IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case NO: **02/2014**

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First Respondent
ZIMBABWE EXILES FORUM	Second Respondent
And	
JOHN DUGARD & FOUR OTHERS	First to Fourth amici curiae
THE TIDES CENTER	Fifth amicus curiae
THE PEACE AND JUSTICE INITIATIVE	Sixth amicus curiae
CENTRE FOR APPLIED LEGAL STUDIES	Seventh amicus curiae

FILING SHEET –SIXTH AMICUS CURIAE

Herewith presented for filing:

1. Sixth *Amicus Curiae*'s Written Submissions; and
2. Practice Note.

DATED at Sandton on this day of 12th **MAY** 2014

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THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT02/2104

In the matter between:

NATIONAL COMMISSIONER, SAPS	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First respondent
ZIMBABWE EXILES FORUM	Second respondent
JOHN DUGARD & FOUR OTHERS	First to fourth amici curiae
THE TIDES CENTER	Fifth amicus curiae
THE PEACE AND JUSTICE INITIATIVE	Sixth amicus curiae
CENTRE FOR APPLIED LEGAL STUDIES	Seventh amicus curiae

SIXTH AMICUS CURIAE'S SUBMISSIONS

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INTRODUCTION*

1. The SCA found that the South African Police Service (*SAPS*) is empowered to investigate allegations of torture committed in Zimbabwe in accordance with the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (*the ICC Act*), irrespective of whether the alleged perpetrators are present within the territory of South Africa. The Peace and Justice Initiative (*PJI*) submits that this finding is correct and in compliance with international criminal law.

2. PJI makes three primary submissions in this regard:

   2.1. First, South Africa as a party to the Rome Statute of the International Criminal Court (*the Rome Statute*) and the Convention Against Torture (1984) (*CAT*) is obliged to investigate and prosecute cases of torture that fall within the ambit of crimes against humanity in terms of its domestic criminal jurisdiction in line with these treaties.

   2.2. Second, the Rome Statute and the CAT encourage state parties to adopt the widest possible domestic jurisdiction over international crimes (in this case torture) to ensure accountability and end impunity for such crimes. South Africa has done so by adopting the ICC Act and the Prevention and Combatting of Torture of Persons Act 13 of 2013 (*the Torture Act*). The ICC

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* The international and comparative law research that forms the basis of the arguments in these submissions was undertaken by a team led by Manuel J. Ventura, Director of The Peace and Justice Initiative, in the Hague, Netherlands.

Act in s 4(3) establishes extraterritorial, and in certain instances universal, jurisdiction for South African courts over the ICC crimes.

2.3. Third, South African law enforcement agencies are empowered to investigate international crimes that have been committed outside the borders of South Africa. Imposing a duty on them to investigate torture as a crime against humanity allegedly committed in Zimbabwe by perpetrators who are neither South African citizens, nor ordinarily resident in South Africa, in circumstances in which the perpetrators are anticipated to be present in South Africa, is consistent with the Constitution, customary international law, the spirit of the ICC's complementarity principle, and the practice of state parties to the Rome and CAT.

3. We consider these submissions in relation to the Rome Statute and the CAT in turn.

THE DUTY TO PROSECUTE ICC CRIMES UNDER THE ROME STATUTE

Jurisdiction over ICC crimes under the Rome Statute

4. The purposes of, and principles underlying, the ICC system are identified in the Preamble to the Rome Statute.[1] It recognises the threat posed by the gravity of ICC

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[1] The majority of Trial Chamber V(A) of the ICC recently observed in *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274 para 64 that:

> "The Rome Statute preamble is a compendious expression, in all solemnness, of the serious and urgent concerns that frame the mandate that the States Parties have given the

crimes to "*the peace, security and well-being of the world*" and affirms that the "*most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*".

5. After years of intensive negotiations by state representatives to the Rome conference about the non-temporal bases upon which the ICC may exercise jurisdiction,[2] states agreed in Article 12 of the Rome Statute that the ICC may only exercise jurisdiction – outside of situations referred to the ICC Prosecutor by the United Nations Security Council (*UNSC*)[3] – if the conduct in question took place on the territory of a state party to the Rome Statute[4] or where the alleged perpetrator is a national of that state. The State attendees to the Rome Conference thus settled on the "*two primary bases of jurisdiction over the offence in international criminal law, and* [which] *are universally accepted*"[5] – territoriality and active nationality (or

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ICC and from which derives the powers and attributes that are reasonable for the achievement of the Court's purposes."

2 For an overview and analysis of the negotiations concerning and adoption of the text of Article 12 of the Rome Statute see Williams and Schabas "Article 12" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Second edition) (Hart, 2008) pp 547-561.

3 See Rome Statute Article 13(b). When referring a situation to the Court under Article 13(b), the UNSC must do so under Chapter VII of the UN Charter. That means that the referral resolution will be binding on all UN member States in accordance with Article 25 of the UN Charter, pursuant to which UN members pledge to accept the decisions of the UNSC on matters of international peace and security.

4 Or a state which has lodged a declaration with the ICC pursuant to Article 12(3) accepting the ICC's jurisdiction *ad hoc*.

5 Williams and Schabas, *supra* at p. 556.

personality).[6] In all six non-UNSC referred situations before the ICC,[7] the court exercised jurisdiction on the basis of territoriality under Article 12(2)(a).[8]

Complementarity and the role of national courts in prosecuting ICC crimes

6. The linchpin of the ICC system is, however, the principle of *complementarity.*[9] The ICC is intended as a court of last resort that will only prosecute international crimes where national structures and courts are either unwilling or unable to conduct investigations and prosecutions. As significant as the establishment of the ICC is in the fight against impunity for international crimes, it is accordingly the national courts of member states that retain the primary responsibility for the prosecution of those crimes.[10]

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6 To be contrasted with the concept of passive nationality (or personality), whereby a state exercises criminal jurisdiction over a crime and/or accused person on the basis that the victim of the crime was or is a national of the concerned state. Stigen *The Relationship between the International Criminal Court and National Jurisdictions* (Martinus Nijhoff, 2008) pp192 and 193

7 These are the situations in Uganda, Democratic Republic of the Congo ("DRC"), Central African Republic ("CAR"), Kenya, Ivory Coast and Mali

8 See Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG (wherein the Pre-Trial Chamber confirmed its jurisdiction over the case on the basis that the alleged Rome Statute crimes occurred on the territory of the Central African Republic, a party to the Rome Statute, during the period 25 October 2002 to 15 March 2003, as opposed to asserting jurisdiction over Mr. Bemba on the basis of his nationality as a citizen of the DRC, which deposited its notification of ratification of the Rome Statute on 11 April 2002).

