THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 02/14

In the matter between:

NATIONAL COMMISSIONER, SAPS	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First Respondent
ZIMBABWE EXILES FORUM	Second Respondent
CENTRE FOR APPLIED LEGAL STUDIES	Seventh amicus curiae

WRITTEN SUBMISSIONS OF THE SEVENTH AMICUS CURIAE: THE CENTRE FOR APPLIED LEGAL STUDIES

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INTRODUCTION

1. The Centre for Applied Legal Studies (CALS) is a human rights organization and law clinic established in 1978 and based at the University of the Witwatersrand School of Law.

2. CALS was admitted as the seventh amicus curiae in this matter on 9 May 2014 and granted leave, at this stage, to deliver written submissions.[1]

3. The focus of the submissions by CALS is a narrow component of international law that has not received particular attention by any of the principal parties: regional international law.

4. CALS makes submissions regarding the duties of South Africa (and, where relevant, Zimbabwe) under international law at a regional and sub-regional level:

   4.1 in Africa as a whole, in particular under the auspices of the African Commission on Human and Peoples' Rights (African Commission);[2] and

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[1] CALS will seek further directions, after the delivery of its written submissions, to confirm whether it is also granted leave to make brief oral submissions at the hearing of the matter.

[2] CALS has been granted Observer status before the African Commission, entitling it to participate in the proceedings of the African Commission.

4.2 within the Southern African Development Community (SADC).

SUMMARY OF CALS SUBMISSIONS

5 The central legal question in this matter is whether the South African Police Service and the National Prosecuting Authority have the power to investigate alleged crimes against humanity committed in Zimbabwe and whether, in the circumstances, they are obliged to do so. The question turns on an interpretation of the following provisions of domestic law:

5.1 section 205 of the Constitution, which provides that the objects of the police service are, among others, to "*investigate crime… and to uphold and enforce the law*".

5.2 section 4 of the International Criminal Court Act 27 of 2002 ("the ICC Act");

5.3 the provisions of the South African Police Service Act 68 of 1995 and the National Prosecuting Authority Act 32 of 1998, in terms of which special directorates – in particular the Hawks of the SAPS and the Priority Crimes Litigation Unit of the NPA - enjoy investigative powers.

6 CALS does not enter the debate among the parties regarding the textual analysis of these provisions. Instead, CALS focuses on the effect of regional international law on the interpretation of the provisions and the powers of the SAPS and the NPA. In summary, CALS makes the following submissions:

6.1 In terms of section 39(1)(b) of the Constitution, when interpreting any legislation – including the legislation in issue in the present matter – the courts must consider international law. An integral component of this obligation relates to international law at the regional level, focusing on African and SADC materials.

6.2 African states and regional structures, as well as African academic commentators, have called on African states to provide and capacitate national and regional structures to prosecute international crimes.

6.3 The Assembly of the African Union (AU) has recognised that universal jurisdiction is a principle of international law but expressed concern at the perceived abuse of universal jurisdiction to prosecute African offenders in non-African states or before the International Criminal Court, to the exclusion of investigations in any other regional

jurisdictions.

6.4 The AU Assembly has recognised that strengthening African national and regional mechanisms of accountability to prosecute international crimes, through the proper implementation of the principle of complementarity (namely, that international mechanisms such as the ICC, should complement rather than supplant national courts), would obviate the need for courts outside Africa such as the ICC to investigate crimes in Africa.

6.5 In order to achieve this objective, the AU has adopted a Model Law on Universal Jurisdiction and called on all African states to legislate accordingly.

6.6 South Africa bears legal obligations to build domestic and regional capacity to promote peace, security and rule of law in Africa. Moreover, as parties to various African and SADC instruments, South Africa and Zimbabwe have a set of rights and responsibilities towards each other within the global order. Relevant aspects of those regional treaty commitments include:

6.6.1 Wide-ranging obligations to cooperate in

combating crime within the SADC region;

6.6.2 the prohibition on torture under the African Charter and an obligation to investigate and punish torture;

6.6.3 obligations of mutual legal assistance to all SADC states in criminal investigations and prosecutions.

