IN THE SUPREME COURT OF APPEAL OF SOUTH AFICA

SCA CASE NUMBER: 485/2012

NORTH GAUTENG HIGH COURT CASE NUMBER: 77150/09

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**1ST APPLICANT**
NATIONAL DIRECTOR OF PUCLIC PROSECUTIONS	**2ND APPLICANT**

and

SOUTHERN AFRICA HUMAN RIGHTS LITIGATION CENTRE	**1ST RESPONDENT**
ZIMBABWE EXILES FORUM	**2ND RESPONDENT**

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SECOND APPLICANT'S PRACTICE NOTE

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1. **NAME AND NUMBER OF THE MATTER:**

   See heading above.

2. **NATURE OF THE APPEAL:**

This is an application for leave to appeal against the whole of the judgment and orders of the North Gauteng High Court in case number NGHC 77150/2009 per Fabricius J.

3. **JURISDICTION:**

In terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 Brand JJA and Theron JJA on 18 September 2012 directed that the application for leave to appeal is referred for oral argument and that further the parties must be prepared to address the Court on the merits if called upon to do so.

Record: Vol 8, p 1210

4. **CONSTITUTIONAL QUESTIONS:**

The application for leave to appeal relates to the interpretation of provisions of a statute which was enacted to give effect to an international treaty. Although no constitutional issues have been directly raised, it must be accepted that a consideration of the relevant issues, namely international obligations, Customary International Law and Conventional International Law raises constitutional issues.

5. **ISSUES ON APPEAL:**

There are three distinct issues which must be decided:

5.1 Whether the appeal has been perempted due to the fact that the Applicants commenced implementing the orders of the Court a quo after leave to appeal was refused.

5.2 In the event of the appeal not being perempted, whether leave to appeal should be granted by this Court.

5.3 In the event of leave to appeal being granted, whether the Court a quo's interpretation of s 4(1) and s 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act, No 27 of 2002 (hereinafter referred to as the "domestic ICC Act") is correct.

6. **DURATION OF ARGUMENT:**

The Second Applicant anticipates that argument will be completed within two days if in fact the issues on the merits have to be argued. Complex arguments are made on both the issue of peremption and the interpretation of the domestic ICC Act. In addition the First Applicant seeks to argue the issue of the locus standi of the Respondents to have initiated a review.

7. **MORE THAN ONE DAY:**

A second day is necessary as indicated above.

8. **LANGUAGE OF THE RECORD:**

The record is in English.

9. **PORTIONS OF THE RECORD THAT NEED TO BE READ FOR THE PURPOSES OF THE APPEAL:**

The Second Applicant is of the view that the following portions of the record need to be read for the purpose of the appeal:

Application

9.1 Pages 1 to 34: Notice of Motion and Founding Affidavits

9.2 Pages 136 to 158: Notices of Applications for Leave to Appeal

9.3 Pages 164 to 208: Respondents' Answering Affidavit and Annexures

9.4 Pages 209 to 243: First and Second Applicants' Replying and Confirmatory Affidavits

Record

9.5 Volume 1: Pages 83 to 135: First Respondent's Memorandum

9.6 Volume 3: Pages 395 to 400: Correspondence

9.7 Volume 3: Pages 402 to 419: Memorandum on gravity

9.8 Volume 3: Pages 420 to 422: Correspondence

9.9 Volume 3: Pages 434 to 435: Referral to First Applicant by Second Applicant

9.10 Volume 3: Pages 443 to 445: Decision by First Applicant

9.11 Volume 4: Pages 591 to 594; 617 to 620; 632 to 638: Supporting Affidavit of Brigadier Marion

9.12 Volume 5: Pages 664 to 734: Answering Affidavit of Second Applicant (Mpshe) (Page 704 referred to in Heads)

9.13 Volume 6: Pages 780 to 854: Answering Affidavit of Second Applicant (Simelane) (Pages 806 to 809 referred to in Heads)

9.14 Volume 6: Pages 882 to 965: Replying Affidavit of Respondents (Pages 887 to 889; pages 939 to 940 relevant to issue)

9.15 Volume 7: Pages 976 to 978 and 989 to 998: Opposing Affidavit of Head: PCLU

9.16 Volume 8: Pages 1104 to 1200: Judgment Court a quo

9.17 Volume 8: Pages 1205 to 1208: Reasons for Judgment

10. **SUMMARY OF SECOND APPLICANT'S ARGUMENTS:**

10.1 Peremption of Appeal

When the conduct of the Second Applicant is viewed in the light of the relevant case law and principles governing peremption, the Respondents have failed to prove that peremption had taken place. The implementing of a mandatory court order after leave to appeal had been refused did not amount to unequivocally abandoning the intention to appeal, nor did the Second Applicant exercise a choice. Finally, it is not a requirement of South African law that the implementation of a mandatory order be accompanied by a letter containing a reservation of rights.

10.2 Application for Leave to Appeal

Leave to appeal should be granted on the ordinary principles of prospects of success and the importance of the case.

10.3 Merits

The issue relates to the correct interpretation of s 4(1) and s 4(3) of the domestic ICC Act. The Court a quo's finding that s 4(1) related to investigations and s 4(3) to trials is incorrect. The upshot of these findings would be that absolute universal jurisdiction applies for investigations.

S 4(1) criminalises the offences created in the ICC Act in South Africa and that s 4(3) makes provision for limited extraterritorial jurisdiction if one or more of the conditions specified in s 4(3) are satisfied. In the light thereof the legislator adopted limited universal jurisdiction and that extraterritorial investigations may only be initiated if the requirements of s 4(3) are satisfied.

The international Rome Treaty, Customary International Law and Conventional International Law do not justify a different interpretation.

Consequently, in the context of the investigation requested by the First Respondent, the presence of the suspects in the country is a prerequisite for the initiation of the investigation.

That consequently the appeal should succeed.

11. **CORE BUNDLE:**

No core bundle will be utilised by the Second Applicant's counsel and reference will be made to the record and application.

12. **COMPLIANCE WITH RULES 8(8) AND 8(9):**

The correspondence relating to the compliance with Rules 8(8) and 8(9) is contained in the Record: Volume 8 at pages 1211 to 1239.

