IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER: 485/2012

NORTH GAUTENG CASE NUMBER: 77150/09

In the matter between:

COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES First Applicant

(Fourth Respondent in the court *a quo*)

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Applicant

(First Respondent in the court *a quo*)

and:

SOUTHERN AFRICA HUMAN RIGHTS LITIGATION CENTRE TRUST First Respondent

(First Applicant in the court *a quo*)

ZIMBABWE EXILES FORUM Second Respondent

(Second Applicant in the court *a quo*)

RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This application for leave to appeal arises in the context of South Africa's international criminal law obligations to investigate and prosecute international crimes assumed through its ratification of the Rome Statute of the International Criminal Court, 1998 ("*the Rome Statute*") and subsequent enactment of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("*ICC Act"*).

2. The only issue in this appeal is whether the South African Police Service ("*SAPS*") and the National Prosecuting Authority ("*NPA*") have the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who come to South Africa from time to time.

3. The applicants contend that it is not competent for them to do so because they derive their power to investigate such a crime from s 4(3) of the ICC Act. It only allows them to investigate such a crime if and when suspects are present in South Africa.

4. We submit that the applicants are mistaken. SAPS and the NPA do not derive their power to investigate crimes against humanity from s 4(3) of the ICC Act. They have the power to do so on two grounds. The first is that s 4(1) of the ICC Act makes a crime against humanity a crime under South African domestic law. SAPS and the NPA have constitutional and statutory powers to investigate all crimes alleged to have been committed under South African law. The second is that SAPS and the NPA have a range of statutory powers which specifically permit and require them to investigate crimes against humanity.

5. We do not submit that SAPS and the NPA may exercise these powers of investigation on foreign territory beyond the borders of South Africa, without the consent of the foreign state

concerned. We submit merely that they may undertake an investigation within South Africa of crimes against humanity wherever they might have been committed.

6. The respondents do not persist with the peremption argument. Accordingly we contend that the only issue for determination on appeal is whether the SAPS and the NPA had the power to investigate the torture docket. If they did, the applicants' only point on appeal should be dismissed.

7. The issue of the respondents' standing in this matter was raised repeatedly by the applicants in the High Court proceedings and in the affidavits seeking leave from this court. However, the applicants do not address standing in their written submissions and do not persist with their standing argument; accordingly the respondents do not address this issue.

PROCEDURAL AND FACTUAL BACKGROUND

Procedural background

8. The first and second applicants, the Commissioner of South African Police Service and the National Director of Public Prosecutions (collectively referred to hereafter as "*the applicants*" unless context indicates otherwise) seek leave to appeal to this Court against the judgment[1] and order[2] of Fabricius J delivered on 8 May 2012 by the North Gauteng High Court ("*the High Court judgment*"), in which the High Court set aside the decision of the applicants (the respondents in the court *a quo*) not to initiate an investigation into crimes against humanity of torture committed in Zimbabwe ("*the impugned decision*").

[1] High Court Judgment, Record, Vol. 8, 1104 – 1201.

[2] High Court Order, Record, Vol 8, 1202 - 1204.

9. The court a *quo* found that through their impugned decision the applicants failed to appreciate the purpose or objectives of the ICC Act and ordered them to initiate an investigation.[3] The court *a quo* also found that their interpretation of the ICC Act conflated investigations and prosecutions, despite being two distinct, although complementary, processes.[4] The High Court concluded that conflating investigations and prosecutions would render the ICC Act unworkable, leading to absurd results that could not have been the intention of the legislature when it enacted the ICC Act. [5]

10. Following his judgment, Fabricius J ordered as follows:[6]

10.1. The impugned decision was reviewed and set aside and declared to be unlawful, inconsistent with the Constitution and therefore invalid;

10.2. The NPA and SAPS were ordered to investigate the contents of the dossier submitted by the first respondent to the applicants documenting the commission of crimes against humanity in Zimbabwe;

10.3. The investigation carried out by the NPA and the SAPS must have regard for South Africa's international law obligations as recognised by the Constitution and contained in the ICC Act; and

10.4. The NPA and SAPS were ordered to pay the costs of the application, including the costs of three counsel.

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[3] High Court Judgment, Vol. 8, p. 1104 – 1201, para 25.

[4] Reasons for Judgment on Application for Leave to Appeal, Vol. 8, p. 1204 – 1208, para 7.

[5] High Court Judgment, Vol. 8, p. 1104 – 1201, para 32.

[6] High Court Order, Vol. 8, p. 1202-1204.

11. On 28 May 2012 the first applicant filed an application for leave to appeal in the North Gauteng High Court.[7] The SAPS followed suit and filed its application for leave to appeal on 4 June 2012.[8] On 7 June 2012 Fabricius J heard and dismissed both applications with costs, finding no reasonable prospect of success that another court would come to a different conclusion.[9]

12. The applicants then filed their application for leave to appeal to this court on 6 July 2012.[10]

13. This application for leave to this court is premised on two grounds, both of which were pressed before Fabricius J and have again been repeated before this court;

    13.1. *First:* the judgment and resultant order of Fabricius J is based on an incorrect interpretation of ss 4(1) and 4(3)(c) of the ICC Act that does not find any support in law;

    13.2. *Second*: Fabricius J erred in finding that the respondents had *locus standi* to bring the application before the High Court.

14. The respondents oppose this application. These issues were raised, canvassed and properly disposed of by the High Court and confirmed by Fabricius J in his dismissal of both applications for leave to appeal.

15. The applicants' appeal is now limited to an argument that the ICC Act does not permit the initiation of investigations into international crimes committed outside of South Africa unless the accused is present in South Africa.

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[7] Application for Leave to Appeal, pp. 136-151.

[8] Application for Leave to Appeal, pp. 152-158.

[9] Reasons for Judgment on Application for Leave to Appeal, Vol. 8, pp. 1204 – 1208.

[10] Application for Leave to Appeal, Notice of Motion, pp. 1-3.