6.7 In the current matter, South Africa and Zimbabwe's mutual international law obligations, reinforced by its specific regional obligations, to promote and protect human rights support the recognition of the power and duty of South African authorities to investigate international crimes committed in Zimbabwe in appropriate cases.

THE SPECIAL RELEVANCE OF REGIONAL LAW

7 International law plays a central role in the present matter. In the particular context of the matter, South Africa's regional international law commitments have a crucial role to play and should not be left out of account. In addition, notions such as 'sovereignty', 'comity'

and 'complementarity' invoked by the SAPS[3] cannot be considered in the abstract, but must be grounded in the specific legal relationships and commitments of South Africa and Zimbabwe.

8 In terms of section 39(1)(b) of the Constitution, courts must consider international law when interpreting the Bill of Rights.

9 In *Glenister II*,[4] Moseneke DCJ and Cameron J outlined the role of international law under section 39(2) in interpreting a provision of the Bill of Rights, having regard also to section 7(2) of the Constitution. The majority held:[5]

> "*It is possible to determine the content of the obligation s 7(2) imposes on the State without taking international law into account. But s 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision … to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.*"

10 Therefore, to the extent that the present matter engages the

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3 See, for example, the SAPS written submissions at p 21 para 42, p 24 para 48 and p 47 para 84.

4 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC) ("*Glenister II*").

5 *Glenister II* at para 201. See also *The Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) 325 (CC) at para 66.

provisions of the Bill of Rights, one should seek to adopt an interpretation that "creates concordance and unity" between South Africa's international law obligations and its domestic law.

11 Section 233 of the Constitution provides further that *"[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*."[6]

12 South Africa has ratified the African Charter on Human and People's Rights ("African Charter") and the SADC Treaty, as well as a number of protocols to both instruments. These instruments are binding on South Africa in international law.

13 This Court has had regard to African and SADC international law instruments to assist in interpreting South African legislation and determining the State's constitutional and international law obligations in a number of decisions.[7]

14 Although non-binding or 'soft law' instruments such as General

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6 In *Fick*, Mogoeng CJ held that section 233 of the Constitution "*resonates with our purpose for developing the common law, comity and the principle of reciprocity, which are central to the enforcement of foreign judgments*." (at para 69)

7 *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 (CC).

Comments and Declarations do not bind South Africa, they are generally regarded as a primary source for determining the content of international law and have regularly been referred to by this Court.[8]

15 In the next two sections, the specific international law position bearing on the issues in this matter is considered at regional (African) and sub-regional (SADC) level.

AFRICAN INSTRUMENTS AND AUTHORITIES

16 At regional level within Africa, there are two areas of relevance to the present matter:

16.1 First, the African human rights system embodied principally in the African Charter; and

16.2 Secondly, efforts to 'regionalize' the investigation and prosecution of international crimes.

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8 See, for example, *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at fn 11; *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) at para 29; and *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) at para 52.

African human rights system

17 South Africa and Zimbabwe are parties to the African Charter, which is binding on both states. The African Charter guarantees a range of rights, including:

17.1 The right to life and the integrity of the person;[9]

17.2 The right to dignity and the prohibition of all forms of exploitation and degradation, including torture and cruel, inhuman or degrading treatment or punishment;[10]

17.3 The rights to freedom of conscience,[11] freedom of assembly[12] freedom of association;[13] and freedom of assembly.[14]

18 The alleged crimes committed by perpetrators in Zimbabwe would, if established, constitute violations of some or all of these rights guaranteed in the African Charter. In particular, the allegations of torture would constitute a gross violation of the right in article 5 of

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9 Article 4 of the African Charter.