9 See El Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (Martinus Nijhoff, 2008) p 1

10 "Preamble" in Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article (Second edition) (Hart, 2008) p 11. See also El Zeidy, supra note 8 at pp 218 to 219

7. The Rome Statute recognises that state parties have an obligation under international law to exercise territorial and active nationality jurisdiction and strongly encourages state parties to exercise broader jurisdictional bases to investigate and prosecute international crimes.[11]

Universal jurisdiction over ICC crimes in domestic courts

8. The significance of, and need for, a domestic obligation to prosecute international crimes is perhaps most obvious when those crimes are committed within the territory, and by citizens of, states that are not parties to the Rome Statute.[12] In those instances, the primary (and often only) way in which to bring those perpetrators to justice (other than commanding the UNSC machinery as contemplated in article 13(b) of the Rome Statute) is domestic prosecution by a state party. If such a domestic prosecution is not pursued in or by the country in which the crime was committed, the perpetrators of those crimes can only be reached and brought to justice through the extraterritorial jurisdiction of state parties to the Rome Statute.

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11 See paragraph 6 of the preamble of the Rome Statute; *Paper on some policy issues before the Office of the Prosecutor* available at: http://www.icc-cpi.int/library/organs/otp/030905-Policy-Paper.pdf ("... *the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States*").

12 Zimbabwe has not ratified the Rome Statute, despite signing it on 17 July 1998. It is accordingly not a state party to the treaty. It is also not a state party to the CAT.

9. It is accordingly plain why the Rome Statute encourages state parties to look beyond its borders, and to the actions of those who are not its citizens, if the aim of ending impunity is effectively to be achieved.

10. The negotiations at the Rome Conference were conducted against the backdrop of the recognition at customary international law that states may exercise universal jurisdiction over those crimes that "*deeply shock the conscience of humanity*"[13] and that violate the values that are foundational to our world order. These include the very crimes that are the subject of the Rome Statue – crimes against humanity, torture, genocide, and war crimes.[14]

11. In limiting the bases for the ICC's jurisdiction over these crimes to territoriality and active personality, but recognising the primacy of the obligations of national courts to exercise their own criminal jurisdiction over them, the Rome Statute accordingly requires of each state party, in addition to its duties of international co-operation, to command the full extent of its criminal jurisdiction – including universal jurisdiction where this is recognised – to achieve the aims of the treaty, and in particular to "*end*

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13 Preamble to the Rome Statute

14 See e.g the Resolution on the Question of the punishment of war criminals and of persons who have committed crimes against humanity GA Res 2712 25 UN GAOR Supp (no 28) at 78 to 79 UN Doc A/ 8028 (1970); The UN Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity adopted in 1973 GA Res 3074 UN GAOR 28th Sess, Supp No 30 at 78 to 79 UN Doc A/ 9030 (1973); UN General Assembly Resolution 49/60 of 9 December 1994; Article 9 of the International Law Commission Draft Code of Crimes against the Peace and Security of Mankind, 1996

impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[15]

South Africa's approach to its domestic jurisdiction over ICC crimes

12. In adopting the ICC Act, South Africa committed itself to bringing to justice perpetrators of ICC crimes – "*either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statue"* or, in the event of the NPA declining or being unable to prosecute, in the ICC in line with the principle of complementarity.

13. Chapter 2 of the ICC Act deals with the primary obligation on the South African courts to prosecute ICC crimes. Section 4(3) of the ICC Act extends the jurisdiction of South African courts to cover ICC crimes committed beyond its borders in the circumstances set out in that section. The section does so by way of a deeming provision, so that, if those circumstances were shown to be present, the crimes would for all intents and purposes be treated as if it had been committed in South Africa. Section 4(3)(c) provides that South African courts have jurisdiction over ICC crimes committed outside of the country's territory based only on the presence of the perpetrator, after the commission of the crime, in South Africa.

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15 The Paris Court of Appeal in the *Gaddafi case* cited this preambular paragraph of the ICC Statute as evidence of the obligation to prosecute authors of international crimes, binding on any State party as a result of "the intent of the international community to prosecute the most serious facts, even though perpetrated by heads of State in the exercise of their functions, whenever they amount to international crimes, contrary to the demands of universal conscience." *Gaddafi*, France, Cour d'appel de Paris, Chambre d'accusation, Decision of 20 October 2000.

14. The ICC Act accordingly acknowledges that the primary obligation under the Rome Statute is the obligation to prosecute the ICC crimes domestically, and, accepts universal jurisdiction over those crimes committed outside the country in the circumstances provided in section 4(3)(c). This is entirely consonant with the object and purpose of the Rome Statute,[16] and the principle of complementarity,[17] with customary international law that entitles all States to investigate and prosecute international crimes, including on the basis of universal jurisdiction, and with the recognition in s 232[18] of the Constitution that customary international law is law in South Africa.

Investigating ICC crimes under the Rome Statute

15. The ICC Act does not explicitly regulate the investigation of ICC crimes to be prosecuted domestically – neither those committed in South Africa, nor those committed extraterritorially. The Rome Statute in article 17(1), however, provides a

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16 See Robinson "The Rome Statute and Its Impact on National Law," in The Rome Statute of the International Criminal Court: A Commentary, Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds) (Oxford: OUP, 2002) p 1861 ("*Implementation of the Rome Statute ... provides an excellent opportunity for States to affirm their abhorrence of these crimes and to establish universal jurisdiction over them.*")

17 PJI has prepared the annexed table showing the practice of a number of states parties to the ICC which have included universal jurisdiction, in some form or another, into their domestic legislation incorporating the Rome Statute into their domestic systems. PJI notes that other states have also incorporated universal jurisdiction for international crimes separately. See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World (2012 Update)*, October 2012, http://www.amnesty.org/en/library/info/IOR53/019/2012/en.