16. On 18 September 2012 this court referred the application for leave to appeal to oral argument. This court also informed the parties to these proceedings that they must be prepared to address the merits of the appeal if the court required it.

17. If this court is minded to consider the merits of the application the respondents will address only the competence of the NPA and SAPS to investigate international crimes.

Factual background

18. This matter has a long history that spans a number of years starting in 2008. For the purpose of these submissions the respondents do not take issue with the brief factual summary provided by the applicants in their heads of argument.[11] We merely highlight the following:

    18.1. The first respondent documented acts of state sanctioned torture committed in Zimbabwe;[12]

    18.2. Torture, when committed as part of a widespread or systematic policy, is a crime against humanity as defined in the Rome Statute and ICC Act;[13]

    18.3. The alleged perpetrators (high level Zimbabwean police and government officials) visited South Africa;[14]

    18.4. Under the ICC Act South Africa is obliged to investigate and prosecute persons responsible;[15]

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[11] First applicant's heads of argument (SAPS-HOA), paras 3-13; Second applicant's heads of argument (NDPP-HOA), paras 4 and 5.

[12] Founding Affidavit (FA), paras 45-59, Vol. 1, pp. 26 – 33; Redacted Memorandum, Vol. 1, 83-135; Summary of Evidence, Vol. 2, pp. 212-250.

[13] FA, para 47-48, Vol 1, p. 28; Redacted Memorandum, Vol. 1, pp. 89-101.

[14] Annexure TCW4, para 27, Vol. 4, pp. 634-645.

18.5. The first respondent submitted a dossier of evidence ("*the torture docket*") to the Priority Crimes Litigation Unity ("*PCLU*") – the unit within the NPA responsible for the direction and management of the investigation of crimes contemplated in the ICC Act – requesting the initiation of an investigation on the basis that South Africa's obligations were triggered;[16]

18.6. The second respondent's request, following extensive (and admitted) delays, was rejected for a variety reasons;[17]

18.7. The respondents launched judicial review proceedings in the North Gauteng High Court challenging the impugned decision under the Promotion of Administrative Justice Act (*"PAJA"*) and the principle of legality;

18.8. The High Court proceedings were premised on the ground that the respondents in the court *a quo*, as the responsible officials for the proper administration and enforcement of the ICC Act, in failing to initiate an investigation and thereafter attempting to justify their decisions on the basis of material errors of fact and law, and through taking into account irrelevant factors and failing to consider relevant ones, flouted both their domestic and international obligations.[18]

19. The High Court determined this matter in the context of the purpose and objectives of the Rome Statute and the ICC Act.

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[15] FA, para 47-48, Vol 1, p. 28; Redacted Memorandum, Vol. 1, pp. 102-108.

[16] FA, para 45, Vol 1, p. 26 - 27.

[17] FA, para 65, Vol 1, p. 35.

[18] FA, para 78-109, Vol 1, pp. 40 – 54.

Legal context in which this application is to be considered[19]

20. The Rome Statute established the world's first permanent International Criminal Court (*"the ICC"*) in The Hague, The Netherlands to try perpetrators of international crimes. It arose out of the growing international appreciation that perpetrators of crimes that shock the conscience of humanity should no longer be able to evade responsibility for their conduct by hiding behind sovereign immunity principles and domestic protection. The ICC, and the Rome Statute that created it, exemplify a common understanding that certain conduct offends all humanity and hence the prosecution and prevention of such conduct is the shared responsibility of the international community.

21. The Rome Statute codifies those crimes deemed to be of international concern, being genocide, crimes against humanity and war crimes. The Rome Statute however does not envisage that prosecution of these crimes is to be undertaken by the ICC, but emphasises in its preamble that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*." This obligation, known as the complementarity principle, obliges States not only to provide assistance to the ICC, but also to undertake domestic prosecution of international crimes where States have jurisdiction to do so.

22. The ICC Act was enacted by Parliament to give effect to South Africa's complementarity obligations under the Rome Statute which requires South Africa to investigate and prosecute

[19] J Dugard *International Law: a South African Perspective* 3ed (Juta) 2012 pp. 175-207; M du Plessis *South Africa's Implementation of the ICC Statute - An African Example* Journal of International Criminal Justice (2007) 5 (2) pp. 460-479.

international crimes, when committed in South Africa or abroad, through the agencies of the SAPS and the NPA and specialised prosecutorial and investigative units – The PCLU and Directorate of Priority Crimes Investigation ("*DPCI"*) – therein.

23. The Rome Statute obliges South Africa under international law to investigate and prosecute crimes against humanity and the ICC Act recognises and informs this duty. The ICC Act incorporates international crimes into South Africa's domestic law. And the SAPS has the competence or power to investigate such crimes wherever they might have occurred and whether the suspect is present within South Africa or not.

24. We thus demonstrate that on the basis of a variety of domestic statutory provisions the SAPS may undertake an investigation within South Africa of any crime against humanity regardless of where and by whom it is alleged to have been committed, including if it is committed outside South Africa. What is more, such an investigation (subject to certain limitations that are not relevant to this matter) would be compatible with customary international law, a fact confirmed by a comparative assessment of state practice.

MERITS OF THE APPEAL

Introduction – and context[20]

25. The applicants stress that should the merits of this appeal be heard, they limit their appeal to the proper interpretation of ss 4(1) and 4(3) of the ICC Act.[21] On the applicants' election the findings of fact of the court *a quo* therefore are not the subject of the applicants' appeal.[22]

[20] High Court Judgment, Vol. 8, p 1104 -1201; High Court Replying Affidavit (HC-RA), Vol. 6, p. 880-881, paras 12-28.

