marcus SC is in my view correct in submitting that s4 (3) of the ICC Act dealt with the jurisdiction of the court to try someone after an investigation. He submitted that Fourth Respondent's argument was absurd: it would mean that if a suspect was physically present in South Africa then an investigation could continue. If they then left, even for a short period, the jurisdiction would then be lost. If they then re-entered South Africa, an investigation would continue. I agree that this does amount to an absurdity. One does not know what would have occurred if an investigation had been ordered, it was not simply an open and shut case. Section 4 (3) was concerned with a trial. The ICC Act was silent on an investigation, but in my view it is logical that an investigation would have to be held prior to a decision by the First Respondent whether or not to prosecute. I am therefore of the view that Fourth Respondent's argument on the meaning of s4 (3) of the ICC Act cannot be upheld."*

By this passage the Court appears to have put paid to the argument that the universal jurisdiction regime under South Africa's ICC Act is 'conditional'. In doing so it arguably accepted *in substance* the distinction made in the Applicants' papers between prescriptive and enforcement jurisdiction. However, the Court did not expressly invoke the prescriptive versus enforcement jurisdiction distinction. The closest it came was earlier in the judgment, noting:

> "*Chapter 2 of this Act deals with jurisdiction of South African courts in respect of crimes, and makes a crime against humanity a crime under South African domestic law. Section 4(1) has no requirement of presence.*"

However, one might infer that by accepting that the power to investigate crimes committed under the ICC Act is 'universal' proper, the Court must have accepted that South African law exercises prescriptive jurisdiction over such crimes on the same terms. Were that not the case the power of the police would be extraordinary. Further, section 205 of the Constitution states that police have power to 'prevent, combat and investigate crime', therefore, if the court accepts their power to investigate *regardless of the presence of the accused*, it must be taken to have accepted those offences are crimes *regardless of the presence of the accused*.

While this aspect of the case might give pause for further academic analysis, the effect of the ruling from a practical perspective is, for the most part, the same: the South African authorities have a duty, *irrespective of the location of the accused*, to investigate international crimes where section 4(3)(c) is implicated.

Looking forward then, and aside from these academic nuances, the decision confirms the South African police have an extensive power to investigate international crimes the world over, without setting out any mechanism for determining which crimes should be selected (hence the suggestion of the 'anticipated presence' standard by the Applicants). In this regard it's worth mentioning that the effect of this construction of section 4 of the ICC Act is not limited to South Africa - Mauritius recently adopted implementing legislation in respect of the Rome Statute which contains a very similar provision on universal jurisdiction (See section 4(3)(c), *The International Criminal Court Act 27 of 2011*).

Comity-related concerns

As far as the Respondents' submissions regarding the political implications of the proposed investigation and any resultant prosecutions are concerned, the Court was unmoved by this argument. While the Court did not go so far as to rule that such considerations are irrelevant to prosecutions under the ICC Act, it agreed with the Applicants that they are premature at the investigatory phase and, when they are considered, are to be made by a senior official, not an

investigating officer (Noting, "*Diplomatic considerations were … not the business of [the police], to put it bluntly".)* In reaching this conclusion the Court relied heavily on the decision of the House of Lords in *R. (Corner House Research and Another) v Director of The Serious Fraud Office (JUSTICE Intervening)* [2008] UKHL 60, noting:

> *"In that case the Director had discontinued investigating allegations of corruption against a United Kingdom Company. There had been a threat by a foreign state (Saudi-Arabia) to withdraw co-operation on security matters if investigations were continued. If this threat was carried out, public safety and national security would be compromised. It had been made clear to the relevant UK officials, that the relevant threats to national and international security had been grave indeed. The Director had therefore taken the decision to discontinue the investigation with extreme reluctance. The Director had been confronted, as the House of Lords put it, by an ugly and obviously unwelcome threat. He had to decide what, if anything he should do. He did not surrender his discretionary power of decision to any third party, although he did consult the most expert source available to him in the person of the Ambassador, and he did, as he was entitled if not bound to so, consult the Attorney General who, however, properly left the decision to him. The issue in the proceedings before the House of Lords was not whether the decision was right or wrong, but whether the decision was a decision the Director was lawfully entitled to make. The evidence before the House of Lords was clear, no commercial interests caused the Director to discontinue the investigations, but a clear threat to "British lives in British streets" Public safety was therefore the relevant consideration. I am of the view that reference to that decision of the House of Lords is particularly apposite. In the present context it was the duty of the First, Second and Fourth Respondents to investigate the docket. It contained sufficient information for purposes of such an investigation, in the context of the Rome Statute. At that stage, it was not their obligation to take political or policy considerations into account. These change in any event from time to time, whilst a proper jurisprudence remains a concrete basis for a stable society living under the twinkling but stern eyes of the Rule of Law. Any such considerations would affectively destroy the efficacy of the ICC Act. Respondents were required to act independently. In the present context, and in the light of the request for an investigation of the torture docket, they had to appreciate the nature and ambit of their duties, and act accordingly. What the First Respondent would thereafter have decided to do with the docket, if I can put it that way, was not a lawful basis for refusing to do an investigation at that stage either. That is a different topic which may or may not arise in future, and which might or might not have arisen in the past, once the investigation had been completed. It is clear therefore that irrelevant considerations where taken into account at that stage."*

Against this backdrop the Court concluded:

> *"In my view it is clear that when an investigation under the ICC Act is requested, and a reasonable basis exists for doing an investigation, political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act.*

Such considerations may become relevant at a stage when the First Respondent would have to decide whether or not to order a prosecution, but even at that stage the purpose of the ICC Act, and South Africa's commitment thereto, remain relevant considerations that have to be taken into account."

Notably, in respect of the relevance of such decisions later on in proceedings, the Court made the point of stating:

"It must not be forgotten that the ICC Act itself denies explicitly diplomatic immunity to government officials accused of committing ICC Act crimes. (See s4(2)(a)). The recent trial of Taylor, in the International Criminal Court in The Hague, is a case in point."

The incorrect reference to the Charles Taylor Trial (he was tried in the Special Court for Sierra Leone, sitting in The Hague; and not by the ICC) is a small distraction. The important point is that this passage not only casts a shadow over arguments that might be raised at a later date relating to political considerations, it also shows that the Court accepts that the ICC Act does in fact remove immunity *ratione personae*.

Finally, the Court was not impressed with the Respondents' handling of the Torture Docket generally, noting:

"It is my view that in deciding whether it was "possible" to bring the perpetrators of international crimes to justice, the Respondents were required to determine whether or not the information before them was sufficient to initiate an investigation, and as I have said, First Respondent admitted that a reasonable suspicion that crimes against humanity were committed in Zimbabwe during that period, existed. It is also strange to say the least that First Respondent said that he did not take the views of Second Respondent, which at on stage were the same as those of the Applicants, into account. It is clear that First Respondent, on his own affidavit, without a thought or concern for the governing international statute or domestic legislation, abdicated his views to those held by the Fourth Respondent. I need scarcely emphasize that the Constitution, s179 has granted him, in the context of the NPA, independence, which he must exercise impartially without fear or favour it is not for him to blindly follow political views or policies, let alone to anticipate such."

In contrast, the Court praised the efforts of the Applicants in preparing the Torture Docket and defended them against the unfortunate attacks leveled against them by the Respondents, noting:

"*[The] Applicants stated in their written heads of argument that, having regard to [the] Respondents' answering affidavits, there was a well-founded apprehension that they had*

> *not acted in good faith, but had instead adopted a carping, defensive, and evasive position to avoid their duties in law. I do not for purposes of this judgment intend to go into this topic in any great detail, but Applicants' comments in this regard seem to be well justified. For instance, Applicants'* bona fides *were attacked, they were accused of publicity seeking, and almost reprimanded for daring to place an undue burden, which was an obvious waste of time, on them. These attacks herein were in my view unfortunate and unjustified, as they did not address the real crux of the case nl. whether the Respondents' response to the torture docket had been performed with due respect for the enabling law applicable to the functions, and with the respect for the values of the Constitution and South Africa's international law obligations.*"