10 Article 5 of the African Charter.

11 Article 8 of the African Charter.

12 Article 9 of the African Charter.

13 Article 10 of the African Charter.

14 Article 11 of the African Charter.

the African Charter, which provides:

> "*Every human being shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, <u>torture</u>, cruel inhuman or degrading punishment and treatment shall be prohibited*." (emphasis added)

19 The African Commission on Human and People's Rights ("the African Commission") is the body enjoined to interpret the African Charter and ensure that states parties comply with their obligations.[15] It is required to "*formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations*."[16] It is also empowered to "*interpret all the provisions of the present Charter*".[17]

20 The African Commission has stated that the prohibition on torture and cruel, inhuman or degrading punishment or treatment in article 5 is to be interpreted as widely as possible to encompass the

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15 Article 45 of the African Charter.

16 Article 45(1)(b) of the African Charter.

17 Article 45(3) of the African Charter.

widest possible array of physical and mental abuses.[18]

21 In *Amnesty International v Sudan*, the African Commission emphasized that:

> "*Punishment of torturers is important, but so also are preventive measures such as halting of incommunicado detention, effective remedies under a transparent, independent and effective legal system, and ongoing investigations into allegations of torture*."[19] (emphasis added)

22 In terms of article 1 of the African Charter, the parties to the Charter – including South Africa and Zimbabwe – "*shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them*." Accordingly, South Africa bears obligations under article 5 of the African Charter specifically to investigate allegations of torture.

23 While this obligation applies primarily to offences committed within South African territory or by South African nationals, it is submitted that these obligations in terms of the African Charter have a bearing on the interpretation of South Africa's domestic law.

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[18] *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

[19] *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) at para 56.

Regionalising international criminal law in Africa

24 African states played a leading role in the adoption of the Rome Statute and the establishment of the ICC. Senegal was the first state in the world to ratify the Rome Statute. Thirty African states have ratified the treaty out of a total of only 108 parties overall.

25 While African states have reiterated their commitment to ensuring that international crimes are investigated and prosecuted, as the SAPS acknowledges in its written submissions,[20] more recently some African states and institutions have expressed concern at the apparent focus of the ICC on African states, to the exclusion of other regions, with the risk of undermining rather than assisting African states to resolve their problems.

25.1 For instance, the chairperson of the AU Commission, Jean Ping, is reported to have stated that while "*the [AU] is not against international justice… it seems that Africa has become a laboratory to test the new international law*."[21]

25.2 In similar vein, the African academic Mahmood Mamdani has noted the perception that the ICC is part of some new

[20] SAPS written submissions p 7 para 15.

[21] *BBC News,* 27 September 2008, 'Vow to pursue Sudan over "crimes"', reported in M du Plessis *The International Criminal Court that Africa wants* (2010, Institute for Security Studies) 20.

"*international humanitarian order*" in which:

> "*Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored the actions the United States doesn't oppose*."[22]

26 These concerns prompted a formal resolution by the Assembly of the African Union, which adopted a 'Decision on the Report of the Commission on the abuse of the principle of universal jurisdiction'.[23] In the decision, the Assembly recognised

> "*that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the Constitutive Act of the African Union*".

27 However, the Assembly resolved that "*the abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States*".

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22 M Mamdani 'The new humanitarian order', *The Nation,* September 29 2008, cited in du Plessis (above 21) at 20.

23 'Decision on the Report of the Commission on the abuse of the principle of universal jurisdiction, Doc Assembly/AU/14(XI), Assembly of the African Union, Eleventh Ordinary Session 30 June – 1 July 2008.