26. The respondents agree that the merits of this appeal should be limited, but in different terms. The respondents submit that the interpretation of s 4 is only relevant to this appeal in so far as it relates to and confirms the jurisdiction of South African courts to prosecute persons accused of international crimes. Yet this application is not concerned with South Africa's obligation to ***prosecute*** international crimes in South Africa; it is concerned with the ***competence*** of the applicants, and the institutions they oversee, to ***investigate*** international crimes, the proper initiation of which is an essential component of South Africa's ability to adhere to its legal duty under the ICC Act to prosecute international crimes. This competence, it will be demonstrated, is not located in s 4(3) of the ICC Act.

27. Accordingly, the only issue on appeal is whether it is competent for the SAPS and the NPA to investigate a crime against humanity outside South Africa by someone over whom the South African courts do not yet have jurisdiction in terms of s 4(3) of the ICC Act, but who is, from time to time, present in South Africa and thus subject to the jurisdiction of the South African courts in terms of s 4(3)(c). The issue is purely one of competence. The question is whether SAPS and the NPA have the power to investigate such a crime. The applicants argue that it is not competent for them to do so and that such an investigation would thus be unlawful and in breach of the legality principle.

28. We contend that it is competent for them to do so.

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[21] The applicants state that the ambit of this appeal should be limited in this respect, should leave to appeal on the merits be granted: SAPS-HOA, para 47; NDPP-HOA para 16.

[22] Application for Leave to Appeal, Respondents' Answering Affidavit (AA), para 12. This has not been contested by the applicants.

29. The entire focus of the applicants' case is their contention that: (i) the power to investigate international crimes is located in s 4(3) of the ICC Act which conditions the jurisdiction of a South African court on the presence of a perpetrator; and (ii) investigations of international crimes under international law are not lawfully permissible by the State unless the perpetrator is present in South Africa.

30. As we demonstrate later in these heads, the applicants are mistaken as to their understanding of the content, relevance and application of these sources of international law in respect of jurisdictional constraints on the investigation of international crimes contemplated in the ICC Act.

31. But more fundamentally, at the level of domestic law the applicants are mistaken as to their understanding of the ICC Act and have misconstrued the respondents' argument in relation thereto. Prior to any discussion of international law, the issues before this court fall to be resolved with reference to the Constitution's injunctions in regard to such investigations, and legislation that deals with the investigative authority of the NPA and SAPS in respect of international crimes.

32. The founding premise of the applicants' argument is that we contend that the SAPS and the NPA derive their power to investigate crimes against humanity from s 4(3) of the ICC Act. But they are mistaken. The SAPS and the NPA have the power to investigate crimes against humanity under our law on two grounds. The first is that s 4(1) of the ICC Act makes a crime against humanity a crime under South African domestic law and SAPS and the NPA have the power to investigate all crimes alleged to have been committed under our law. The second is that a variety of statutory provisions specifically vest the SAPS and the NPA with the power to investigate crimes against humanity. We turn now to detail those provisions.

Investigations under South African law

33. Throughout these proceedings, and as carefully observed by the court *a quo*, the applicants have conflated and confused what is legally permissible in respect of the investigation and prosecution of international crimes.

34. The ICC Act is silent on investigation of international crimes. The applicants argue that the competence to investigate international crimes is derived from s 4(3). But as we have stated, this approach misconceives the respondents' argument on this issue.

35. The respondents do not argue that SAPS and the NPA derive their power to investigate such a crime from s 4(3) of the ICC Act.

36. Section 4(1) of the ICC Act provides that anyone who commits a crime against humanity is guilty of an offence and liable on conviction to a fine or imprisonment. It criminalises a crime against humanity under South African domestic law. It is and remains a crime under South African law regardless of where or by whom it is committed. The criminalisation of such a crime under South African law is not dependent on the jurisdiction of the South African courts to try the offender in terms of s 4(3).

37. SAPS have the power to investigate such a crime under the following provisions:

    37.1. In terms of s 205(3) of the Constitution, the objects of SAPS are *inter alia* to "*investigate crime … and to uphold and enforce the law"*. It vests SAPS with the power to investigate all crimes under South African law, including those proscribed under the ICC Act.

37.2. Section 11(1) of the South African Police Services Act 65 of 1998 ("*SAPS Act*") provides that the National Commissioner of SAPS "*may exercise the powers and shall perform the duties and functions necessary to give effect to (section 205(3) of the Constitution)".*[23] SAPS are accordingly endowed with all the powers, duties and functions necessary to give effect to s 205(3) of the Constitution, that is, to investigate all crimes allegedly committed under South African law.

37.3. Further, s 13(1) of the SAPS Act states: "*Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*"

37.4. Section 17A read with ss 16(1), 16(2)(iA) and item 4 of Schedule 1 of the SAPS Act classifies all offences under the ICC Act as "*national priority offences"*.

37.5. Section 17C(1) of the SAPS Act establishes the DPCI, that is, the Hawks. Section 17D(1) provides that the functions of the Hawks are to prevent, combat "*and investigate"* national priority offences.

37.6. Section 17D(3) of the SAPS Act provides that, if the head of the Hawks has reason to suspect that a national priority offence has been committed, he or she may request the National Director of Public Prosecutions to designate a Director of Public Prosecutions "*to exercise the powers of section 28"* of the National Prosecuting Authority Act 32 of

[23] Section 11(1) refers to s 218(1) of the Interim Constitution but, in terms of s 12(1) of the Interpretation Act 33 of 1957, it must now be read as a reference to s 205(3) of the Constitution.

1998 (*"the NPA Act"*), that is, to investigate the offence by interrogating witnesses in terms of s 28 of the NPA Act.

37.7. In terms of s 17F of the SAPS Act, all government departments and institutions must, when required to do so, take reasonable steps to assist the Hawks in the achievement of these objectives. Section 17F(4) specifically requires the National Director of Public Prosecutions to ensure that a dedicated component of prosecutors is available to assist and co-operate with the Hawks in conducting its investigations of priority crimes. To that end Parliament has created a PCLU dedicated to the combatting, investigation and prosecution of, *inter alia*, the crimes in the ICC Act.