18 Section 232 of the Constitution of South Africa provides:

> "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*"

useful guide to the proper approach to the investigation stage. It does so in at least three ways:

15.1. First, by distinguishing between the investigatory and prosecutorial obligations on state parties as separate and distinct stages.

15.2. Second, by emphasising that, in line with the principle of complementarity, in those instances in which the ICC has jurisdiction, such jurisdiction will be excluded while a matter is being investigated by a state party, unless the investigation is not "*genuine*" – either because the state is unable, or unwilling "*genuinely*" to carry out the investigation.

15.3. Third, by stating that, once such a "*genuine*" investigation has taken place, a state's decision not to prosecute an ICC crime will, in line with the principle of complementarity, exclude the jurisdiction of the ICC – again unless the state's decision not to prosecute is because the state is unable, or unwilling "*genuinely*" to prosecute.

16. Article 17(1) accordingly recognises, not only that there is an obligation under international law on state parties to *investigate* (as distinct from a duty to prosecute) those ICC crimes within its domestic jurisdiction, but also that the *primary* obligation to investigate those crimes is on state parties. Logically, and in terms of the normal principles of criminal procedure, the threshold for the initiation of an investigation

must be lower than that for a prosecution. Article 17 is, however, premised on the recognition that states must conduct both a "*genuine*" investigation, and an investigation that would enable a decision "*genuinely to prosecute*".

17. Article 17(1)(b) of the Rome Statute indicates that an investigation should take place *prior* to a state determining, based on the law and facts, whether or not there are sufficient grounds to proceed with a prosecution. This has a number of implications for the issue before this Court:

17.1. An investigation cannot be avoided on the basis that there may ultimately be an insufficient basis for a prosecution. A decision to prosecute can only be taken once a "*genuine*" investigation into the complaint has been conducted.

17.2. The Rome Statute approaches the investigation of ICC crimes as primarily falling on the state party to carry out– and one that must be performed in good faith, or at least "*genuinely*". Whether or not a particular investigation meets this standard is subject to scrutiny by the ICC if that complaint were to be referred to the ICC. The fact that, in this case, such a referral cannot take place as the ICC does not have jurisdiction over crimes committed in Zimbabwe supports, rather than detracts from, an obligation to investigate falling on South African authorities that are empowered to conduct such investigations.

17.3. This, however, does not mean that state parties are compelled either to investigate, or to prosecute, international crimes brought to its attention if it is unable to do so. It does, however, require the state to be able to justify why this is so.

18. The ICC Act, and section 4(3)(c), must be interpreted consistently with South Africa's treaty obligations under the Rome Statute[19] and purposively with its aim of creating a framework for effective implementation of the Rome Statute in South Africa, complying with South Africa's obligations under the Rome Stature and its aim to

> "*enable, as far as possible, and in accordance with the principle of complementarity as referred to in Article 1 of the Statute, the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances*".[20]

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19 Constitution s 233; See also approach to domestic statutory interpretation per Judge Antonio Cassese STL *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I/AC/R176*bis* 16 February 2011 para 41:

> *'that one should construe the national legislation of a State in such a manner as to align it as much as possible to international legal standards binding upon the State*

And at para 45*:*

> *'International conventional and customary law can provide guidance to the Tribunal's interpretation of the Lebanese [law]. It is not a question of untethering the Tribunal's law from the Lebanese provisions […]. It is rather that as domestic law those Lebanese provisions may be construed in the light and on the basis of the relevant international rules.'*

20 ICC Act s 3(d)

THE DUTY TO PROSECUTE TORTURE UNDER CAT

19. Under the Convention Against Torture (1984) (*CAT*) a state party is obliged to ensure *"that all acts of torture are offences under its criminal law"*, together with attempts to commit torture, and complicity and participation in torture.[21]

20. CAT obliges member states to provide for punishment that takes into consideration the grave nature of the crime, and is proportionate to the crime. [22]

21. South Africa has fulfilled these obligations through the recent enactment of the Torture Act[23] which adds to those offences that relate to torture incorporated into South African law by virtue of the ICC Act.

Jurisdiction over torture under CAT

22. CAT requires state parties to establish national criminal jurisdiction over torture. Specifically, CAT obliges state parties to implement territorial jurisdiction[24] and active personality jurisdiction.[25] Passive personality jurisdiction is also permissible, but is left to the relevant state's discretion.[26]

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21 CAT Article 4(1) and Nowak and McArthur, *CAT Commentary* p 249.

22 CAT Article 4(1).

23 Act 13 of 2013.

24 CAT Article 5(1) (a).

25 CAT Article 5(1)(b).

23. Importantly, CAT creates an obligation for states to incorporate universal jurisdiction over torture in domestic law[27] on condition that the alleged offender is present for purposes of prosecution, unless that person is extradited to another state that has jurisdiction over the acts of torture pursuant to Article 5(1)(a)-(c).[28] In other words, CAT obliges States to establish universal jurisdiction over torture according to the principle of *aut dedere aut iudicare* (or "*prosecute or extradite*").[29] CAT does not prescribe how this must be done[30] and permits each state party a margin of appreciation. The object of this provision is to ensure that "*no offender would have the opportunity to escape the consequences of his acts of torture.*"[31]

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26 CAT Article 5(1)(c).

27 CAT Article 5(2); CAT Committee, *Guengueng et al. v. Senegal*, Communication No. 181/2001, UN Doc. No. CAT/C/36/D/181/2001 19 May 2006 Annex paras 6.3-4; Nowak and McArthur *CAT Commentary* p 316:

> "*CAT is the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States parties without any precondition other than the presence of the alleged torturer.*"

28 Universal jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes Institut de Droit International Resolution Art. 3(b) Krakow 26 August 2005:

> "*universal jurisdiction requires the presence of the alleged offender on the territory of the prosecuting State, apart from acts of investigation and requests for extradition.*"

29 CAT Article 7(1) provides:

> "*The State Party in the territory under whose jurisdiction a person alleged to have committed [torture as incorporated into domestic law] is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purposes of prosecution.*"

30 CAT Article 5(2); *Guengueng et al. v. Senegal*, Communication No. 181/2001, CAT Committee UN Doc. No. CAT/C/36/D/181/2001 19 May 2006 Annex para 7.14.