13. **COMPLIANCE WITH RULE 10(3)(g)**

In terms of Rule 10(3)(g) of the above Honourable Court, our heads of argument do not exceed 40 pages and accordingly it was not necessary to obtain leave to file heads of argument in excess of 40 pages.

DATED at PRETORIA on this the 19th day of April 2013.

C E PUCKRIN SC
SECOND APPLICANT'S COUNSEL

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Brooklyn
Pretoria

RC MACADAM

SC BUKAU

Priority Crimes Litigation Unit
National Prosecuting Authority of South Africa
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123 Westlake Building
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Pretoria

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CERTIFICATE

We, the undersigned,

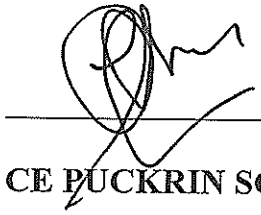
CEDRIC ELDRID PUCKRIN,

RAYMOND CHRISTOPHER MACADAM and

SUSAN CHARLOTTE BUKAU

do hereby certify that Rules 10 and 10A have been complied with in preparation of the heads of argument and the practice note. A chronology in terms of Rule 10(3)(d)(i) has not been prepared as such a chronology has been compiled by the First Applicant.

DATED at PRETORIA on this the 19th day of APRIL 2013.



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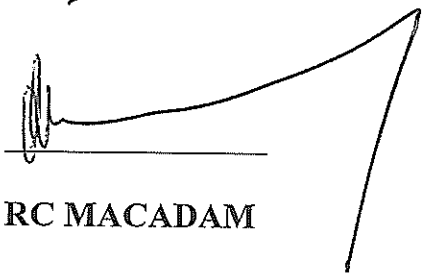

RC MACADAM

SC BUKAU

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SECOND APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1. This is an application for leave to appeal against the judgment and orders of the Honourable Mr Justice Fabricius of the North Gauteng High Court (hereinafter referred to as the *"Court a quo"*) directing that the Second Applicant, in conjunction with the First Applicant, assess the First Respondent's request for an investigation to be initiated under the Implementation of the Rome Statute of the International Criminal Court Act, No 27 of 2002 (hereinafter referred to as the *"domestic ICC Act"*) in the light of the Court a quo's interpretation of sections 4(1) and 4(3) of the said Act and all other findings directly relevant to such interpretation and orders. The judgment of the Court a quo was delivered on 8 May 2012. The Court a quo refused the Second Applicant's application for leave to appeal on 7 June 2012.

2. The Second Applicant lodged an application for leave to appeal to this Honourable Court on 6 July 2012. On 18 September 2012, this Honourable Court directed that the application for leave to appeal be referred for oral argument in terms of section 21(3)(c)(ii) of the Supreme Court Act, No 59 of 1959, and further that the parties be prepared to address the Court on the merits if called upon to do so.

3. The application for leave to appeal is opposed by the Respondents, who allege that the appeal has been perempted; alternatively that there are no prospects of success.

BACKGROUND

4. The background to the application has been fully documented in the chronology table which has been compiled by the First Applicant.

5. For the purpose of these heads of argument, the following significant events are documented:

5.1 On 14 March 2008, the First Respondent submitted material in support of a request for an investigation in terms of the domestic ICC Act to a component of the Office of the Second Applicant (the Priority Crimes Litigation Unit, hereinafter referred to as *"the PCLU"*), which was specifically mandated to manage and direct investigations and prosecutions relating to the Act.

5.2 The subject matter of the proposed investigation was the torture of members of the political opposition in Zimbabwe allegedly by the Zimbabwean Police after a raid on the opposition party's headquarters on 28 March 2007. The torture was allegedly committed at various police stations in Zimbabwe. The First Respondent implicated 12 members of a special police unit, based in Harare, as having carried out

the torture. In addition six Ministers or Directors General were also implicated on the basis of alleged command responsibility.

5.3 The Second Applicant referred the request for an investigation to the First Applicant on 15 December 2008.

5.4 On 29 May 2009 the First Applicant decided not to initiate an investigation primarily on grounds which are not the subject matter of this application.

5.5 On 12 June 2009 the Second Applicant accepted the First Applicant's decision and on 19 June 2009 notified the First Respondent accordingly.

5.6 On 15 December 2009, the First Respondent, now for the first time joined by the Second Respondent, launched an application to have the decision not to investigate, reviewed and set aside.

THE SECOND APPLICANT'S INTEREST

6. The investigation of the offences created in terms of the domestic ICC Act is the responsibility of the Directorate for Priority Crime Investigation (hereinafter referred to as *"the DPCI"*), which has been established in terms of the South African Police Service Act, No 68 of 1995, as amended (hereinafter referred to

as *"the SAPS Act"*)[1] and does not form part of the Second Applicant's establishment.

7. The SAPS Act however requires that the Second Applicant make prosecutors available to assist the DPCI with the conduct of its investigations.[2] In addition, the National Prosecuting Authority Act, No 32 of 1998, as amended (hereinafter referred to as *"the NPA Act"*) requires that Directors of Public Prosecutions manage and direct specific investigations.[3] The Second Applicant is therefore directly affected by the orders made by the Court a quo.

8. As will be elaborated hereinunder, the Second Applicant's submission is that the Court a quo's interpretation of sections 4(1) and (4)(3) of the domestic ICC Act is in conflict with the principle of legality and therefore that any investigation initiated in the light thereof would be unlawful. The orders of the Court a quo therefore directly prejudice the powers, duties and functions of the Second Applicant.

APPEAL NOT PEREMPTED

9. It is submitted that the law relating to peremption is trite and that when the conduct of the Second Applicant is viewed in the light thereof, the Respondents have failed to prove that the appeal has indeed been perempted.