38. The PCLU of the NPA has the following powers and duties:

38.1. In terms of s 13(1)(c) of the NPA Act, the President may appoint a Special Director of Public Prosecutions to exercise the powers and carry out and perform the duties and functions conferred on him or her by the President.

38.2. The President appointed Advocate Ackerman SC as a Special Director of Public Prosecutions by proclamation in the Government Gazette on 24 March 2003. He appointed him as head of the PCLU of the NPA "*to manage and direct the investigation and prosecution of crimes contemplated in"* the ICC Act.[24]

38.3. In terms of s 24(7) of the NPA Act, the head of the PCLU may request the Provincial Commissioner of SAPS for assistance in the investigation of any matter. The Provincial Commissioner is obliged to comply with the request "*so far as practicable"*.

[24] Proclamation of the President of the Republic of South Africa, Vol. 2, p. 210 and 211.

39. SAPS and the PCLU thus have the power to investigate an alleged crime against humanity wherever it might have occurred and whether the suspect is present within South Africa or not. This appeal does not turn on whether they may exercise their powers of investigation outside South Africa. We accept for present purposes that they may only exercise their powers within South Africa. But they may undertake an investigation within South Africa of any crime against humanity regardless of where and by whom it is alleged to have been committed.

40. The extraterritorial application of South African criminal legislation is not unique to the ICC Act. A number of South African laws criminalise conduct committed beyond South Africa's borders, which also have the status of "priority offences". These include but are not limited to the following:

    40.1. Any offence referred to in paragraph (a) of the definition of "*specified offence*" of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Section 15(2) thereof provides that "*any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic*" if that "*person is found to be in the Republic*". The first prosecution in terms of this Act was against a Nigerian national accused of terrorist activities committed in Nigeria. Issues of investigative power were not raised in this case despite the offences in question being committed in Nigeria.[25]

[25] See *S v Okah* (SS94/11) [2013] ZAGPJHC 75 (26 March 2013) available at http://www.saflii.org/za/cases/ZAGPJHC/2013/75.html at paras 5 - 3.

40.2. Section 9 of the Regulation of Foreign Military Assistance Act 15 of 1998 provides that any court in South Africa may try a person for an offence in terms of this Act, which includes the unauthorized provision of foreign military assistance, regardless of whether the act or omission to which the charge relates was committed outside the Republic.

40.3. Section 35 of the Prevention and Combating of Corrupt Activities Act 12 of 2004, explicitly provides for extraterritorial jurisdiction, and certain offences, even if committed, outside of South Africa, may be tried in a South African court if the person concerned is "*found in South Africa*".

40.4. The Prevention of Organised Crime Act 121 of 1998 defines unlawful activity as "*any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere*."

40.5. Section 7 of the Implementation of the Geneva Conventions Act 8 of 2012 provides that "*any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic*."

41. All these Acts, like the ICC Act, speak only to the jurisdiction of South African courts over South African nationals and non-nationals. None however condition the investigation of the offences they create on the presence of the perpetrator in South Africa, and the provisions of the SAPS and ICC Act would apply similarly.

42. It is thus clear that the power of the police to *investigate* crimes under South African law is not territorially limited or conditioned on the presence of an alleged perpetrator.[26]

Sections 4(1) and 4(3) of the ICC Act properly considered

43. The applicants argue that the court *a quo's* interpretation of s 4(1) "*amounted to finding that absolute universal jurisdiction had been adopted for the investigation of the crimes created in the ICC Act* and "*rejected the argument of the First applicant that section 4(3) applied to investigations*".[27] The applicants argue that this finding is "*unequivocally wrong and inconsistent with the ordinary principles regulating the interpretation of statutes, domestic law and International Criminal Law*".[28]

44. The applicants submit that s 4(3) dictates the investigative power of the NPA and SAPS. They then extensively reference international law and universal jurisdiction and argue that international law prohibits investigations *in absentia* in order to justify their construction of s 4(3).

45. However, these questions are red herrings for the purpose of the court's determination of the appeal.

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[26] For instance, under the SAPS Act, members of the police service are authorised, under certain circumstances, not only to investigate but also to act extraterritorially. See s 13(6):

> "*Any member may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized.*"

[27] SAPS-HOA, para 17.

[28] SAPS-HOA, para 18.

46. This is because the applicants never engage with the reality that the exercise of their investigative jurisdiction in relation to crimes committed within South Africa's borders and extraterritorially is permitted – indeed required – under our domestic law. As far as domestic law is concerned, the police's power to investigate stems from the provisions referred to above, drawn from the Constitution, the SAPS Act, and the NPA Act as read with the ICC Act. The domestic empowerment, of the applicants to perform investigations in respect of international crimes including those committed abroad, is thus clear.

47. The question is accordingly not whether s 4(3) of the ICC Act empowers SAPS and the NPA to investigate crimes against humanity. The only question is whether it restricts their powers of investigation.

48. We submit it does not do so for the following reasons:

    48.1. The only purpose of s 4(3) is "*to secure the jurisdiction of a South African court"* to convict and sentence someone accused of a crime against humanity. It is concerned solely with the jurisdiction of the courts and does not purport to impose any restriction on the powers of the SAPS and the NPA to investigate crimes against humanity. Our law does not require a suspect to be present in South Africa for his or her alleged crime to be investigated by SAPS and the NPA. It permits "*investigations in absentia"*.

    48.2. It would be absurd to interpret s 4(3) to mean that SAPS and the NPA may only investigate crimes against humanity if, at a minimum, the suspect is present in South Africa. It would mean that, if a suspect comes and goes, SAPS and the NPA would have to stop their investigation every time he or she leaves and restart it again every time he or she returns. Such an absurdity could not have been intended.

48.3. There are furthermore reasons of practice and logic which affirm that a suspect does not have to be physically present for an investigation to be initiated or for an arrest warrant to issue in anticipation of a suspect's anticipated arrival.