28 In 2009, the AU referred to the "*need to empower the African Court on Human and Peoples' Rights to deal with serious crimes of international concern in a manner complementary to national jurisdiction*".[24]

29 However, despite developments to merge the African Court on Human and Peoples' Rights with the African Court of Justice to establish the African Court of Justice and Human Rights, neither the existing courts nor the envisaged merged court enjoy criminal jurisdiction.[25]

30 In the absence of a regional criminal court, the AU has adopted a Model Law on Universal Jurisdiction.[26] The Minister of Justice of Zimbabwe served as one of the members of the Bureau of the Meeting that adopted the Model Law.[27]

31 At the 19th Session of the Assembly of the AU, the AU adopted a resolution encouraging member states to make use of the Model Law "*in order to expeditiously enact or strengthen their National*

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24 Press release on behalf of the AU, 3 July 2009, cited in du Plessis (above 21) at 51.

25 Protocol on the Statute of the African Court of Justice and Human Rights, article 28 (jurisdiction).

26 African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, adopted on 15 May 2012 at Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia.

27 African Union Press Release No. 038/2012 dated 16 May 2012.

Laws in this area".[28]

32 Accordingly, the African Union – through the Assembly – has called on member states to bring their domestic laws into line with the Model Law. The Model Law provides a framework in terms of which the courts of one African state will exercise jurisdiction over international crimes committed in another African state. In the absence of an African regional court with criminal jurisdiction, the exercise of universal jurisdiction by one African state over another is an alternative means of 'regionalising' international justice on the continent.[29]

33 The Model Law is clear on the question regarding the stage at which the presence of an accused person in the territory of the state exercising jurisdiction is required. Article 4(1) provides:

> "*The Court shall have jurisdiction to try any person charged with committing a crime prohibited under this law, regardless of whether such crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such person shall be within the territory of the State at the commencement of the trial.*" (emphasis added)

[28] 19th Session of the Assembly of the African Union, 15-16 July 2012, Addis Ababa, Assembly AU Decision 419 (XIX) para 11.

[29] C Chernor Jalloh 'Regionalizing International Criminal Law?' *International Criminal Law Review* 9 (2009) 445-499.

34 Article 5 provides further that the prosecuting authority "*shall have the power to prosecute before the Court any person in the territory of the State who is alleged to have committed a crime prohibited under this law*" (emphasis added). Accordingly, prosecution in absentia is not permissible under the Model Law. Read with article 4, the Model Law requires the accused to be present when the trial commences.

35 The Model Law also commits prosecuting authorities to afford "*the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings*" in relation to crimes under the law.[30] As noted below, Zimbabwe and South Africa have already made a legal commitment in these terms under a SADC instrument.

36 In summary, the following aspects of international law at the regional level in Africa are significant:

36.1 Under the African human rights system embodied by the African Charter:

36.1.1 South Africa and Zimbabwe are both parties to the African Charter, which specifically prohibits

[30] Article 18(1) of the Model Law.

torture in article 5.

36.1.2 The African Commission has held that the Charter requires state parties to investigate and punish torturers.

36.1.3 Article 1 of the Charter requires state parties to take legislative and other measures to give effect to their obligations.

36.2 In relation to international criminal law:

36.2.1 African states and institutions have at all stages affirmed the need to prosecute international crimes and recognised universal jurisdiction as one means to do so.

36.2.2 Concern has been expressed at the need for the 'regionalisation' of international criminal law in Africa.

36.2.3 A regional court with criminal jurisdiction has been proposed, but not established. However, the AU has adopted a Model Law on Universal Jurisdiction and called on states to use it to adopt

or strengthen national laws.

36.2.4 In terms of the Model Law, states have jurisdiction provided that the accused is in the territory of the relevant state at the commencement of the trial. Presence is not required during investigation.

37 The significance of these regional international law developments will be addressed further below, after considering the sub-regional instruments adopted at SADC level.

SADC INSTRUMENTS AND AUTHORITIES

38 An assessment of the principles of international law relevant to the present matter must take into account the particular legal relationship of South Africa and Zimbabwe as members of SADC and the web of mutual legal obligations that they have undertaken as sovereign nations.