31 Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 36 UN ESCOR Commission on Human Rights p 11 para 61 UN Doc. E/CN.4/1367 (1980).

The presence requirement under CAT

24. Some domestic courts have interpreted the presence requirement in CAT as meaning that jurisdiction over those crimes is founded by the presence of the perpetrator; in other words, that jurisdiction over the crime of torture does not arise until the alleged offender is present in the territory of the prosecuting state. Such jurisdictions accept that a trial *in absentia* may be possible for the crime of torture, as long as the alleged perpetrator was present in the domestic forum at the time the charges were filed.[32]

25. Even on this approach, however, there remains a need for some preparatory investigation – a difficulty that has been acknowledged to varying degrees even in jurisdictions that follow this approach:

25.1. In the Pinochet case, the Spanish National Court found jurisdiction over acts of torture based on Article 23(4)(g) of the Organic Law 6/1985, which grants

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32 This was the case in Ely Ould Dah, which concerned charges of torture against a Mauritanian intelligence officer during a governmental campaign of repression in 1990. In May 1993, an amnesty law was passed in Mauritania, preventing any investigation or prosecution of persons responsible for crimes committed in that period. Ely Ould Dah was arrested in France on 1 July 1999 when he was participating in a training program in Montpellier, and was subsequently indicted for torture and put under house arrest. On 5 April 2000, Ely Ould Dah escaped to Mauritania – an event that has caused an investigation to be opened. After a series of legal wrangles, during which the Cour de Cassation recognized the competence of French courts to exercise jurisdiction over the crime of torture committed in Mauritania notwithstanding the amnesty law, the trial in absentia opened on 30 June 2005 before the Cour d'assises of Nîmes. On 25 July 2005, the court sentenced the Mauritanian Captain to ten years in prison, the maximum term for the charges of torture. Ely Ould Dah, France, Court of Cassation, Criminal division, Decision of 23 October 2002, Bulletin criminel 2002 N° 195 p. 725. The decision was upheld by the European Court of Human Rights. Decision on the Admissibility in the case of Ould Dah v. France (No. 13113/03), 30 March 2009.

universal jurisdiction over specific crimes on the strength of the CAT.[33] The legislation subsequently underwent some changes whereby investigations too are subject to a presence requirement.[34] Despite this change, a Spanish court has recently ruled that Spain's obligations under CAT to investigate torture took precedence over legislative restrictions requiring that investigations human rights violations committed abroad could only take place if the suspects are present in Spain.[35]

25.2. Faced with a comparable question, the Supreme Court of the Netherlands held that the law in terms of which it implemented CAT (the Torture Convention Implementation Act) permitted the prosecution of a perpetrator in terms of universal jurisdiction under the same conditions as Article 5(2) of CAT, that is, when he/she was present in Netherlands.[36] Accordingly, *"[p]reparatory investigations might start earlier, but at the moment of instituting formal proceedings and/or issuing an arrest warrant, the suspected torturer must be present in the territory."*[37]

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33 *Pinochet* Spanish Central Criminal Court (Audiencia naçlonal) Order (auto) 5 November 1998 no1998/22605 rec 84/1998. This order was confirmed in the decision of the Audiencia Naçional 24 September 1999 no. 1999/28720, rec. 84/1999.

34 Applicant's Heads of Argument 10 April 2014 fn 7.

35 See Audiencia Nacional (Spain), Prior Proceeding 150/2009-P, Auto of 15 April 2014, available at http://www.ccrjustice.org/files/Court%205%20Decision%2015.04.14.pdf (in Spanish). For a discussion of the decision in English, see http://www.ccrjustice.org/newsroom/press-releases/spanish-court-refuses-close-guant%C3%A1namo-torture-investigation

36 Supreme Court of the Netherlands *Bouterse* LJN: AB1471 ILDC 90 (NL 2001) 18 September 2001 para. 8.5.

37 Nowak and McArthur *CAT Commentary* p. 319 (emphasis added).

26. The view that jurisdiction – and with it the power to investigate – is only triggered when the alleged torturer is in the territory of the forum state also makes little sense in respect of extradition requests. The objective of an extradition request is to have the subject of an investigation who is in the territory of another state brought into the requesting state's jurisdiction for the purpose of prosecution. Most extradition requests at least require that a "*probable cause*" standard can be proved.[38] In order to fulfil this standard, an investigation must be opened and carried out in the requesting State to the extent necessary to achieve such a minimum requirement. A presence requirement for an investigation to be opened in such circumstances would essentially prevent any extradition request from ever being made.

Universal jurisdiction over torture as customary international law crime

27. The imperative to investigate and prosecute cases of torture is recognised in customary international law. As a result, it is established as an international crime over which universal jurisdiction may be exercised. Even before the adoption of CAT, torture was arguably recognized as a crime under customary law which attracted universal jurisdiction.

27.1. The seminal case on torture as an international crime and the legal consequences thereof is the *Furundžija* case, decided by a Trial Chamber of

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38 See *eg* 2003 UK-US Extradition Treaty. Some States require that a *prima facie* case be made. This was the case in the pre-existing 1972 UK-US Extradition Treaty.

the ICTY on 10 December 1998.[39] The Trial Chamber found that a general prohibition against torture has evolved in customary international law[40]. The court also noted that "[*be]cause of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.*"[41] The court proceeded to articulate the inter-state and individual consequences of a violation of a *jus cogens* norm.

27.2. In the *Pinochet* case before the courts of the United Kingdom, the majority of judges viewed CAT as having either codified or crystallized an emerging international consensus on the customary right of all states to prosecute suspected torturers no matter what their nationality or where the crime was committed, based on the *jus cogens* character of the prohibition under international law.[42] Lord Browne-Wilkinson presiding argued that torture committed on a systematic or widespread scale was a crime against humanity which has a *jus cogens* status, thereby justifying all states to assert jurisdiction over acts of torture wherever committed.[43] Lord Millet held

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39 ICTY Prosecutor v Anton Furundžija Trial Chamber II Judgment 10 December 1998, Case No. IT-95-17/1-T (1999) 39 ILM.