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[1] Section 16(2)(iA) and section 17D
[2] Section 17D(3) and section 17F(4)
[3] Section 13(1)(c), read with unnumbered Presidential Proclamation dated 24 March 2003 and generally section 24(1)(c)

10. In this regard, it is submitted that:

10.1 Courts are loath to debar a litigant from exercising a right conferred by law and therefore have only upheld the claim of peremption in a very small number of cases.[4]

10.2 The onus of proving peremption rests with the party alleging it.[5] The Court must be clearly satisfied that it has been established and therefore in doubtful cases acquiescence must be deemed to be non-proven.[6]

10.3 Peremption occurs *"where a man has two courses open to him, and he unequivocally takes one, he cannot afterwards turn back and take the other."*[7]

10.4 The conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal.[8]

10.5 An appeal cannot be perempted when it will mean that a Court is bound, as a result of a mistake of law, to what is legally untenable.[9]

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[4] Fick v Walter and Another 2005 (1) SA 475 (C) at page 476 para 1
[5] Natal Rugby Union v Gould 1999 (1) SA 432 (SCA) at page 443 E - F
[6] Dabner v South African Railways & Harbours 1920 AD 583 at 594
[7] Clarke v Bethal Cooperative Society 1911 TPD 1152 at 1161
[8] Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) at page 515 para 10

11. The conduct of the Second Applicant from the time when the Court a quo refused leave to appeal and until the lodging of this application is described in the replying affidavit on behalf of the First Applicant and the annexures and affidavits attached thereto. In the light of the above principles, it is submitted that peremption has not been proven.[10]

11.1 The day after leave to appeal was refused, a senior member of the NPA wrote to the Second Applicant, informing her that a *"petition"* (meaning an application for leave to appeal to this Honourable Court) would be lodged.[11]

11.2 On 2 July 2012, another member of the NPA notified the attorney of the First Respondent that the First and Second Applicants had not abandoned their application for leave to appeal.[12]

11.3 The application for leave to appeal was timeously lodged.

11.4 By virtue of the refusal of leave to appeal by the Court a quo, the First and Second Applicants were obliged to give effect to the mandatory order to initiate the investigation. To have failed to do so would have

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[9] Government of the Republic of South Africa and Others v Von Abo 2011 (5) SA 262 (SCA) at page 270 paras 18 and 19
[10] Application pages 211 to 243
[11] Application Annexure "J" page 234
[12] Application Annexure "NFA5" page 201

constituted contempt of Court. This issue was pertinent due to the fact that the Court a quo had specifically indicated that, had it have granted leave to appeal, it would have ruled that its orders not be suspended pending the appeal.[13] The Respondents had served a notice in terms of Rule 49(11) in anticipation of leave to appeal being granted. The submission to the orders of the Court a quo constituted nothing more than respect for the Court and cannot be construed as acquiescence.[14] It also cannot be said that the Second Applicant had a choice when she elected to comply with the orders of the Court a quo.

11.5 As is evident from the submissions dealing with the granting of leave to appeal and the merits, it is clear that the issues upon which the Second Applicant seeks leave to appeal are of considerable importance. In the light of the Resident Magistrate, Taungs and Von Abo decisions referred to supra, this would in addition mitigate against peremption being upheld.

11.6 The Respondents' argument on peremption is primarily that the Applicants should have initiated the investigation under cover of a letter reserving their rights to appeal. This issue has been considered on at least two occasions by South Africa's Courts almost 100 years apart and on each occasion the Court has found that although such a letter would

[13] Record Vol 8 Reasons for Judgment page 1208 para 10
[14] Resident Magistrate, Taungs v James 1914 CPD 1064 at 1066

have provided absolute clarity, the absence thereof cannot constitute peremption as the overriding consideration is conduct consistent with an intention to appeal.[15] (Rule 10(3)(b)(ii) departed from in order to demonstrate the longstanding nature of the legal principle relied upon.) As has been submitted above, the Second Applicant's conduct did not constitute acquiescence.

11.7 It is submitted that the Respondents' own conduct is consistent with an appreciation that the Applicants intended lodging an application for leave to appeal:

11.7.1 After leave to appeal was refused, the Respondents did not raise the issue of initiating an investigation with the Applicants.

11.7.2 After being advised that the Applicants had not abandoned their intention to appeal, the attorney of the Respondents wrote on 24 July 2012, confirming that she agreed with the approach that pending the application for leave to appeal, the investigation should continue.[16]

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[15] Fick v Walter and Another supra at page 483 para [35]
Hlatshwayo v Mare and Deas 1912 AD 242 at 248 to 252

[16] Application Anwa Dramat's replying affidavit Annexure "H" page 232 para 6

11.8 Finally, when regard is had to the authorities referred to in the Respondents' answering affidavit[17], it is submitted that the factual circumstances and decisions in those matters do not support a finding in favour of peremption in the context of the Second Applicant's case.

LEAVE TO APPEAL SHOULD BE GRANTED

12. It is submitted that it is trite that leave to appeal will be granted upon the cumulative effect of all the factors relevant to the application with particular reference to the prospects of success and the importance of the case.[18]

13. It is the submission of the Second Applicant that not only does it have reasonable prospects of success, but that in fact the appeal should succeed. In order to avoid prolixity the submissions dealing with the prospects of success are set out fully under the heading dealing with the merits of the case.

14. Insofar as the importance of the case is concerned, this relates to the correct interpretation of a statute giving effect to obligations imposed under an international treaty, requiring the prosecution of persons guilty of genocide,

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[17] Application pages 177 to 179
[18] Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others 1985 (4) SA 773 (A) at 790B

crimes against humanity and war crimes (hereinafter referred to as *"the Rome Statute offences"*). It is submitted that the effect of the Court a quo's interpretation of the Statute sets a precedent whereby the Applicants are required to investigate allegations of such offences throughout the world with no connection to South Africa and with no legal basis upon which to place such matters before either a South African Court or the International Criminal Court (hereinafter referred to as *"the ICC"*).

15. It is therefore respectfully submitted that the criteria for granting leave to appeal have been satisfied and that the Second Applicant should be granted leave to appeal on the grounds set out in its notice of application for leave to appeal.[19]

THE MERITS

16. It is submitted that this issue relates to the correct interpretation of sections 4(1) and 4(3) of the domestic ICC Act. It also relates to whether either the Rome Statute of the International Criminal Court (hereinafter referred to as *"the Rome Treaty"*) or Conventional or Customary International Law prescribe that States must adopt absolute universal jurisdiction (or universal jurisdiction in absentia) or whether conditional universal jurisdiction is permissible.

[19] Application Anwa Dramat's founding affidavit Annexure "D" pages 152 to 158

17. The Court a quo's interpretation of section 4(1) amounted to a finding that absolute universal jurisdiction had been adopted for the investigation of the crimes created in the domestic ICC Act.[20] The Court a quo rejected the argument of the First Applicant that section 4(3) established the jurisdiction for extraterritorial investigations and found that section 4(3) applied to trials and was intended to prevent in absentia trials.[21] These findings were reached without referring to any form of authority.