48.4. Were the entire investigation to be subject to having established the presence of an accused, there is a risk that no prosecution would ever be undertaken – a risk which is practically borne out by the position adopted by the applicants in this matter.

49. For these reasons, under international law, and in terms of logic and practicality, it is open to the applicants under the ICC Act to commence investigations prior to the presence of the accused in South African territory on the basis of their anticipated presence. It is a position that South Africa has already adopted in response to the crimes allegedly committed by President Omar al-Bashir of Sudan.[29] South African authorities issued an arrest warrant for him under the ICC Act without him

[29] On 31 July 2009 Dr Ntsaluba of Foreign Affairs explained as follows at a Press Conference:

> *"South Africa is the (sic) State Party of the Rome Statute of the International Criminal Court and is therefore obliged to cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86), and hence also in the execution of arrest warrants. It is worth noting that Article 87(7) of the Statute provides that, when a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties, or in the case of a United Nations Security Council (UNSC) referral to the UNSC.*
>
> *Article 27 of the Rome Statute provides that the official capacity as Head of State or Government of an accused provides no exemption from criminal responsibility. Furthermore, Section 4(1) of the South African Implementation of the Rome Statute of the International Criminal Court Act also ousts the applicability of other domestic laws in respect of an accused, with the result that the immunity from prosecution that President El Bashir would normally have enjoyed in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), is not be applicable."*

At that press conference it was disclosed that an international arrest warrant for al-Bashir "has been received" and "endorsed by a [South African] magistrate". Dr Ntsaluba explained that "[t]his means that if President El Bashir (sic) arrives on South African territory, he will be liable for arrest".

The press statement is available at http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=3378&tid=3523.

being present in South Africa, but merely on account of his anticipated presence. Kenya has also issued an arrest warrant for President al-Bashir on the same grounds.[30]

50. The applicants are therefore wrong – as a matter of domestic law, logic, and practice – to insist on the presence of the accused before they will investigate.

51. That empowerment or competence is furthermore affirmed – not undermined as the applicants would have it – by a proper understanding of jurisdiction in the context of international criminal law and how these principles inform the interpretation and application of the ICC Act.

52. We turn next to a short discussion of international law.

International law on jurisdiction

Introduction

53. Under the ICC Act, jurisdiction over international crimes is provided for in ss 4(1) and 4(3).

54. Section 4(1) of the ICC Act provides that "[*d]espite anything to the contrary in any other law in the Republic, any person who commits a[n] [international] crime, is guilty of an offence*". There are four grounds upon which jurisdiction may be exercised over international crimes by South African courts under the ICC Act: territoriality, nationality, passive personality and universal jurisdiction. Nationality and passive personality jurisdiction may be founded on citizenship or if the person concerned – the perpetrator in the case of the former, or victim in the case of the latter – is *ordinarily resident* in the Republic (ss 4(3)(b) and (d) of ICC Act respectively).

[30] *Kenya Section of The International Commission of Jurists v Attorney General & Another* [2011] eKLR.

55. Section 4(3)(c) is far-reaching, permitting the exercise of universal jurisdiction. In this regard section 4(3)(c) states:

> "*In order to secure the jurisdiction <u>of a South African court</u> for purposes of this Chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if –*
>
> *(c) <u>that person, after the commission of the crime, is present in the territory of the Republic</u>"*

56. The applicants submit: (i) that s 4(3)(c) of the ICC Act establishes a so-called "conditional" universal jurisdiction regime in terms of which South Africa cannot exercise jurisdiction ***in any form*** over crimes until an accused is present in South Africa, and (ii) the absence of jurisdiction on the part of South African courts vitiated or stymied the "jurisdiction" of the applicants to investigate the torture docket, the two being co-extensive.

57. The applicants are wrong as a matter of domestic law – as we stressed already. They are also wrong as a matter of international law.

Jurisdiction to prescribe, enforce and adjudicate

58. Under international law universal jurisdiction permits, and in some instances obligates, States to exercise criminal jurisdiction over certain crimes absent the traditional bases for jurisdiction: territorial, nationality, personality, or protective interests.[31]

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[31] See G Bottini "Note: Universal Jurisdiction After the Creation of the International Criminal Court" (2004) 36 *N.Y.U. J. Int'l L. & Pol.* 503, 511; L Reydams suggests that universal jurisdiction: *'means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit'.* L Reydams *Universal jurisdiction: international and municipal legal perspectives,* Oxford University Press, 2007, p. 5; O'Keefe, defines it as, *"the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the*

59. Jurisdiction is understood in three respects. In *R v Hape*, the Supreme Court of Canada discussed these: prescriptive jurisdiction, enforcement jurisdiction, and adjudicative jurisdiction.[32]

60. "*Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities.*"[33] South Africa exercised this entitlement when it enacted the ICC Act, incorporating war crimes, crimes against humanity and genocide into domestic law and making them crimes in South Africa through s 4(1).

61. "*Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. . . '[E]nforcement or executive jurisdiction refers to the states' ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as investigative jurisdiction.*"[34]

62. Conduct that falls within the enforcement jurisdiction rubric includes conduct of judicial and non-judicial actors (eg. police, prosecuting authorities and judges). Such conduct covers "*interviewing witnesses, issuing search and arrest warrants, court orders for production of documents and attendance of witnesses, executing searches and seizures, detaining and arresting individuals,*

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time of the relevant conduct", R O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2 *J International Criminal Justice* 734, 736.; Princeton Principles on Universal Jurisdiction.

[32] *R v Hape* [2007] 2 S.C.R. 292, 2007 SCC 26 (*Hape*).

[33] *Id* at 58.

[34] S. Coughlan et al. in "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 *C. J. L.T.* 32 .

imposition of fines or imprisonment and other activities to 'use the resources of government to induce or compel compliance with the law.""[35]

63. "*Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force*."[36]

64. As a general rule, whether or not States are permitted under international law to exercise criminal jurisdiction in relation to crimes committed extraterritorially (for example through the ICC Act) will depend upon the ground(s) on which they claim to do so.