39 SADC is an inter-governmental organization headquartered in Gaborone, Botswana. It was formally established in August 1992, replacing the Southern African Development Coordination Conference established in 1980. Its goal is to further socio-

economic cooperation and integration as well as political and security cooperation among 15 southern African states, which include South Africa and Zimbabwe. SADC complements the role of the African Union.

40 SADC was established in terms of the SADC Treaty, which has been ratified by all of the member states. In the recent judgment in *The Government of the Republic of Zimbabwe v Fick*, this Court (per Mogoeng CJ) confirmed that the SADC Treaty has been approved by the South African Parliament and is therefore binding on South Africa.[31] Mogoeng CJ further confirmed that Zimbabwe has ratified the SADC Treaty[32] and is bound to act in accordance with it.[33]

41 The SADC Treaty refers in its Preamble to "*the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law*". In terms of article 5 of the SADC Treaty, the objectives of SADC include to:

41.1 "*promote common political values, systems and other*

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[31] *The Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) 325 (CC) at para 30.

[32] Zimbabwe ratified the SADC Treaty on 17 November 1992.

[33] *Fick* at para 34.

shared values which are transmitted through institutions which are democratic, legitimate and effective";[34]

41.2 "*consolidate, defend and maintain democracy, peace, security and stability*".[35]

41.3 "*achieve complementarity between national and regional strategies and programmes*".[36]

42 The SADC Treaty provides in article 21 for broad areas of cooperation among the member states. These include "*politics, diplomacy, international relations, peace and security*". The Treaty accordingly commits the member states to substantial cooperation across wide-ranging areas.

43 In *Fick*, the Court held that South African law must be interpreted, and if necessary, developed, to support and affirm Southern African Development Community (SADC) structures and instruments and the responsibilities that accompany such structures. Mogoeng CJ concluded that it was necessary to develop the South African common law to facilitate the enforcement in South Africa of decisions of the SADC Tribunal:

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34 Article 5(1)(b) of the SADC Treaty.

35 Article 5(1)(c) of the SADC Treaty.

36 Article 5(1)(e) of the SADC Treaty.

> "*South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights.*"[37]

44 In *Tsebe*, in the specific context of crime in the region, this Court recognised that

> "*South Africa and Botswana are also signatories to other SADC treaties and protocols in terms of which they have bound themselves to work together and with other SADC countries to combat crime in the SADC region*".[38]

45 In *Tsebe*, Zondo AJ, writing for the majority of this Court, referred to "*South Africa's obligations under treaties concluded with other states in terms of which they must co-operate to fight crime, particularly in the SADC region*", emphasising that "*Government must not only fight crime but it must also be seen as sparing no*

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[37] *Fick* at para 59.

[38] *Tsebe* at para 34.

effort in fighting crime".[39]

46 The following SADC instruments are relevant in this regard:

46.1 the Protocol on Combating Illicit Drugs;[40]

46.2 the Protocol on Politics, Defence and Security Co-operation;[41]

46.3 the Protocol Against Corruption;[42]

46.4 the Protocol on the Control of Firearms, Ammunition and Other Related Materials;[43]

46.5 the Protocol on Mutual Legal Assistance in Criminal Matters;[44] and

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39 *Tsebe* at para 64 (Zondo AJ for the majority). The concurring judgment per Cameron J (Froneman J, Skweyiya J and Van der Westhuizen J) endorsed para 64.

40 This protocol came into force on 20 March 1999. See article 6, which commits member states to "establish appropriate mechanism (sic) for cooperation among enforcement agencies of the member states to promote effective enforcement" relating to illicit drugs.

41 This protocol came into force on 2 March 2004. Zimbabwe ratified it on 2 February 2004. South Africa ratified it on 6 August 2003.

42 This protocol came into force on 6 July 2005. Zimbabwe ratified it on 8 October 2004. South Africa ratified it on 15 May 2003.