18. It is respectfully submitted that the above findings are unequivocally wrong and inconsistent with the ordinary principles regulating the interpretation of statutes, domestic law and International Criminal Law.

The correct interpretation of the domestic ICC Act applying the ordinary rules of interpretation of statutes

19. The Preamble to the domestic ICC Act clearly states that it is intended to *"provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances."* This intention is again repeated in section 3(d) as one of the objects of the Act. Due to the fact that the Rome Treaty offences were not crimes according to South African law prior to the enactment of the Act, it was also necessary to criminalise such offences.

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[20] Record Vol 8 Judgment page 1173 para 21
[21] Record Vol 8 Judgment pages 1193 to 1194 and Record Vol 8 Reasons for Judgment page 1207 para 7

20. South African crimes are generally not of extraterritorial effect and, in fact, a presumption against extraterritorial operation exists.[22] At International Criminal Law, this is referred to as territorial jurisdiction.[23]

21. Consequently when statutes create criminal offences, it is not specified that the crimes must be committed in South Africa; for example section 63(1) of the National Road Traffic Act, No 93 of 1996 criminalises the offence of reckless or negligent driving without stipulating that the offence must be committed in South Africa although there can be no question of it being of extraterritorial effect.

22. At International Criminal Law however it is accepted that under the following circumstances activity committed outside a State may be criminalised by such State (non-territorial jurisdiction):

22.1 Nationality jurisdiction (This is where the suspect is a national of the State creating the offence).[24]

22.2 Passive personality jurisdiction (This is where the victim of a crime is a national of the State creating the offence).[25]

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[22] S v Basson 2007 (3) SA 582 (CC) at page 660 para 223
[23] Mitsue Inazumi: Universal Jurisdiction in Modern International Law: Expansion of national Jurisdiction for Prosecuting Serious Crimes under International Law at pages 22 to 23
[24] Mitsue Inazumi supra at page 24

22.3 Protective jurisdiction (This is where the State claims jurisdiction over crimes that are harmful to its national security, e.g. treason).[26]

22.4 Universal jurisdiction (This is where a State claims extraterritorial jurisdiction with no link to any of the three grounds for extraterritorial jurisdiction described supra). International Criminal Law however recognises two separate versions of universal jurisdiction, namely absolute universal jurisdiction (universal jurisdiction in absentia) and conditional universal jurisdiction. The former is exercised with no connection whatsoever to the State exercising jurisdiction whereas the latter is only exercised when the suspect is present in the territory of the State exercising jurisdiction after the commission of the crime.[27]

23. It is respectfully submitted that when sections 4(1) and 4(3) are read in the light of the above principles, the conclusion is inescapable that the domestic ICC Act criminalised the Rome Treaty offences in South Africa in section 4(1) of the Act and adopted nationality jurisdiction, passive personality jurisdiction and conditional universal jurisdiction in section 4(3). Any doubt as to the correctness of this interpretation is removed by the opening paragraph of section 4(3), which in fact stipulates that *"Any person who commits a crime contemplated in (1) outside the territory of the Republic is deemed to have*

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[25] Mitsue Inazumi supra at page 24
[26] Mitsue Inazumi supra at page 25
[27] Mitsue Inazumi supra at pages 25 to 28

committed that crime in the territory of the Republic" provided that one of the four situations specified in section 4(3)(a) to (d) is established.

24. Such an interpretation would therefore exclude the Act from being applicable to crimes committed outside the territory of South Africa in the absence of one or more of the situations set out in section 4(3)(a) to (d) applying.

25. The above interpretation is shared by leading local and international experts in the field of International Criminal Law. It is necessary to depart from Rule 10(3)(b)(ii) in order to demonstrate how widely accepted the Second Applicant's interpretation of the Act is.[28]

26. At a session of the General Assembly of the United Nations, convened under the topic, *"The Scope and Application of the Principle of Universal Jurisdiction"*, the basis for jurisdiction for the domestic ICC Act was described as follows: *"The basis for jurisdiction over genocide, crimes against humanity and war crimes are therefore the Act incorporating these crimes into South African domestic law, and not the principle of universal jurisdiction. This Act requires a jurisdictional link between the crime and South African jurisdiction, namely nationality of South Africa or residence on its territory, the presence of the*

[28] John Dugard: International Law – A South African Perspective (4th Ed) at pages 202 to 203
Chacha Murungu & Japhet Biegon: Prosecuting International Crimes in Africa (eds) page 311
Sivuyile S Maqungo: Implementing the ICC Statute in South Africa, published in The Rome Statute and Domestic Legal Orders Vol 1, Claus Kress & Flavia Lattanzi (eds), at page 185
The AU-EU Expert Report on the Principle of Universal Jurisdiction published by the Council of the European Union on 16 April 2009 at page 15 para 18(i)

perpetrator, irrespective of nationality, on South African territory or on the basis of the passive personality principle."[29]

27. In argument at both the review and the application for leave to appeal the Court a quo and Respondents placed great reliance on the fact that section 4(3) was incorporated into Chapter 2, which is entitled *"The Jurisdiction of the Courts and the Institution of Prosecutions in South African Courts"*. This was the primary basis for concluding that section 4(3) related to trials and not investigations. It is respectfully submitted that such conclusion is incorrect.

28. If regard is had to legislation having an extraterritorial effect passed in order to give effect, inter alia, to international obligations, it is clear that the legislator defines the proscribed activity without reference to territory and in another section defines the extraterritorial jurisdiction. It also emerges that when extraterritorial jurisdiction is defined, it is done so using the terminology *"jurisdiction of a South African Court"*. See:

28.1 Sections 3 to 21 (criminalisation provisions) and section 35 (extraterritorial jurisdiction) of the Prevention and Combating of Corrupt Activities Act, No 12 of 2004 (hereinafter referred to *"the PCCA Act"*).

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[29] "South African Observations on the Application of Universal Jurisdiction" par 3.4.1 at http://www.un.org

28.2 Sections 2 to 14 (criminalisation provisions) and section 15 (jurisdiction in respect of offences) of the Prevention of Constitutional Democracy against Terrorist and Related Activities Act, No 33 of 2004 (hereinafter referred to as *"POCDATARA"*).