40 At Para 137.

41 Furundžija ICTY Trial Chamber II Judgment 10 December 1998, Case No. IT-95-17/1-T; (1999) 39 ILM para 153.

42 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* House of Lords Judgment of 24 March 1999 2 WLR 827 (1999); [1999] 2 All ER 97 (referred to as "*Pinochet III*").

43 *Pinochet III* at p 114-115 a-e per Lord Browne-Wilkinson.

that crimes of *jus cogens* which are on a scale as to be regarded as an attack on the international legal order entail universal jurisdiction under customary law.[44]

27.3. The International Court of Justice recently affirmed that "*the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).*"[45]

State practice in exercising universal jurisdiction over torture under CAT

28. There is a reasonable number of instances of national courts exercising universal jurisdiction over the crime of torture, perhaps because of the clear conventional basis provided by CAT and also because just one act of torture, as defined in Article 1(1), is sufficient to trigger universal jurisdiction over the crime.

29. In the landmark case of *Filartiga v Peña-Irala* in the United States, concerning a civil law claim arising out of acts of torture perpetrated by a Paraguayan official against a Paraguayan citizen in Paraguay, a US court held that "*the torturer has become, like the pirate or the slave trader before him, hostis humanis generis, an enemy of all*

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44 *Pinochet III* at 177d per Lord Millet.

45 Question relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) 20 July 2012 para 99.

mankind". It accordingly claimed civil jurisdiction over the crime pursuant to the 1789 Alien Torts Claim Act.[46]

30. Although the *Filartiga* case concerns civil jurisdiction, the case nonetheless supports the principle that the crime of torture is universally condemned and that all nations have an interest in the repression of such crimes, regardless of the nationalities of the parties involved or where the crime took place. Since the CAT had not yet come into existence, the court was clearly relying on the characterization of torture as a violation of the law of nations when it held that

> "an *act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations*".[47]

31. Universal jurisdiction over torture as codified in CAT has been at the heart of the efforts to prosecute Hissène Habré, the former Chadian head of State residing in Senegal since 1990, for atrocities committed mainly against political opponents during his time in office (1982-1990). The Senegalese Supreme Court dismissed the case against Habré in March 2001, citing lack of universal jurisdiction over acts of torture committed abroad by foreigners under the existing provisions of the Senegalese Criminal Code.[48] However, after protracted legal wrangling, new legislation allowing for the prosecution of genocide, crimes against humanity, war crimes and torture, even when committed in another country, was passed on 31

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46 Filatiga v. Pena-Irala, United States, 630 F.2d 876 (1980) at 890.

47 At II.

48 Habré, Hissène, Senegal, Supreme Court, 20 March 2001, available at www.icrc.org/ihl-nat.nsf.

January 2006.[49] In the 2012 judgement on Senegal's alleged violation of the CAT by virtue of its failure to exercise jurisdiction over Habré, the International Court of Justice noted that:

> *"While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré."*[50]

32. The ICJ concluded that by "not immediately initiat[ing] a preliminary inquiry as soon as they had reason to suspect Mr Habré, who was in their territory, of being responsible for acts of torture [a point reached at the latest, in 2000 when the first complaint was filed against Mr. Habré] Senegal had breached its obligation under Article 6(2), of the CAT.[51]

33. With regard to Senegal's obligation to prosecute or extradite Habré under Article 7(2) of the CAT, the ICJ held that "*the competent authorities involved remain responsible*

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49 On 8 February 2013 the Extraordinary African Chambers were inaugurated in Dakar. On 2 July 2013, Hissène Habré was charged with crimes against humanity, torture and war crimes by the Extraordinary African Chambers and placed in pre-trial detention.

50 Question relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) 20 July 2012 para 86.

51 *Ibid* para 88.

for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure."[52] The ICJ further clarified that:

> *"Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State."*[53]

34. It concluded that *"the obligation provided for in Article 7, paragraph 1, required Senegal to take all measures necessary for its implementation as soon as possible, in particular once the first complaint had been filed against Mr Habré in 2000."*[54] A trial is now imminent before the Extraordinary African Chambers in Dakar.[55]

35. A number of cases based on universal jurisdiction involving somewhat lower level offenders living in Europe have taken place since the *Pinochet* litigation. In the Netherlands, three individuals, one former colonel in the Zairian army under Mobutu[56] and two Afghan war criminals have been convicted for torture on the basis

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52 *Ibid* para 90. See also para 91 (*"The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts"*) and para 94 (*"The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect."*)

53 *Ibid* para 95.

54 *Ibid* para 117.

55 On 8 February 2013 the Extraordinary African Chambers were inaugurated in Dakar. On 2 July 2013, Hissène Habré was charged with crimes against humanity, torture and war crimes by the Extraordinary African Chambers and placed in pre-trial detention.

56 In the Prosecutor v Nzapali case no A07178, the former colonel of the Zairian army and member of the Presidential Guard known as the 'king of the beasts' to his fellow officers, who allegedly led death squads between 1990 and 1995 in Kinshasa, was arrested in September 2003 on charges of torture and rape committed in 1995 and 1996. He had applied for asylum in the Netherlands in

of the Dutch Torture Convention Implementation Act of 1988,[57] the International Crimes Act of 2003, the Dutch Criminal Code and the Criminal Law in Wartime Act.[58]

36. In the United Kingdom, an Afghan warlord was found guilty of torture in Afghanistan in the 1990s on the basis of CAT, as implemented in domestic legislation (section 134 of the Criminal Justice Act in 1988).[59] In France, two Algerian brothers,[60] who were also citizens of France, and members of the Algerian Relizane Militias,[61] were indicted on 30 March 2004 by a Nîmes investigating judge for torture and crimes against humanity allegedly committed between 1994 and 1997, during a terror campaign against civilians aimed at finding out information about subversive groups. They have been released on bail awaiting trial.