65. The founding principles for the exercise of jurisdiction over extraterritorial crimes were set out in the *Lotus Case*.[37] In that decision the Permanent Court of International Justice (the predecessor to the International Court of Justice) stated:

> "*It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. <u>But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."</u>*

[35] B Perrin "Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the Criminal Code" (2009) 13 *Canadian Criminal LR* 175, 179.

[36] *Hape supra* note 32 at 58.

[37] PCIJ, 'The Case of the S.S. Lotus', *France v. Turkey* (Judgment), 7 September 1927, p 9.

66. Accordingly, States have a wide discretion to apply their laws and exercise jurisdiction in respect of crimes beyond their borders under international law. The question is what the limitations may be on the exercise of that jurisdiction, and whether those limitations are as narrow as the applicants would have it.

Limitations on jurisdiction

67. In respect of enforcement jurisdiction, which includes the initiation of an investigation, there is only one limitation under international law, reflected in the judgment of the International Court of Justice (ICJ) in *Democratic Republic of the Congo v Belgium (Arrest Warrant Case):*

> "*The only prohibitive rule (repeated by the Permanent Court in the "Lotus" case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to any extraterritoriality, including those that are well established and not just to universal jurisdiction. Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law."*[38]

68. The position therefore, and endorsed by the Constitutional Court in *Kaunda,*[39] is that provided that the exercise of enforcement jurisdiction does not occur in a foreign State without that State's

[38] ICJ, *Democratic Republic of the Congo v Belgium*, 11 April 2001, Joint Separate Opinion (*Arrest Warrant Case*), paras 54-56 available at http://www.icj-cij.org/docket/files/121/8136.pdf.

[39] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) (*Kaunda*), para. 39: "*It is not necessary to enter this controversy. What seems to be clear is that when the application of a national law would infringe*

permission, jurisdiction may lawfully be exercised. Per force this means that relevant non-judicial aspects of *enforcement* jurisdiction in South Africa for the purposes of this appeal, such as the initiation of investigations, do not require the accused to be physically present in South Africa for enforcement steps to be taken.

69. In respect of *adjudicative* jurisdiction, in South Africa under the ICC Act a court's jurisdiction is expressly conditional on the accused's physical presence. This is for a logical reason that is sourced in our Constitution: namely, it is accepted that trials *in absentia* infringe an accused's constitutionally recognised fair trial rights.

The International Court of Justice confirms that presence is not a requirement for permissible exercise of universal jurisdiction

70. The applicants rely on the ICJ's judgment in the *Arrest Warrant Case* to bolster their submission that conditional (presence dependant) universal jurisdiction is the norm in international law.

71. In citing short sections of the judgment in the *Arrest Warrant Case*, however, the applicants omit the ICJ's key final conclusions as to the practice of universal jurisdiction reached in the judgment. The judges of the ICJ state that the lack of established practice of absolute universal jurisdiction "*does not necessarily indicate, however, that such an exercise would be unlawful.*"[40] In fact, the judgment concludes that "*State practice - is neutral as to the exercise of universal jurisdiction*."[41]

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the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law." It is thus plainly wrong in this context for the second applicant to submit in its heads of argument (at para 59.5) that the Constitutional Court has ruled that the Constitution is not of extraterritorial effect. It expressly declined to enter that controversy.

[40] *Arrest Warrant Case supra* note 38 para 45.

[41] *Id.*

72. Thus, the judges' observation that no consistent national practice on absolute universal jurisdiction has emerged, plainly does not mean, as the applicants suggest, that absolute universal jurisdiction is not permitted under international law. The ICJ goes on to explain that one State's exercise of conditional universal jurisdiction does not affect other States' ability to apply broader or absolute universal jurisdiction.

73. Therefore, the ICJ decision confirms that a State may permissibly exercise universal jurisdiction and that the lawfulness of the exercise of jurisdiction is not conditioned by the accused being present in the State's territory. That competence is expressly preserved under international law for use at the discretion of the State concerned. What the applicants do not draw attention to is that the ICJ assessed trends in international law regarding universal jurisdiction and found that international movement is **toward** domestic jurisdictions exercising universal jurisdiction, to varying degrees, over international crimes.

74. The ICC Act is part of that trend – and lawfully so. The Rome Statute obliges South Africa under international law to investigate and prosecute crimes against humanity and the ICC Act recognises and gives effect to this duty.

Conclusion on international law

75. A plain reading of the ICC Act reflects that, while physical presence is a requirement for a South African "court" to have adjudicative jurisdiction under s 4(3) of the ICC Act, there is no such presence requirement applicable to law enforcement measures necessary to investigate a crime that has been committed and which has been proscribed as unlawful under s 4(1).

76. Accordingly, we submit that the court *a quo*'s finding regarding enforcement jurisdiction cannot be faulted. As the High Court concluded, the applicant's construction, which they persist in before this court, "*amounts to an absurdity"* since "*it is logical that an investigation would have to be held prior to a decision by the First Respondent whether or not to prosecute. I am therefore of the view that Fourth Respondent's argument on the meaning of s 4(3) of the ICC Act cannot be upheld.*"[42]

77. Accordingly, and by way of summary, the exercise of enforcement jurisdiction which includes investigations – provided no coercive enforcement measures are taken on the territory of another state (e.g. arrests or unsanctioned investigations) – into crimes committed in another state, does not require the presence of an accused in South Africa.

Comparative examples – state practice

Introduction

78. The applicants also rely on comparative international law with a presence requirement for *prosecutions* and suggest that it is equally applicable to *investigations*.[43] The applicants' arguments again conflate the two distinct categories of enforcement and adjudicative jurisdiction.

79. Investigation into international crimes in the absence of perpetrators is not a unique or unheard of practice.

80. The Institute of International Law, an organisation dedicated to the development of international law comprised of the world's leading public international lawyers, observes: "***Apart from acts of***

[42] High Court Judgment, Vol. 8, p. 1104 – 1201, para 32.