28.3 Section 24 (criminalisation provisions) and section 26 (extraterritorial application) of the National Conventional Arms Control Act, No 41 of 2002 (hereinafter referred to as *"the NCAC Act"*).

29. It is therefore submitted that the jurisdiction of the South African Court means no more than the circumstances under which a crime will be of extraterritorial effect which would in turn establish when an investigation could be initiated. What however distinguishes the domestic ICC Act from the three pieces of legislation referred to above is the fact that, with reference to terrorism, corruption and trade in conventional arms, there is no International Tribunal which has jurisdiction over those offences. The Rome Treaty however makes provision for the ICC to itself try cases under certain circumstances.[30] The reference to the South African Courts in Chapter 2 of the domestic ICC Act is to distinguish the duty of South Africa as a State Party to institute prosecutions from that of the ICC.

[30] Articles 12 and 13 of the Rome Treaty

30. There are numerous other flaws in the Court a quo's and Respondents' interpretation of the meaning of *"the jurisdiction of South African Courts"*:

30.1 Insofar as it was found that section 4(3) was enacted to prevent in absentia trials, it is difficult to find any authority documenting the conduct of such trials in the history of South Africa. Such trials are specifically prohibited in terms of section 35(3)(e) of the Constitution, section 158(i) of the Criminal Procedure Act, No 51 of 1977 and the Common Law.[31] It is submitted that there would be no need for a post-Constitution Act to have to prohibit in absentia trials. Section 2 of the domestic ICC Act specifically makes the Constitution and the law of South Africa applicable to trials conducted in South Africa relating to the Rome Statute offences.

30.2 If the Court a quo's interpretation is correct, then section 4(3)(c) should have been inserted in section 5, which specifically deals with *"the institution of prosecutions"*.

30.3 Also in the light of the same interpretation, sections 4(3)(a), (b) and (d) are inexplicable because if section 4(3) was enacted to safeguard against in absentia trials, it would prevail exclusively. It is the Second Applicant's submission that the other sub-sections were specifically enacted so as to make provision for the initiation of investigations in the absence of the

[31] Hiemstra's Criminal Procedure at 22-38

accused and in order to address national extraterritorial interests. Consequently section 4(3)(c) is a basis for initiating an investigation based on conditional universal jurisdiction and not a trial provision.

30.4 Insofar as the Court a quo found that section 4(1) dealt with investigations as distinct from trials, it is difficult to understand how this conclusion could have been reached. Not only is section 4(1) included in Chapter 2, but it is also specifically prefaced as *"Jurisdiction of South African Courts in Respect of Crimes"*. It is the Second Applicant's submission that the preface applies to all the provisions of Section 4 and that that section is intended to criminalise the crimes in South Africa and to define the circumstances under which the Act will be of extraterritorial effect enabling investigations to be initiated.

31. It is common cause that the crimes sought to be investigated by the Respondents were not committed within the territory of South Africa nor were the victims and alleged perpetrators South African citizens or persons ordinarily resident in the country. Consequently it is submitted that the investigation of the complaint would have to be considered in the light of section 4(3)(c) and not section 4(1). It would be a prerequisite for invoking section 4(3)(c) that the accused be present in the country and, absent this jurisdictional fact, there would be no basis for initiating an investigation under the domestic ICC Act.

32. It is submitted that neither the Rome Treaty nor Customary International Law nor Conventional Law would justify a different interpretation.

Rome Treaty

33. The obligations of the State Parties are defined in the Preamble and it is submitted that they are not obliged to adopt absolute universal jurisdiction. In fact it is submitted that several provisions within the Treaty mitigate against the adoption of such jurisdiction:

33.1 The Preamble emphasises that *"nothing shall be taken as authorising any party to intervene in an armed conflict or the internal affairs of any State"*. This language is drawn directly from the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations.[32] In the opinion of Hakan Friman, Swedish Associate Judge, this provision was specifically enacted in order to prevent States justifying interventions in other States.[33]

33.2 In terms of articles 12.2(a) and (b), a State Party may only consent to the jurisdiction of the ICC in respect of a crime committed on its territory, vessel or aircraft or by one of its nationals.

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[32] http://www.un-documents.net/a25r2625.htm

[33] Hakan Friman: "The International Criminal Court: Negotiations and Key Issues", African Security Review, Vol 8, No 6, 1999 at pages 7 to 8 at http://www.iss.co.za

33.3 Although a State Party may refer a situation to the Prosecutor of the ICC in terms of article 14.1 in order to enable the Prosecutor to initiate investigations proprio motu in terms of article 15.1, the exercise of such powers are also limited to the situations defined in article 12 supra.

34. The International Court of Justice found that *"The Rome Statute does not establish a new legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either."*[34]

35. In 2004 and 2011 the Commonwealth appointed an expert group to compile a report on the implementation of the Rome Treaty and to draft model laws which could be adopted by Member States. In both reports the expert groups found that the Rome Treaty did not specify what form of jurisdiction should be applied under national law. They however noted that certain States had elected to adopt universal jurisdiction, either with a precondition of presence or not. With reference to the adoption of universal jurisdiction with no requirement of presence, the experts were of the view that States following that approach would face arguments as to the consistency of that position with International Law. Their recommendation that universal jurisdiction should be applied recognized conditional universal jurisdiction. The model law for conditional universal

[34] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002 at page 176/177 para 66 (hereinafter referred to as "Belgium v Congo")

jurisdiction is almost identical to the domestic ICC Act whereas the model law for absolute universal jurisdiction is irreconcilable with it.[35]

36. It is also the view of international experts that the Rome Treaty does not prescribe absolute universal jurisdiction.[36]

37. It is a fact that few State Parties have adopted absolute universal jurisdiction with their implementation of the Rome Treaty.[37] Belgium, which originally adopted absolute universal jurisdiction, amended its legislation to essentially dispense therewith.[38]

38. It is therefore respectfully submitted that the Second Applicant's interpretation of the domestic ICC Act is not inconsistent with the Rome Treaty.

Customary International Law

39. It is submitted that Customary International Law does not impose an obligation on States to implement absolute universal jurisdiction.