43 This protocol came into force on 8 November 2004. Zimbabwe ratified it on 20 February 2006. South Africa ratified it on 27 January 2003.

44 This protocol came into force on 1 March 2007. Zimbabwe and South Africa both signed it on 3 October 2002 in Kampala, Uganda.

46.6 the SADC Mutual Defence Pact.[45]

47 These specific SADC instruments, all of which are binding on South Africa and Zimbabwe, impose a range of obligations to co-operate in combatting crime in the SADC region.

47.1 The SADC Protocol on Politics, Defence and Security Cooperation established the Organ on Politics, Defence and Security Cooperation. In terms of article 2(1), the specific objects of the Organ include to:

47.1.1 "*protect the people and safeguard the development of the Region against instability arising from the breakdown of law and order, intra-state conflict, interstate conflict and aggression*";[46]

47.1.2 "*promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charters and Conventions of the Organisation of*

45 This pact came into force on 17 August 2008.

46 Article 2(1)(a).

African Unity and United Nations respectively";

47.2 The Protocol against Corruption states in the Preamble that it was adopted "*aware of the inter-relationships between corruption and other criminal activities*" and "*convinced of the need for a joint and concerted effort as well as the prompt adoption of a regional instrument to promote and facilitate cooperation in fighting corruption*".

47.3 Article 2(1) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters records the commitment of SADC States (including South Africa and Zimbabwe) to extend to other member states "*the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions*". In terms of article 2(2), mutual legal assistance includes assistance in respect of investigations, prosecutions or proceedings.

48 In addition to the instruments referred to above, the SADC Summit adopted the SADC Principles and Guidelines Governing Democratic Elections (2004), which refer to the aspiration of "*a single vision, that of a shared future*" for the members of SADC.

48.1 The Principles record the commitment of member states to

adhere to a set of common principles in the conduct of elections, which include freedom of association and political tolerance.[47]

48.2 The Principles provide that the responsibilities of member states during elections include safeguarding the human and civil liberties of all citizens and ensuring that adequate security is provided to all parties participating in elections.[48]

49 In similar vein, the SADC Parliamentary Forum adopted Norms and Standards for Elections in the SADC Region (2001), which record a similar set of commitments regarding the conduct of elections.[49]

49.1 The Norms and Standards describe one of the "problems" facing SADC members as follows:

"*It is common in some of the SADC countries that members of the electorate belonging to other parties have been intimidated, beaten up, tortured and even murdered for belonging to opposition parties and for openly expressing their support for their preferred party*".[50]

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47 Article 2(1) of the Principles.

48 Paragraphs 7.4 and 7.7 of the Principles.

49 The SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region (2001), adopted on 25 March 2001.

50 Paragraph 3 of the Norms and Standards.

49.2 The Norms and Standards set out a series of recommendations for action by member states to address this and other problems associated with the conduct of elections in all SADC states.

50 Accordingly, the SADC member states – and South Africa and Zimbabwe in particular – have made mutual legal commitments regarding:

50.1 Substantial cooperation in political and economic matters, including building common values and establishing effective institutions;

50.2 The protection of human rights, specifically in the context of the conduct of elections;

50.3 Cooperation regarding the combatting of various crimes that affect the region;

50.4 A specific commitment to offer "*the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions*" in investigations, prosecutions and proceedings.

51 The significance of the sub-regional (SADC) international law position, as well as the international law developments at regional (African) level discussed above, are developed in the next section.

IMPACT OF AFRICAN AND SADC LAW ON THE ISSUES IN THIS CASE

Summary of African and SADC international law position

52 South Africa and Zimbabwe are accordingly subject to a range of international law obligations at regional (African) and sub-regional (SADC) level regarding cooperation in investigating and prosecuting the crime of torture.

52.1 In particular, at **regional (African) level**:

52.1.1 <u>Under the African human rights system embodied by the African Charter:</u>

52.1.1.1 South Africa and Zimbabwe are both parties to the African Charter, which specifically prohibits torture in article 5.