1998, but after a victim informed the police of his criminal past, an investigation was commenced into his possible involvement in war crimes led by the Netherlands National Investigation Team for War Crimes (Nationaal Opsporingsteam Voor Oorlogsmisdrijven, NOVO), which was set up in 1998 and is responsible for investigating '1F' files. On 7 April 2004, the District Court of Rotterdam convicted him for torture, acquitted him on the rape charge, and sentenced him to two and a half years of prison. It was judged that 'the accused, at some time in or around October 1996, in Matadi (Bas-Zaïre), jointly and in conjunction with others, as civil servant, i.e. as member of the Garde Civile and in the performance of his duties, repeatedly and intentionally inflicted (grievous) bodily harm on someone who was deprived of his freedom, the sole object being to punish him and force him into compliance with his wishes.'

57 Torture Convention Implementation Act of 1989 (Netherlands).

58 Criminal Law in Wartime Act of 1952, Arts. 8 and 9. The judgments were published on 9 and 13 February 2006. For a comment, see Guénaël Mettraux, "Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 qua War Crimes," JICJ 4, 2 (2006).

59 In the case of Faryadi Sarwar Zardad on 18 July 2005 Zardad was found guilty of torture and of hostage taking, and sentenced to 20 years' imprisonment; R v. Zardad London, UK Central Criminal Court (Case No. T2203 7676) 18 July 2005 (unreported).

60 The brothers' names are Hocine 'Adda' Mohamed and Abdelkader Mohamed.

61 These government-supported 'self defence groups' were charged with rooting out subversive elements in the population.

37. This trend towards investigating and prosecuting alleged torturers has been limited to cases where the suspected persons are living on the territory of the investigating country. In Germany, on 31 March 2006, Federal Prosecutor Kay Nehm issued his decision not to go forward with an investigation against Zakirjon Almatovich Almatov, the Interior Minister of Uzbekistan, for crimes against humanity (tied to the Andijan massacre of 13 May 2005) and systematic torture committed in Uzbekistan's prisons. In December 2005, a complaint had been filed against Almatov and 11 other government officials by eight Uzbek victims, with the support of human rights groups, at a time that Almatov was visiting Germany.[62]

38. Under the 2002 German Code of Crimes against International Law, genocide, war crimes and crimes against humanity may be investigated and prosecuted in terms of the principle of universal jurisdiction.[63] Although the presence of the offender in German territory is not a formal requirement for the exercise of jurisdiction, the public prosecutor is not *required* to prosecute if the suspect is not present on German territory and such presence is not to be anticipated.[64] The prosecutor justified his

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62 The European Union imposed sanctions, including a ban on travel to EU countries for 12 Uzbek officials it considers responsible for the indiscriminate and excessive use of force in Andijan. Almatov is on the top of that list. However, days before the EU released the 12 names subject to the visa ban, German authorities granted Almatov a visa on humanitarian grounds to undergo treatment for cancer.

63 Act to Introduce the Code of Crimes against International Law of 26 June 2002, available at: <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf>, Art. 1, Part 1, Section 1: 'This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences [2] designated therein even when the offence was committed abroad and bears no relation to Germany.'

64 Ibid., Art. 3, s. 153f. The prosecutor may also dispense with prosecuting if the suspect is not a German national, the offence was not committed against a German, or the suspect is being prosecuted by an international criminal tribunal or by the State of territoriality, nationality or passive personality.

decision not to open an investigation against Almatov based primarily on the argument that the likelihood of a successful investigation and prosecution was "*non-existent*" given that Uzbekistan was unlikely to cooperate and an investigation in Uzbekistan would be necessary.[65] A motion to reconsider the decision was dismissed by the new Federal Prosecutor.[66] In February 2007, eight victims filed an appeal against this decision with the Higher Regional Court in Stuttgart. The appeal emphasized that because Germany has incorporated the ICC statute into its domestic law and is a signatory to CAT, it is obligated to arrest Almatov and begin investigations based on the evidence available.[67] Since the alleged crimes were not committed in Germany the Federal Supreme Court had to determine which court is locally competent to decide. To PJI's best knowledge, the Court's decision is still pending.

39. Unlike the present case, the German Prosecutor's decision not to open the investigation into Almatov was based on anticipated evidentiary considerations, not to a claim that he was not legally entitled to investigate the case under the 2002 Code. Furthermore, it must be emphasized that CAT provides for no exception to the obligation *"to extradite or prosecute"* where cooperation of the State of territoriality would be difficult to secure, so long as the alleged offender is able to receive a fair

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65 He also noted that some of the alleged acts of torture took place before the entry into force of the 2002 German Code of Crimes against International Law.

66 Federal Prosecutor, Decision of 16 October 2006, Case No. 3 ARP 116/05-2 (not published).

67 Organizations that assisted the victims have argued that a successful investigation could be carried out despite Uzbekistan's lack of cooperation by interviewing victims and witnesses living outside Uzbekistan and former UN Special Rapporteur on Torture Theo van Boven who issued a 2003 report documenting systematic torture in Uzbekistan.

trial.[68] In fact, as noted earlier, the very system of universal jurisdiction included in CAT exists precisely because of the recognition that perpetrators may be unlikely to be prosecuted by their State of nationality, which is usually also the State where the crimes were committed. Moreover, the prosecution of Almatov in Germany had been urged by both former UN Special Rapporteurs on Torture, Theo Van Boven and Manfred Novak.[69]

40. It thus seems likely that the decision of the Prosecutor not to proceed with the case was based on policy considerations related to Germany's foreign relations with Uzbekistan rather than legal obstacles. In the present case, this court must determine whether such considerations have any place in a decision not to initiate an investigation in accordance to South African law, and, if considered, what weight must be given to such factors when balanced against the fundamental character of torture as a *jus cogens* norm.

Investigation is not precluded where the perpetrator is not present

41. It is accordingly clear that universal jurisdiction is recognised for torture as an international crime both under customary international law and under CAT. Due to

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68 See CAT Art. 7(3).