[43] For example, SAPS-HOA, para 87-89.

investigation and requests for extradition, *the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or on aircraft which is registered under its laws, or other lawful form of control over the alleged offender.*"[44]

81. The Princeton Principles on Universal Jurisdiction state that a judicial body may try accused persons on the basis of universal jurisdiction, "*provided the person is present before such judicial body*".[45] However that language "***does not prevent a state from initiating the criminal process, conducting an investigation***, *issuing an indictment or requesting extradition,* ***when the accused is not present***".[46]

82. This approach is not purely academic, and a number of States permit the initiation of investigations into international crimes even if the alleged perpetrator is not present in their territory. Comparative international law indicates that States operationalise the three facets of prescriptive, enforcement, and adjudicative jurisdiction in different ways, giving effect to their international obligations as well as recognising each State's unique legal, political and policy-based concerns, as well as the practicality of exercising such jurisdiction.

Examples abound of investigations permitted in the absence of accused

83. Contrary to the applicants' suggestion a review of comparative international law supports a conclusion that the ICC Act permissibly allows South Africa to commence investigations in the

[44] M. Christian Tomuschate, Institute of International Law "Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005) para 3(b), available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf (emphasis added).

[45] The Princeton Principles on universal jurisdiction at 32 [online]. Available at http://www.princeton.edu/lapa/unive_jur.pdf.

[46] *Id.*

absence of a potential defendant. As we demonstrate below, ample authority and state practice show that investigations *in absentia* are not uncommon in comparative jurisdictions and under international law, provided that the State initiating the investigation has prescriptive jurisdiction, which South Africa does.

84. For example, the *Third Restatement of Foreign Relations Law of the United States* emphasises the differences among prescriptive, enforcement and adjudicative jurisdiction. "*A state may enforce its law - whether through courts or otherwise - only if it has jurisdiction to prescribe the law sought to be enforced. It may enforce its law through the courts only if it also has jurisdiction to adjudicate, but* ***it may take non-judicial enforcement measures . . . whether or not it has jurisdiction to adjudicate***."[47]

85. Non-judicial enforcement activities carried out within a State's own territory, including the use of police and investigative agencies, are valid so long as the law being enforced is within the State's jurisdiction to prescribe and the procedures of investigation, arrest, adjudication and punishment are consistent with the State's obligations under international human rights law.[48]

86. Thus, as but one example, United States law clearly recognises States' authority to conduct investigations on domestic soil in respect of crimes committed abroad, within the confines of proper enforcement jurisdiction.

87. The experiences of European States in operationalising universal jurisdiction are also instructive. Leading human rights organisation Human Rights Watch has observed that law enforcement agencies have several tools at their disposal with which to conduct internal investigations about

[47] Restatement (Third) of the Foreign Relations Law of the United States (1987), sec 401, introductory note.

[48] *Id* at sec 432, cmt (b).

serious international crimes. "*Initial information about a suspect or alleged criminal act can be gleaned from open sources, including human rights NGO reports and intergovernmental organizations. When victims and diaspora communities are present in the country where officials are conducting the investigation, potential witnesses may also be located without extraterritorial investigations, or located with the assistance of private petitioners*." [49] Various European authorities have confirmed their use of NGO reports, interviews with potential witnesses and research conducted with émigré communities conducted on domestic soil and concerning crimes committed abroad. [50] Such evidence indicates that domestically-conducted investigations of international crimes are feasible and not infrequent, provided the State initiating the investigation has prescriptive jurisdiction (as does South Africa).

88. There is no general requirement for the exercise of enforcement jurisdiction in the context of universal jurisdiction that an accused be physically present in a potential forum state prior to the commencement of an investigation. It is important, we respectfully submit, in the present matter to carefully distinguish between requirements demanded prior to the commencement of a prosecution as opposed to those needed for the initiation of an investigation. Unfortunately, the applicants have not exercised that care.[51]

89. Even where a State's laws contain a presence requirement for the exercise of adjudicative jurisdiction, such a requirement is often not demanded at the time an investigation commences.

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[49] Human Rights Watch *Universal Jurisdiction in Europe: The State of the Art* (2006) 18, No. 5(D) 13 (Human Rights Watch), available at http://www.hrw.org/sites/default/files/repo rts/ij0606web.pdf.

[50] *Id.* South African Courts also recognise the value of reports of this nature. See *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 19 and *Kaunda supra* note 39 at para 123.

[51] Applicants, as noted above, repeatedly reference comparative international law requiring presence prior to trial, rather than prior to investigation. SAPS-HOA, para 87. The issue of presence prior to trial is not at issue in the present matter.

90. For example, Norway, which has not introduced definitions of international crimes into domestic law, though which does enable the prosecution of non-nationals for crimes committed overseas, requires presence at the time of indictment but not upon initiation of an investigation.[52]

91. In Germany, adjudicative jurisdiction exists where a potential defendant is present in the country or his presence is anticipated.[53] Presence may not be required, however, in order to commence an investigation.[54] It is significant that under German law, *"[w]here the suspect is present or likely to be present, the prosecution is obliged to investigate unless a country with priority jurisdiction is already carrying out a genuine investigation.*"[55]

92. Presence prior to trial does not appear to be required in Greek universal jurisdiction cases.[56]

93. Under Italian law, no presence requirement is even stipulated for the prosecution of crimes that Italy is obligated to prosecute under international agreements in accordance with Article 7(5) of the Penal Code.[57]

94. Similarly, in British universal jurisdiction cases, "*the police are able to carry out an investigation regardless of the location of the accused,*" though the case may proceed to trial only where the accused is present in the country.[58]

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[52] Norwegian General Civil Penal Code, art 12.4; Human Rights Watch, *supra* note 49 81.

[53] German Code of Criminal Procedure, para 153(f)(2).