52.1.1.2 The African Commission has held that the Charter requires state parties to

investigate and punish torturers.

52.1.1.3 Article 1 of the Charter requires state parties to take legislative and other measures to give effect to their obligations.

52.1.2 <u>In relation to international criminal law:</u>

52.1.2.1 African states and institutions have at all stages affirmed the need to prosecute international crimes and recognised universal jurisdiction as one means to do so.

52.1.2.2 Concern has been expressed at the need for the 'regionalisation' of international criminal law in Africa.

52.1.2.3 A regional court with criminal jurisdiction has been proposed, but not established. However, the AU has adopted a Model Law on Universal Jurisdiction and called on states to use it to adopt or strengthen national laws.

52.1.2.4 In terms of the Model Law, states have jurisdiction provided that the accused is in the territory of the relevant state at the commencement of the trial. Presence is not required during investigation.

52.2 **At SADC level**, the two states have undertaken a web of inter-related obligations to all SADC member states, including one another, regarding:

52.2.1 Substantial cooperation in political and economic matters, including building common values and establishing effective institutions;

52.2.2 The protection of human rights, specifically in the context of the conduct of elections;

52.2.3 Cooperation regarding the combatting of various crimes that affect the region;

52.2.4 A specific commitment to offer "*the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions*" in investigations, prosecutions and proceedings.

53 The position under international law at regional and sub-regional level has two significant consequences for the issues arising in the present matter. The first concerns the interpretation of the relevant legislation regarding the *power* to investigate. The second concerns whether there is a *duty* to investigate in the circumstances.

Significance of regional law regarding power to investigate

54 First, to the extent that there is any doubt regarding the *power* to investigate despite the physical absence from South Africa of the suspects, international law at African and SADC provides a strong basis to prefer an interpretation recognising such a power.

54.1 In terms of section 233 of the Constitution and section 39(1)(b), the court should prefer an interpretation that is consistent with international law.

54.2 In particular, the AU Model Law specifically recommends that national laws permit investigation (but not prosecution) without requiring the suspect to be present in the territory. In addition, at SADC level South Africa and Zimbabwe have undertaken obligations of mutual legal assistance that relate to, among other things, investigation.

54.3 African and SADC international law developments

therefore strongly support an interpretation of section 4(3) of the ICC Act that does not require the presence of a suspect for an investigation to be conducted.

Significance of regional law for exercise of power to investigate (duty)

55 Secondly, on the basis that the power to investigate without requiring the presence of a suspect is established, regional law has a bearing on the exercise of the power.

55.1 In its written submissions, the SAPS argues that there is a *discretion* whether to investigate.

55.2 This Court has held on a number of occasions that a statutory power, even a power framed in discretionary language, may entail an authorisation to act coupled with an obligation to do so.[51] It is submitted that the power to investigate an alleged international crime reported to the SAPS and the NPA is a power of that nature. This must be so, having regard to the obligations of South Africa to investigate and prosecute international crimes – both at

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[51] *S and Others v Van Rooyen and Others* (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) at paras 181-182; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 35.

general international law level and under regional instruments.

55.3 However, even if there is some form of discretion in respect of the power to investigate, the factors relevant to the exercise of that discretion must be informed by, among other considerations, the international law position under regional (African) and sub-regional (SADC) instruments.

55.4 The SAPS invokes a range of factors that it argues must inform whether an investigation should be conducted. The factors suggested by the SAPS fall into two broad categories.