On this basis the Court ordered the Respondents to pay the costs of the application jointly and severally, including the costs of three counsel, noting:

> "*I must add that I considered the employment of two senior counsel and one junior counsel on behalf of the Applicants as having been a wise and reasonable precaution in the light of the facts and the relevant legislation, and the importance of the matter to the Applicants, the victims and the general public.*"

This is good news for civil society organisations such as the Applicants – who expended vast amounts of time and effort on preparing the torture docket in the first place, and then took the precaution of hiring three of the country's leading constitutional and international law advocates to prepare and argue their case before the High Court. It is, in this respect, a victory for the rule of law, a victory for international criminal justice, and a validation of hard work, tenacity, and a commitment to human rights.

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Universal Jurisdiction Rises from the Global South

Naomi Roht-Arriaza*

JOHANNESBURG – One of the critiques of transnational prosecutions based on universal jurisdiction is that they are a new brand of neo-colonialism, with former colonial powers seeking to bring into court disgraced leaders of their former colonies. It is true that many of the recent transnational cases involve European courts, while the defendants come from Africa or Latin America. But two cases – each from a different hemisphere – show that as universal jurisdiction provisions become a more regular feature of national law, countries of the South can, and do, make use of them in egregious cases of international crimes**.**

South Africa

In a judgment issued Tuesday, South Africa's North Gauteng High Court (Judge H.J. Fabricius) ruled that South African prosecutors and police illegally refused to proceed with an investigation of systematic torture in Zimbabwe. (credit for photo of the Pretoria courthouse)

As IntLawGrrl Diane Marie Amann also discusses in her post below, the case involved allegations, contained in a dossier provided to police and prosecutors by the Southern Africa Litigation Centre and Zimbabwe exiles, that high-ranking officials from Zimbabwean President Robert Mugabe's political party ordered police to storm the offices of the opposition MDC party on March 27, 2007. Over a hundred people were alleged to have been detained and severely tortured, as part of a widespread and systematic campaign against the MDC. Several of the named defendants traveled regularly to South Africa, although none was identified as being present when the case was heard.

South Africa's 2002 Rome Statute of the International Criminal Court Act domesticates the Rome Statute. It orders courts to apply the Act, the Constitution, and also allows them to apply the Rome Statute itself as well as customary international law and comparative law:

- Section 1 incorporates the Rome Statute crimes.
- Section 4(3) provides the following:

> *'In order to secure the jurisdiction of a South African court for purposes of this chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if …*
>
> > *'c. that person, after the commission of the crime, is present in the territory of the Republic; or*
> >
> > *'d. That person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.'*

- Section 5(1) requires the consent of the Director of Public Prosecutions to initiate a prosecution.

The South African authorities refused to open an investigation, alleging that, first, the information they had received from the two NGOs was insufficient, and that, secondly, there was no point investigating because the Zimbabwean authorities were unlikely to cooperate, all the evidence was in Zimbabwe, and moreover opening an investigation would likely chill relations with the Zimbabwean police and create political problems. Finally, the government argued, the Act required presence of the defendants to prosecute, and none of the defendants had been shown to be present.

The court rejected all these arguments:

- It found that there was a clear difference between investigation and prosecution, and that all sides agreed that there was reasonable suspicion of criminal acts within the meaning of the Act: that was enough to trigger an investigation. The political and practical difficulties in proceeding were extraneous to the decision to investigate; in effect, the police were ordered to "see how far you get," including by invoking mutual assistance treaties.
- Moreover, the court found that if the police could not initiate an investigation for crimes committed outside South Africa, the ICC Act would be rendered meaningless. Presence of the defendant was not required in the investigative phase, although it was necessary for trial. The court ordered the police, in collaboration with the prosecutor's Priority Investigation Unit, to investigate the case, although it made clear that the police were not required to bring any witnesses from Zimbabwe and could not guarantee the safety of any who volunteered testimony. At a later stage, the Director of Public Prosecutions was directed to decide if there was enough evidence to move from investigation to prosecution.