[54] Human Rights Watch, *supra* note 49, 64.

[55] Human Rights Watch, *supra* note 49, 67.

[56] A Pearlroth, Redress & Fédération internationale des ligues des droits de l'Homme *Universal Jurisdiction in the European Union: Country Studies* (2004) 13, 20.

[57] *Id* 22. A presence requirement is, however, stipulated in order to exercise universal jurisdiction over torture or over any crime under Italian law carrying a prison sentence of at least three years.

[58] *Id* 37; Human Rights Watch, *supra* note 49, 94.

95. It is thus not uncommon in European legal systems to observe a presence requirement in the context of adjudicative jurisdiction but which does **not** exist for non-judicial enforcement jurisdiction mechanisms, such as the initiation of an investigation.

96. Significantly, even the 2012 draft African Union Model National Law on Universal Jurisdiction over International Crimes notes that a prosecution requires the presence of the accused but does not insist upon a similar requirement in the context of investigations. Under Article 4 concerning "*Jurisdiction*", the draft law provides: "*4(1). The Court shall have jurisdiction to try any person charged with committing any crime prohibited under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State at the time of the commencement of the trial*."[59]

97. The suggested legislation omits any presence requirement prior to the initiation of an investigation, while it is demanded prior to prosecution. The AU no doubt could have expressed support for a presence requirement prior to investigation as well as prior to trial if such had been its intent.

Conclusion on state practice

98. A strict presence requirement such as that proffered by the applicants ignores the circumstances of a case, and in the context of serious international crimes, subverts the commitment of the international community to ensure that impunity is addressed at an international **and** national level. This is not the practice in foreign States in respect of investigations for international crimes.

[59] African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia "African Union (Draft) Model National Law on Universal Jurisdiction Over International Crimes" (7-15 May 2012), available at http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf.

99. To read in a strict presence requirement will not facilitate the purpose and use of the ICC Act in the manner that Parliament intended, and will frustrate compliance by South Africa with its obligations under the Rome Statute.

100. It is clear from the discussion above that States vest national investigating authorities with a degree of discretion when determining if and how to conduct investigations and prosecutions. As to when an investigation is to be initiated, irrespective of whether it is an international or national crime, each case should be decided on its own merits, within a workable practicable legislative framework, and in the case of the applicants (as the South African authorities charged with investigations and potential prosecutions of universal jurisdiction offences), with good faith and due regard for the purpose and objects of the ICC Act.

101. As regards the ICC Act, that discretion must be applied to the investigation and prosecution of international crimes with regard, as found by the *court a quo*, to the *"special status according to international crimes, and the need for special procedures to be developed and adopted*."[60]

102. South African law, given that it does not explicitly limit circumstances under which an investigation can be commenced, mirrors those laws deliberately eschewing reference to a presence requirement in the context of investigations. States, including South Africa, have promulgated legislation and reforms that respond to their international obligations and unique domestic contexts.

103. The applicants cite various reforms in European legal systems for the proposition that absolute universal jurisdiction is disfavoured.[61] In fact, what these reforms suggest is that there is indeed a

[60] High Court Judgment, para 25.

[61] NDPP-HOA, para 37.

global trend against absolute universal jurisdiction in the context of *adjudicative jurisdiction*, but that there is no single approach adopted by States with regard to a presence requirement in the context of non-judicial *enforcement jurisdiction*, which includes police investigations. The exact timing of when presence is required—at the stages of investigation, issuance of an arrest warrant, or trial – belongs to domestic law and policy.[62]

104. South Africa's Legislature through the ICC Act has at the very least made it clear that physical presence is only required for the exercise of adjudicative jurisdiction in respect of international crimes. Had it wished to make that a requirement at the investigative phase, it would have done so, by explicitly conditioning the initiation of investigations on the presence of alleged perpetrators.

CONCLUSION

105. The applicants' point on appeal is thus wrong for the reasons set out above.

106. South African law permits the investigation of international crimes committed within our territory and abroad. International law does not require an accused person's presence within the State's territory for a lawful investigation of international crimes committed abroad. The SAPS and the NPA thus have the power to investigate an alleged crime against humanity wherever it might have occurred and whether the suspect is present within South Africa or not.

107. Rigid presence requirements in law or prosecutorial policy "*greatly diminish the effectiveness of universal jurisdiction laws as an 'important reserve tool in the international community's struggle*

[62] F Lafontaine "Universal Jurisdiction – The Realistic Utopia" (2012) 10(5) *Journal of International Criminal Justice* 1277.

against impunity.'"[63] South Africa is uniquely positioned, given its history, geographic location, specialised investigating and prosecuting units, and judicial independence to appreciate and address "as far as possible" the gravity of international crimes.

108. The applicants' arguments, rather than pursuing the interests of justice, facilitate avoidance of the ICC Act's objectives and South Africa's Rome Statute obligations.

109. For all these reasons, the respondents submit that the High Court did not err with respect to any of the grounds of appeal raised by the applicants. This Court should dismiss the application for leave to appeal with costs, including the costs of three counsel.[64]

110. Finally it is regrettable to read in both applicants' heads of argument that they seek costs against the respondents. That is despite the authority drawn to their attention in the High Court with regard to the usual principles regarding costs in constitutional matters of this sort;[65] and despite Fabricius J making it clear to the applicants that it was inappropriate for them to be seeking costs against the respondents in the event of them being successful.

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WIM TRENGOVE SC

GILBERT MARCUS SC

MAX DU PLESSIS

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[63] Human Rights Watch Report *supra* note 49 (*citing* UN Secretary-General, "Rule of Law and Transitional Justice" para 48).

[64] The respondents sought the costs of three counsel which was granted by the High Court. Although the applicants have no basis to seek costs against the respondents (on the authority of the Constitutional Court in *Biowatch*), it is notable that the second applicant in this court itself seek the costs of three counsel.

[65] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paras 21 – 25.

Chambers, Sandton and Durban

22 May 2013

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