69 See Gulnoza Saidazimova, 'Uzbekistan: Germany Under Pressure To Reopen Andijon Case', Radio Free Europe, 23 June 2006, available at http://rfe.rferl.org/featuresarticle/2006/06/B7311ACB-04E8-45D3-AE57-30C34A1CCD1F.html;
For a critical analysis, see also Salvatore Zappalà, "The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister Missed Opportunity or Prosecutorial Wisdom?," *JICJ* 4, 3 (2006), 602.

the particular formulation of the basis for universal jurisdiction in CAT, states have at times required the presence of the alleged offender on their territory before commencing an investigation or prosecution. There is, however, insufficient uniformity of practice to show that presence is a requirement under customary international law or under CAT – at least for the purposes of preliminary investigations, or in relation to extradition requests.[70]

42. Accordingly, interpreting CAT consistently with customary international law recognition of torture, and with the exercise of universal jurisdiction over torture does not support a conclusion that CAT prohibits state parties from investigating a suspect when he or she is not present within its territory, as long as enforcement jurisdiction is only exercised once the person is present in South Africa. CAT only restricts prosecution *in absentia*.

CONCLUSION

43. In all of these circumstances, PJI submits that the SCA's finding was consistent with international law, in holding that investigations into the charges of torture were

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70 *North Sea Continental Shelf Cases (Germany/Denmark; Germany/The Netherlands)*, Judgment of ICJ 20 February 1969 ICJ Reports 1968 p 3 at p 43 para 74:

> "*Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensible requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform*"

competent irrespective of whether the alleged perpetrators are present within the territory of South Africa.

Nadine Fourie

Tererai Mafukidze

Doron Block

Chambers
Sandton
12 May 2014

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International Crimes Act, 2003

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Prevention and Combating of Torture of Persons Act 13 of 2013

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Universal Jurisdiction in National International Criminal Court Incorporation Legislation

Country	Incorporating Legislation	Relevant Provision(s)	Description of universal jurisdiction provision
Argentina	Ley de Implementacion del Estatuto de Roma de la Corte Penal Internacional	Artículo 3(d)	Argentine courts shall exercise jurisdiction over foreigners who commit crimes abroad as long as so provided for in treaties and international conventions to which Argentina is a party.
Bosnia and Herzegovina	Law on Implementation of the Rome statute of the International Criminal Court and Cooperation with the International Criminal Court	Articles 9, 10	The BiH Prosecutor's Office and the Court of BiH have jurisdiction to conduct criminal proceedings against the perpetrators of criminal offences under Article 5 of the Rome Statute and crimes against humanity; and the Prosecutor's Office shall initiate criminal prosecution, as allowed under the Criminal Procedure Code, for those crimes falling under the jurisdiction of the ICC, regardless of the location where the criminal offence was committed, if such crime relates to proceedings already being conducted in BiH, before the ICC or the competent organ of some other country.
Burkina Faso	Loi n°052-2009/AN Portant Détermination des Compétences et de la Procédure de Mise en Oeuvre du Statut de Rome Relatif à la Cour Pénale Internationale par les Juridictions Burkinabe	Article 15	Burkinabe courts have jurisdiction over international crimes, regardless of the place where they have been committed, when the accused is present on the national territory.
Canada	Crimes Against Humanity and War Crimes Act	Sections 6, 9	Every person who commits genocide, a crime against humanity or a war crime may be prosecuted regardless of the location where the criminal offence was committed and whether or not the person is in Canada.
Comoros	Loi n°11-022/au du 13 décembre 2011, portant de Mise en Oeuvre du Statut de Rome	Article 15	The courts of the Comoros have jurisdiction over international crimes, regardless of the place where they have been committed, when the accused is present on the national territory.
Democratic Republic of the Congo	Loi Modifiant et Completant Certaines Dispositions du Code Penal, du Code de l'Organisation et de la Competence Judiciaires, du Code Penal Militaire et du Code Judiciaire Militaire, en Application du Statut de la Cour Penal Internationale	Article 4	Any person who, outside the national territory, is alleged to have committed international crimes may be tried by the courts of the Democratic Republic of the Congo, if (s)he is on the national territory at the time of the opening of the investigation.
Germany	Act to Introduce the Code of Crimes	Article 1, Sections 1, 6-	Amended section 153 of the Code of Criminal Procedure provides that whoever

Country	Incorporating Legislation	Relevant Provision(s)	Description of universal jurisdiction provision
	against International Law of 26 June 2002	14; Article 3	commits the offences against international law, such as genocide, crimes against humanity and war crimes, even when the offences were committed abroad and bear no relation to Germany, maybe be prosecuted even if they are foreigners, provided that they are present in Germany or such presence might be anticipated.
Ireland	International Criminal Court Act 2006	Section 12(2)	Any person who commits war crimes outside of Ireland is guilty of that offence and liable to be punished by Irish law.
Kenya	International Crimes Act, 2008	Section 8(c)	A person who is alleged to have committed an offence of genocide, crimes against humanity or war crimes may be tried and punished in Kenya for that offence if the person is, after commission of the offence, present in Kenya.
Luxembourg	Loi du 27 février 2012 portant adaptation du droit interne aux dispositions du Statut de Rome de la Cour pénale internationale, approuvé par une loi du 14 août 2000 portant approbation du Statut de Rome de la Cour pénale internationale, fait à Rome, le 17 juillet 1998	Article 5	Replaces Article 7-4 of the Code of Criminal Procedure to say that any person who has committed international crimes abroad may be tried in the Grand Duchy, when an extradition request is made and (s)he is not extradited.
Mauritius	International Criminal Court Act 2011	Section 4(3)(c)	Where a person commits an international crime outside Mauritius, (s)he shall be deemed to have committed the crime in Mauritius if present in Mauritius after the commission of the Crime.
New Zealand	International Crimes and International Criminal Court Act 2000	Section 8(1)(c)	Proceedings may be brought for international crimes regardless of whether or not any act forming part of the offence occurred in New Zealand; or whether or not the accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.
Republic of Korea	Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court	Article 3	Any foreigner who commits crimes such as genocide outside the territory of the Republic of Korea and stays in the territory of the Republic of Korea may be punished.
Samoa	International Criminal Court Act 2007	Section 13(1)(d)	Proceedings for the offences of genocide, crimes against humanity or war crimes may be instituted against the accused in Samoa, if the accused is, after the commission of the offence, present in Samoa.
Senegal	Loi n°2007-05 du 12 février 2007	Article 2	Any person who, outside the national territory, has committed international