The decision will no doubt at least put a crimp in the travel plans of a wide range of Zimbabwean ZANU-PF party and government officials.

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Complementarity in Action: Applying South Africa's ICC Act, National Court Orders South African Prosecutors to Investigate Torture in Zimbabwe

Diane Marie Amann*

By means of a fascinating application of complementarity under the Rome Statute of the International Criminal Court, South African prosecutors must investigate allegations of torture committed in Zimbabwe. So ordered the High Court of South Africa Tuesday, in its judgment in *South African Litigation Centre and Zimbabwe Exiles Forum v. National Director of Public Prosecutions* and other government units.

Complementarity, of course, is the principle that allots jurisdiction over crimes punishable under the 1998 ICC Statute; specifically, genocide, war crimes, and crimes against humanity. (As posted earlier this week, the crime of aggression may one day be added to that list.) The statute's preamble states:

> *"[T]he International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."*

The global community thus looks first to countries to pursue persons suspected of ICC crimes. And Tuesday's ruling requires one national system to do just that.

In his 98-page judgment, Pretoria-based High Court Judge Hans-Joachim Fabricius reversed prosecutors' 2008 rebuff of the request from 2 applicant NGOs for an investigation into "into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe."

Of special note:

The national order for a transnational investigation issued notwithstanding the fact that the ICC itself cannot exercise jurisdiction over acts in Zimbabwe, a state not party to the ICC statute.

As IntLawGrrl Naomi Roht-Arriaza further discusses today in her post from Johannesburg, the applicants sought investigation of an event alleged to have taken place on March 27, 2007, in Harare, Zimbabwe's capital. Paragraph 8 of the judgment states:

> *"Zimbabwean police, under orders from the ruling party, the Zanu-PF, raided the headquarters of the opposition party, the Movement for Democratic Change ("MDC"). Over one hundred people were arrested and taken into custody, amongst them were MDC supporters and officials, as well as persons who worked in near by shops and offices. Individuals affiliated to the MDC were detained for several days, and were continuously and severely tortured ... on the basis of their association with the MDC and their opposition to the ruling party."*

It's further alleged that these acts of torture were "'inflicted by – and at the instigation of and/or consent or acquiescence of public officials" as "part of a widespread and systematic attack on MDC supporters and officials and those opposed to the ruling party, the Zanu-PF."

Authority for the court's order is twofold: South Africa's Constitution and a South African statute, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

Here's the reasoning by which applicants successfully invoked South Africa's ICC Act:

> *"[I]n the light of the collapse of the Rule of Law in Zimbabwe, concern for the safety of the victims, and the unlikely-hood of securing accountability in a Zimbabwean court ... South Africa was legally required to investigate war crimes, crimes against humanity and genocide, regardless of whether they were committed in South Africa or by South African nationals, those responsible could and should be held accountable under South African law designed for this very purpose."*

One hears echo of the "unwilling or unable" requirement of complementarity as set forth in Article 17(a) of the Rome Statute.

The Pretoria court agreed with applicants' reasoning. Referring to respondent prosecutors by assigned numbers, it stated in paragraph 29:

> *"In the present context it was the duty of the First, Second and Fourth Respondents to investigate the docket. It contained sufficient information for purposes of such an investigation, in the context of the Rome Statute. At that stage, it was not their obligation to take political or policy considerations into account. These change in any event from time to time, whilst a proper jurisprudence remains a concrete basis for a stable society living under the twinkling but stern eyes of the Rule of Law. Any such considerations would affectively destroy the efficacy of the ICC Act."*

The court order concluded by instructing various governmental agencies on their obligations to,

> *"In so far as it is practicable and lawful, and with regard to the domestic laws of the Republic of South African and the principles of international law, do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket.*

Will be well worth watching as this deployment of a national system in service of global criminal justice plays out.

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