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[35] 2004 and 2011 Expert Group Reports and Model Laws at pages 5 and 6 (2004) and 9 to 11 (2011) at http://www.thecommonwealth.org/

[36] Mitsue Inazumi supra at pages 86 to 87

[37] Joseph Rikhof: Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity, published in the "Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes", Morten Bergsmo (ed), FICHL publication, at pages 69 to 70

[38] Antonio Cassese: Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction, published in the "Journal of International Criminal Justice 1 (2003) at pages 589 to 590

40. The issue of absolute universal jurisdiction was considered by the International Court of Justice.[39] Belgium which sought to defend its decision to adopt absolute jurisdiction relied not on an obligatory rule but rather the absence of a prohibitive rule. The views of the members of the Court on the issue of universal jurisdiction were divergent:

40.1 The President of the Court was of the view that International Law only recognised universal jurisdiction in the case of piracy and that universal jurisdiction in absentia in the case of war crimes and crimes against humanity was unknown to International Law.[40]

40.2 Judge Ranjeva found that a sufficient basis to apply universal jurisdiction in absentia had not been established.[41] The learned Judge noted that as at the time of the judgment, i.e. 14 February 2002, that of the 125 States, which had national legislation relating to war crimes and crimes against humanity, only five did not require as a prerequisite the presence of the accused in their territory.[42]

40.3 Judge van den Wyngaert found that there was no generally accepted definition of universal jurisdiction in Conventional or Customary

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[39] Belgium v Congo supra at page 3
[40] Page 42/43 para 12 to 13 of the Judgment
[41] Page 58/59 para 11 of the Judgment
[42] Page 57/58 para 8 of the Judgment

International law and that States which had adopted the principle had done so in very different ways.[43]

40.4 Judge Rezek remarked as follows: *"In no way does international law as it now stands allow for activist intervention, whereby a State seeks out on another State's territory, by means of an extradition request or an international arrest warrant, an individual accused of crimes under public international law but having no factual connection with the forum State."*[44]

40.5 Judge Bula-Bula remarked: *"Belgium has neither an obligation ... nor any entitlement under international law to pose as prosecutor for all mankind ..."*[45]

40.6 Judges Higgins, Kooijmans and Buergenthal remarked as follows: "... *There is no established practice in which States exercise universal jurisdiction ... As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. ... National legislation reflects the circumstances in which the State*

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[43] Page 165/166 para 44 of the Judgment
[44] Page 92/93 para 6 of the Judgment
[45] Page 126/128 para 81 of the Judgment

provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scale of international law."[46]

41. For the purpose of this appeal it is not necessary to make a finding as to which of the above divergent views is correct. The divergent views support the Second Applicant's submission that there is no obligatory rule of Customary International Law requiring the adoption of absolute universal jurisdiction.

42. The AU-EU expert report supra also acknowledges that when not constrained otherwise by treaty, States exercise universal jurisdiction in a diversity of ways.[47]

43. Professor Claus Kreß, writing in 2006, expressed the view that the small number of States which have adopted universal jurisdiction in absentia form a minority insufficient to assert the creation of a new rule of Customary International Law relating to this form of jurisdiction.[48]

44. Prof M Cherif Bassiouni points out that universal jurisdiction is not as well established in Customary International Law as its proponents profess it to be due to a failure to distinguish between lex lata and de lege ferenda.[49]

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[46] Page 76/77 para 45 of the Judgment
[47] AU-EU expert report at page 9 para 10
[48] Prof Claus Kreß: Universal Jurisdiction over International Crimes and the Institut de Droit international, published in the Journal of International Criminal Justice 4 (2006) at page 577
[49] Prof M Cherif Bassiouni: Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, published in the Virginia Journal of International Law, Vol 42 (2001) at pages 83 and 95

45. It is therefore submitted that at Customary International Law it is for individual States to decide which form of universal jurisdiction to adopt and State practice has been predominantly not to favour absolute universal jurisdiction.

46. Although various disadvantages relating to absolute universal jurisdiction have been advanced, it is submitted that the most compelling reason for not adopting absolute universal jurisdiction has been provided by Cassese,[50] who points out: *"If the accused never enters the country where the court is located, or is not extradited to that country, a situation that appears most likely, the judge will end up investigating hundreds of complaints about which he can do nothing."*

47. The designation of a norm as peremptory in international law (jus cogens) and also the existence of an obligation erga omnes does not mean that States are obliged to exercise universal jurisdiction.[51]

Conventional International Law

48. Unlike war crimes, which are the subject of the Geneva Conventions, there are no specialised conventions relating to crimes against humanity.[52]

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[50] Antonio Cassese: International Criminal Law 2003 Edition at pages 289 to 290

[51] The Report of the Commission on the Use of the Principle of Universal Jurisdiction: Executive Council African Union EX.CL/411(XIII) at page 8 para 35

[52] Fausto Pocar and Magali Maystre "The Principle of Complementarity: a Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?", published in the "Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes", Morten Bergsmo (ed), FICHL publication, at page 273

49. The Respondents seek the crime against humanity of torture to be investigated. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as *the Torture Convention")* does not call for the State Parties to implement universal jurisdiction, but merely the principle of aut dedere aut judicare.[53] The Convention also does not exclude criminal jurisdiction exercised in accordance with national law.[54]

50. Conventional International Law can therefore not be a basis for making the adoption of absolute universal jurisdiction obligatory.

The Initiation of Investigations

51. The Court a quo found that the domestic ICC Act was silent on the subject of investigations. It is submitted that both this Act and the Rome Treaty have as their objectives the prosecution of persons who are guilty of the offences in question. Neither instrument we submit would call for an investigation which could not be placed before a Court having jurisdiction. In the case of the First Respondent's complaint, on the interpretation of the Act as given by the Court a quo, the case could not be placed before either the ICC or a South African Court.

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[53] Article 5.2
[54] Article 5.3

52. It is submitted that the domestic ICC Act's silence on the domestic investigations is to be interpreted that it did not intend to depart from the normal principles relating thereto. The South African Police Service, it is submitted, does not have a legal mandate to investigate crimes which fall outside the jurisdiction of the South African Courts.