Country	Incorporating Legislation	Relevant Provision(s)	Description of universal jurisdiction provision
	modifiant le Code de la Procédure pénale relative à la mise en oeuvre du Traité de Rome instituant la Cour Pénale Internationale		crimes may be tried according to Senegalese laws, if (s)he is under the jurisdiction of Senegal or if a victim resides on the territory of Senegal, or if the government obtains his/her extradition.
Switzerland	Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale	Section I(1) (Article 264m)	Whoever commits abroad international crimes is punishable if (s)he is in Switzerland and (s)he is not extradited or handed over to an international criminal tribunal whose jurisdiction is recognized by Switzerland.
Trinidad and Tobago	The International Criminal Court Act, 2006	Section 8(1)(c)	Proceedings in Trinidad and Tobago may be brought for the offences of genocide and war crimes regardless of the nationality or citizenship of the accused, whether or not any act forming part of the offence occurred in Trinidad and Tobago, or whether or not the accused was in Trinidad and Tobago at the time that the act constituting the offence occurred or at the time a decision was made to charge the accused with the offence.
Uganda	International Criminal Court Act, 2010	Article 18(d)	For the purpose of jurisdiction, where an alleged offence constituting genocide, crimes against humanity or war crimes is committed outside the territory of Uganda, proceedings may be brought against a person if the person is, after the commission of the offence, present in Uganda.
Uruguay	Ley Nº 18.026, Cooperación con la Corte Penal Internacional en Materia de Lucha Contra el Genocidio, los Crímenes de Guerra y de Lesa Humanidad	Artículo 4.2	International crimes (genocide, war crimes and crimes against humanity) committed outside of Uruguay shall be tried in the territory of Uruguay if the person suspected of having committed them (Uruguayan or not) is present on the territory of Uruguay after its commission, except in case of extradition requests or surrender requests by the ICC.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 02 / 2014

In the application of:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First respondent
ZIMBABWE EXILE FORUM	Second respondent
and	
JOHN DUGARD	First amicus curiae
KEVIN HELLER	Second amicus curiae
GERHARD KEMP	Third amicus curiae
HANNAH WOOLAVER	Fourth amicus curiae
TIDES CENTER	Fifth amicus curiae
THE PEACE AND JUSTICE INITIATIVE	Sixth amicus curiae

SIXTH AMICUS CURIAE'S PRACTICE NOTE

NATURE OF PROCEEDINGS

1. The applicant ('SAPS') has brought an application in terms of Rule 19 of the Rules of this Court for leave to appeal against the judgment and orders of the Supreme Court of Appeal ('SCA') handed down on 27 November 2013.

2. The Chief Justice has issued a directive requiring the parties to address the Court on both the issue of leave and the merits in the appeal.

3. On 6 May 2014, the Court issued an order in which it admitted the first to the sixth *amici curiae* ('PJI') in the matter. The seventh *amicus curiae* was also subsequently admitted.

4. The Chief Justice issued further directions on 6 May 2014 requiring that:
   4.1 the amici curiae to file their written submissions by no later than Monday, 12 May 2014;
   4.2 any party that wishes to reply to the amici curiae's written submissions must do so by no later than Friday, 16 May 2014.

ISSUES TO BE ARGUED

5. The issues before this Honourable Court are:

5.1 whether leave should be granted;

5.2 whether the SCA erred in finding that the SAPS is empowered to investigate allegations of torture committed in Zimbabwe in accordance with the Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002, ("the *ICC Act*") irrespective of whether the alleged perpetrators are present within the territory of South Africa.

RELEVANT PORTIONS OF THE RECORD

6. PJI will not rely on any portion of the record, other than the decision of the SCA, to make its submissions.

ESTIMATED DURATION OF THE ARGUMENT

7. 30 minutes, subject to such directions as the Court may issue regarding oral submissions.

SUMMARY OF 6TH AMICUS CURIAE'S MAIN ARGUMENT

8. PJI will submit that the findings made by the SCA were correct as they are consistent with international law. It will make four primary submissions in this regard:

8.1 First, South Africa as a party to the Rome Statute of the International Criminal Court (*the Rome Statute*) and the Convention Against Torture (1984) (*CAT*) is obliged to investigate and prosecute cases of torture that

fall within the ambit of crimes against humanity in terms of its domestic criminal jurisdiction in line with these treaties.

8.2 Second, the Rome Statute and the CAT encourage state parties to adopt the widest possible domestic jurisdiction over international crimes (in this case torture) to ensure accountability and end impunity for such crimes. South Africa has done so by adopting the ICC Act and the Prevention and Combatting of Torture of Persons Act 13 of 2013 (*the Torture Act*). The ICC Act in s 4(3) establishes extraterritorial, and in certain instances universal, jurisdiction for South African courts over the ICC crimes.

8.3 Fourth, South African law enforcement agencies are empowered to investigate international crimes that have been committed outside the borders of South Africa. Imposing a duty on them to investigate torture as a crime against humanity allegedly committed in Zimbabwe by perpetrators who are neither South African citizens, nor ordinarily resident in South Africa, in circumstances in which the perpetrators are anticipated to be present in South Africa, is consistent with the Constitution, customary international law, the spirit of the ICC's complementarity principle, and the practice of state parties to the ICC Statute and CAT.

MAIN AUTHORITIES ON WHICH PJI WILL RELY

i. Williams and Schabas "Article 12" in Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court—Observer's Notes, Article by Article (second edition) (Hart, 2008) pp 11; 547-561; 556

ii. El Zeidy The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (Martinus Nijhoff, 2008) p 1; 218-219

iii. Robinson "The Rome Statute and Its Impact on National Law," in The Rome Statute of the International Criminal Court: A Commentary, Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds) (Oxford: OUP, 2002) p 1861

iv. *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* House of Lords Judgment of 24 March 1999 2 WLR 827 (1999); [1999] 2 All ER 97 (referred to as "*Pinochet III*"); p 114-115A-E; 177D

v. ICTY Prosecutor v Anton Furundžija Trial Chamber II Judgment 10 December 1998, Case No. IT-95-17/1-T (1999) 39 ILM para 137; 153;

vi. Nowak, E and McArthur, E *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2008) pp. 249; 316; 319;

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