55.4.1 The first category are practical considerations, including methods of gathering information; the anticipated presence of perpetrators and resource allocation.[52]

55.4.2 The second category consists of factors relating to the relationship between South Africa and Zimbabwe. These include 'Zimbabwe's sovereignty', extradition, 'comity', 'subsidiarity'

[52] SAPS written submissions p 47 para 84.

and 'complementarity'.[53]

55.5 Before even addressing the content of any of the factors, it is submitted that – by their very nature – the majority are factors that can and should properly be taken into account at the later stage of making a decision whether to prosecute, *after investigation* of the allegations. Indeed, the SAPS itself contends that these factors all "require further consideration". This is especially true of the first category of practical considerations. For example, it is only possible to consider "*methods of gathering information*" and possible evidence by undertaking an investigation and attempting to do so.[54] To the extent that these factors may permissibly be taken into account, they will be relevant to the decision whether to <u>prosecute</u>, informed by the investigation, and should not apply to a decision whether to investigate at all.

55.6 However, in relation to the *content* of the factors contended for by the SAPS, the following submissions are

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53 SAPS written submissions at p 47 para 84.

54 In any event, in *Tsebe*, Zondo AJ (for the majority) held that "bringing foreign witnesses to South Africa to testify in trials relating to crimes committed outside South Africa" was not "an insurmountable difficulty" (at para 62).

made arising from the regional law analysis above:

55.6.1 SAPS makes the submission that the investigation will impact on Zimbabwe's sovereignty, arguing that *"[e]very investigation into conduct of officials detracts from the sovereignty of that state.*" (emphasis added)

55.6.2 The SAPS fails to consider the *specific* relationship between South Africa and Zimbabwe. In particular, it gives no regard to the fact that Zimbabwe, in the exercise of its sovereignty, has voluntarily assumed a range of international law obligations regarding the combating of crime in the region and cooperation with SADC states. Zimbabwe has specifically assumed international law obligations – in instruments to which South Africa is a party - regarding:

55.6.2.1 the prohibition on torture under the African Charter,

55.6.2.2 obligations of mutual legal assistance to all SADC states.

55.6.3 In addition, Zimbabwe (through its Minister of Justice) played an active role in the adoption of the AU Model Law on universal jurisdiction.

55.6.4 South Africa and Zimbabwe have voluntarily adopted a wide range of regional multi-lateral treaties that reflect a legal relationship premised on close interaction and cooperation, rather than a strictly arms-length, territorial relationship.

55.6.5 In this regard, the comparison by SAPS to BRICS countries such as Russia and China is inapposite. While South Africa has committed to substantial economic cooperation with the BRICS states, these states have not made the extensive legal commitments of South Africa and Zimbabwe under African and SADC instruments.

55.7 In the circumstances, it is submitted that the extensive legal relationship between South Africa and Zimbabwe reflects the exercise of their sovereign power to conclude treaties. Giving effect to the power to investigate the alleged crimes committed in Zimbabwe constitutes a proper recognition of that relationship and of the sovereign

acts of both states. In effect, an investigation would give effect to the intention of both states as embodied in the web of regional treaties that bind them.

CONCLUSION

56 South Africa and Zimbabwe are party to a number of regional (African) and sub-regional (SADC) international instruments.

57 The principles and developments at African and SADC level strongly support an interpretation of the legislative provisions in issue in this matter empowering the SAPS and the NPA to conduct an investigation even without the presence of the alleged perpetrators.

58 To the extent that there is any discretion to be exercised regarding the power to investigate, international law at African and SADC level would warrant the exercise of the power to investigate in the particular circumstances of this matter, particularly having regard to the specific legal relationship between South Africa and Zimbabwe.

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12 May 2014

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- African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, adopted on 15 May 2012 at Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia
- Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008

SADC instruments

- SADC Treaty, adopted on August 17, 1992 and entered into force September 30, 1993
- The SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region (2001), adopted on 25 March 2001
- SADC Principles and Guidelines Governing Democratic Elections (2004), adopted August 2004
- SADC Protocol on Combating Illicit Drugs, adopted on August 24 1996 entered into force March 20 1999
- SADC Protocol on Politics, Defence and Security Co-operation, adopted on August 14, 2001 entered into force March 2, 2004
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