53. This Honourable Court has previously ruled that the principle of legality applies to the initiation of criminal investigations.[55]

> *"[22] The principle of legality required him to confine himself in the exercise of those powers to what the statute permitted, and in specifying 'alleged irregularities' he went beyond that. To insist that he should not have done so is not technical or formal. It is a requirement of constitutional substance, relating to the ambit of the investigating director's powers and the pre-conditions for their lawful exercise."*

54. We therefore submit that the initiation of an investigation without a legal basis is therefore unlawful. We have already submitted that the terminology, *"the jurisdiction of a South African Court,"* is used by the legislator to extend jurisdiction to activities committed outside the territory of South Africa. This

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[55] Powell NO and Others v Van der Merwe NO and Others 2005 (1) SACR 317 (SCA) para 22

language is also consistent with the Rome Treaty where the ICC Prosecutor's right to investigate is limited to crimes "*within the jurisdiction of the Court*".[56]

55. While it is accepted that certain countries who have adopted conditional universal jurisdiction initiate investigations without the presence of the suspect,[57] it is submitted that the issue is not what other countries do, but what the South African legislator intended, because each State has the unfettered right to choose how it implements the Rome Treaty.

56. It is submitted that there are several indications establishing that it was not the intention of the legislator to initiate investigations on anticipated presence:

56.1 There is no provision making allowance therefore.

56.2 There is no equivalent provision of section 9(2)(d) relating to national investigations. Section 43(1)(b) of Act 51 of 1977 therefore applies. This section provides that where an offence is committed outside the area of jurisdiction of a Magistrate or Justice, then the warrant must be issued by the said official in whose area of jurisdiction the suspect is.

56.3 There can be no prospect for extradition in the absence of a warrant issued under section 43 of Act 51 of 1977 or a bench warrant.

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[56] Article 53.1(a)
[57] See sections 8 and 9 of the Crimes against Humanity and War Crimes Act, S.C.200 of Canada

Consequently, the procedure followed by Belgium in the Belgium v Congo matter supra is not possible.

56.4 The Court a quo specifically dealt with the issue of mutual legal assistance and in this regard referred to the International Cooperation in Criminal Matters Act, No 75 of 1996 (hereinafter referred to as *"ICCMA"*).[58] Section 2(2)(a) provides that a letter of request for an investigation may be issued if there are reasonable grounds for believing that an offence has been committed in the Republic. In terms of section 4(3) of the domestic ICC Act, the Rome Statute offences are only deemed to have been committed in the territory of the Republic if one or more of the jurisdictional facts set out therein have been established.

57. The initiation of investigations in the absence of one or more jurisdictional facts set out in section 4(3) would amount to absolute universal jurisdiction, which was not the intention of the legislator.

58. The Respondents had at various stages advanced arguments seeking to justify the initiation of the investigation in the absence of the suspects:

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[58] Record Vol 8 Judgment page 1198 para 10

58.1 In the memorandum submitted to the Head of the PCLU, it was submitted that the threshold of anticipated presence should be adopted.[59]

58.2 In the application answering affidavit, the Respondents raise arguments relating to:

- the fact that the Applicants' version would mean that the crimes are only proscribed when the accused enter the country,[60]
- crimes such as torture are automatically part of South African law in terms of section 232 of the Constitution,[61]
- and that the wording "*beyond the borders of South Africa, certain circumstances ...*" should be construed as an ad hoc determination to be made in each individual case.[62]

58.3 It was also contended that section 205 of the Constitution authorised the police to investigate crimes all over the world [63] and that the Applicants had admitted that a prima facie case was made out in the *"torture docket"*. [64]

59. It is respectfully submitted that there is no merit in these arguments:

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[59] Record Vol 1 pages 115 to 116 para 63 to 64
[60] Application page 182 para 54
[61] Application page 182 para 55
[62] Application page 185 para 68
[63] Application page 183 para 60
[64] Application page 189 para 74.6

59.1 In the light of Brigadier Marion's supporting affidavit, 16 of the persons in respect of which an investigation was sought, had either not visited the country at all, or stopped doing so. The visits of the remaining two suspects were of regular but short duration only.[65] Cassese has expressed the view that the requirement of presence means that this must not be of short duration.[66] We however reiterate our submission that there would have to be a specific statutory enactment sanctioning investigations on anticipated presence.

59.2 It has never been the Second Applicant's submission that a crime is only committed when the suspect enters the country. It is only that the obligation to investigate by South Africa is triggered by presence. It must also be noted that the domestic ICC Act specifically prohibits prosecutions prior to the commencement of the Act.[67]

59.3 South Africa is not a monist jurisdiction and consequently a person cannot be tried for an international crime unless such conduct has been criminalised under domestic law.[68] Torture is no different and in fact a *"Prevention and Combating of Torture of Persons Bill"* is currently being placed before Parliament in order to implement the Convention.[69]

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65 Record Vol 4 Annexure "TCW4" pages 635 to 637 para 27
66 Cassese: "Is the bell tolling for Universality?" article supra at 593
67 Section 5(2)
68 Dugard supra at 155
69 http://www.justice.gov.za/

59.4 The interpretation of the phrase *"beyond the borders of South Africa"* by the Respondents would be in conflict with the provisions of section 4(3) as well as the obligation to enact legislation[70] which is clear and of general application.

59.5 It does not assist to refer to section 205 of the Constitution, because the Constitutional Court has ruled that the Constitution is not of extraterritorial effect.[71] The Respondents' interpretation runs against the presumption against extraterritoriality (South Africa) and the sovereign equality of States (which, as we have already submitted, has been incorporated into the Preamble of the Rome Treaty). The Second Applicant has never admitted that the "*torture docket*" constituted prima facie evidence. That it is not, is also confirmed by Marion's assessment of the material.[72] In any event, in respect of a crime committed outside the territory of South Africa, in addition to the sufficiency of evidence, one or more of the jurisdictional grounds set out in section 4(3) must be established.

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[70] The Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O. and Others 2001 (1) SA 545 (CC) at page 559 para 24

[71] Kaunda and Others v President of the RSA and Others 2005 (4) SA 235 (CC) at pages 252 to 253 para 38

[72] Record Vol 5 Answering Affidavit Adv MJ Mpshe SC page 704 para 84
Record Vol 4 Supporting Affidavit Brigadier Marion pages 616 to 620 para 14 and pages 632 to 635 paras 25 to 26

59.6 Generally the Respondents have referred to international obligations in generic terms in an attempt to have absolute universal jurisdiction adopted contrary to the intention of the legislator.

Criticism by the Court a quo

60. The Court a quo found that the presence of the suspects in the country had not been properly explained and that the First Applicant's argument would produce absurd results because jurisdiction would be gained and lost whenever a suspect entered or left the country.[73]

61. We submit that a careful reading of para 27 of Marion's supporting affidavit [74] demonstrates that all the relevant periods were dealt with from the time when the request for an investigation was made on 14 March 2008 until the finalisation of Marion's affidavit in September 2010. The First Applicant did not initiate any investigations despite the presence of a very small number of the implicated persons, because this was not the basis upon which the decision not to initiate the investigation was taken.[75]

62. The "*absurdity*" remarked on by the Court would only arise in the event of there being insufficient evidence to justify the arrest of the suspect. As is clear from Marion's supporting affidavit, there would be no basis upon which the suspects

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[73] Record Vol 8 Judgment page 1194 para 32
[74] Supra
[75] Record Vol 3 pages 443 to 445

could be arrested on the available evidence and that further evidence would have to be obtained from the Government of Zimbabwe. We again reiterate the concerns expressed by Cassese supra.

Acceptance of the views of the Head: PCLU

63. The Court a quo found that at a certain stage the views of the Head: PCLU corresponded with that of the Respondents and should have been followed by the Applicants. In this regard the Court a quo found that in May 2009 the Head: PCLU had identified six actions which the First Applicant should have performed in the light of six factors taken into account by him.[76]

64. It is submitted that these views failed to take into account the obligation to establish one or more of the jurisdictional facts set out in Section 4(3) of the domestic Rome Statute as a prerequisite for an investigation. The Court a quo should have found that these actions could only be contemplated once jurisdiction had been established. In accepting the views of the Head: PCLU, the Court a quo respectfully erred in finding that the views set out in paragraphs (g), (h), (i), (j), (k) and (l) on pages 1169 and 1170 of the judgment were expressed to the First Applicant in May 2009.

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[76] Record Vol 8 Judgment pages 1169 to 1170 para 16.2

65. We submit that no such views were expressed in May 2009, nor did the Head: PCLU ever communicate with the First Applicant from 14 March 2008 to 12 June 2009. (Although he had ample opportunity at the relevant time to have expressed his views had he so desired.) These views were only expressed verbally to the Second Applicant on 12 June 2009 and therefore constitute inadmissible ex post facto reasoning.[77] On the Head: PCLU's own version, he never requested the Applicants to reconsider the decision not to investigate and the only inference to be drawn therefrom, we submit, is that he did not have the necessary conviction in his own views.

66. The record filed on behalf of the Second Applicant, it is submitted, clearly demonstrates that the Head: PCLU never applied his mind to the relevant issues. Although on 1 July 2008 he recommended that an investigation be instituted,[78] this was based solely on the following:

66.1 The memorandum of the First Respondent, which primarily advocated (in our submission incorrectly) absolute universal jurisdiction. [79]

66.2 Two-and-a-quarter pages, compiled by himself, entitled *"Legal Notes: Zimbabwe Situation"*, dealing only with the elements of a crime against humanity and the gravity test of the ICC.[80]

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[77] Nieuwoudt v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission; Du Toit v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission; Ras v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission 2002 (1) SACR 299 (C) at page 313a-c

[78] Record Vol 1 pages 420 to 422

[79] Record Vol 1 pages 110 to 117

66.3 A three-page letter to the Prosecutor of the ICC, seeking advice on how to recommend making a decision on prosecution on these issues. In passing, he remarked *"A further possible requirement of anticipated presence should not be an obstacle ..."* At that stage he had neither established whether in fact the suspects visited the country nor had he paid attention to the requirements of section 4(3)(c).[81]

66.4 An opinion on the issue of gravity, requested from one of the counsel for the First Respondent.[82]

CONCLUSION AND ORDERS

67. Although the First Applicant did not accept that investigations could be conducted on the basis of anticipated presence,[83] the decision not to initiate the investigation was based on grounds which are not the subject of this appeal.

68. The issue is whether the orders made after reviewing the decision are unlawful and whether they should be set aside. We have already submitted that this Court will not endorse orders which are legally untenable.[84] We have already submitted that the Court a quo's finding that the presence of the suspects was not

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80 Record Vol 3 pages 395 to 397
81 Record Vol 3 pages 398 to 400
82 Record Vol 3 pages 402 to 419
83 Record Vol 3 page 443 para 30
84 Government of the Republic of South Africa and Others v Von Abo supra at para 18

a prerequisite for the initiation, conduct and management of the investigation is bad in law. We therefore submit that the Respondents' reliance on the Rustenburg Platinum Mines Ltd and Patel decisions is misplaced.[85]

69. Although the issue of presence was not enquired into when the request for an investigation was made, this was however done when the review proceedings were instituted. As has been established by Marion's investigation, only two suspects have regularly visited the country since 1 April 2008 and there is no evidence implicating them in the offences. The Second Applicant had opposed the mandamus sought at the review proceedings primarily on the basis that the requirement of presence had not been met.[86] It is respectfully submitted that no useful purpose would be achieved by ordering a reassessment. It is trite that review is a discretionary remedy and that this Honourable Court should set aside the order directing a reconsideration.[87]

70. In the circumstances it is submitted that the Applicants' appeal must be upheld with costs, such costs to include:

70.1 The costs of the review before the Court a quo;

70.2 The costs of the application for leave to appeal before the Court a quo;

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[85] Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA)
Patel v Witbank Town Council 1931 TPD 284 at 290

[86] Record Vol 6 Answering Affidavit Adv Menzi Simelane pages 806 to 809 para 33

[87] Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa (4th Ed) at page 959

70.3 The costs for the application for leave to appeal to this Honourable Court;

70.4 The costs occasioned by the employment of three counsel in both instances.

71. It is finally submitted that the order of the Court a quo be substituted with an order in the following terms:

"The Respondents' review is dismissed with costs, such costs to include the costs occasioned by the employment of three counsel."

DATED at PRETORIA ON THIS 19th DAY OF APRIL 2013.

CE PUCKRIN SC

RC MACADAM

SC BUKAU

COUNSEL FOR THE 2ND APPLICANT