

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 02/14

In the application of:

NATIONAL COMMISSIONER , SAPS

Applicant

and

SALC

1st Respondent

ZIMBABWE EXILES FORUM

2nd Respondent

and

JOHN DUGARD AND 3 OTHERS

1st to 4th *Amici Curiae*

THE TIDES CENTER

5th *Amicus Curiae*

THE PEACE AND JUSTICE INITIATIVE

6th *Amicus Curiae*

CENTRE FOR APPLIED LEGAL STUDIES

7th *Amicus Curiae*

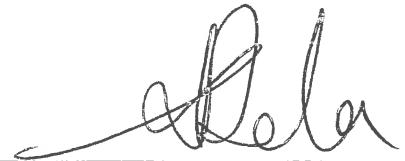
FILING SHEET

Presented herewith for service and filing:

1. Practice note of the fifth *amicus curiae*; and
2. Written submissions of the fifth *amicus curiae*.



Dated at JOHANNESBURG on 12 MAY 2013.



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PRACTICE NOTE OF THE TIDES CENTER

Nature of the proceedings

1. This is an application for leave to appeal in terms of Rule 19 of the Rules of this Court against the judgment and order of the Supreme Court of Appeal, handed down on 27 November 2013.

2. The Tides Center ("*the Center*") was admitted by the Court as the Fifth *Amicus Curiae* in this application on 6 May 2014.

The issues that will be argued

3. Whether or not the South African Police Service ("*SAPS*") and other investigative bodies may or should have primary regard to the likelihood of the presence in South Africa, anticipated or otherwise, of an alleged perpetrator of crimes against humanity when deciding to initiate or continue an investigation into such crime.

Relevant portions of the record

4. The Center will not be relying on any portions of the record.

Estimated duration of oral argument

5. Subject to questions by the Court, 15 minutes.
6. In assessing the scope of oral argument, the Center will consider the submissions of the other *amici curiae*.

Summary of argument

7. Crimes against humanity are crimes under South African law. The SAPS, and other South African law enforcement bodies, are obliged to investigate all crimes under South African law.
8. The duty to investigate, is – in light of considerations of reasonableness and practicality – constrained by contextual factors. Factors which the SAPS may

lawfully consider include the availability of evidence in South Africa and the principle of complementarity.

9. The Center is concerned that the judgment of the Supreme Court of Appeal in this matter (*"the SCA judgment"*) may be read as allowing and/or requiring the SAPS to place primary weight, when considering whether to initiate or continue an investigation into alleged crimes against humanity, on the likelihood that the alleged perpetrator will voluntarily be present in South Africa at some stage, and that a prosecution in South Africa will result.

10. The Center submits that this interpretation of international and domestic law would not be the correct one. The likelihood of the voluntary presence of an alleged perpetrator in South Africa is, at most, a secondary consideration. This is because:

10.1. In the event that SAPS find material evidence of a crime against humanity and wish to prosecute the accused, the SAPS has mechanisms, such as extradition, to compel the accused's presence in South Africa.

10.2. The prosecution need not be in South Africa. The evidence gathered by SAPS may be made available to the International Criminal Court (*"the ICC"*) or foreign states so that they may pursue a prosecution.

11. Accordingly, the SAPS must first carry out an investigation, and only thereafter, having considered the evidence available to it, may it determine what steps need to be taken, if any, to secure the presence of the accused.

12. To make, pre-investigation, a determination about the likely presence of an accused, and then use that decision to terminate the investigation, would be putting the cart before the horse.

Main authorities

13. Constitution of the Republic of South Africa, 1996.
14. Extradition Act 67 of 1962.
15. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
16. International Co-operation in Criminal Matters Act 75 of 1996.
17. Rome Statute of the International Criminal Court.

SUSANNAH COWEN

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Chambers, Johannesburg and Cape Town

12 May 2014

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SUBMISSIONS OF THE TIDES CENTER

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I. INTRODUCTION

1. These submissions are filed on behalf of the Tides Center (*"the Center"*).¹
2. Through its project, AIDS-Free World, the Center's work includes campaigns for the effective prosecution of sexual violence as crimes against humanity to achieve justice for its victims.² It seeks to end impunity for crimes of sexual violence, especially where such violence constitutes crimes against humanity.³
3. The Center's concern is to ensure that the precedent established by this Court on the factors influencing the duty to investigate international crimes⁴ is properly grounded in international and domestic law, and will enable South Africa to play an effective role in the international community, to prevent impunity for heinous crimes such as rape and torture, and to ensure that South Africa does not become a safe haven for perpetrators of such crimes.⁵

¹ The Center was admitted by this Court as the Fifth *Amicus Curiae* on 6 May 2014. It is a not for profit public benefit corporation based in California, US. (Hathorn, Record of application for admission, p 6, para 7.) We refer to this record herein as Record – Tides.

² Record – Tides: 5, para 5.

³ Record – Tides: 7, para 10.

⁴ By "international crime(s)", the Center means the crimes of genocide, war crimes, and crimes against humanity. These are the crimes defined as such in section 1 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (*'the ICC Act'*). These should not be confused with other crimes of an international nature, such as piracy. Rape is included as one of the acts which may amount to a crime against humanity in article 7(1)(g) of the Rome Statute of the International Criminal Court (*"the Rome Statute"*). South Africa signed the Rome Statute on 17 July 1998 and deposited its instrument of ratification on 27 November 2000.

⁵ The Center has, itself, been actively involved in the investigation of alleged mass rape of female Zimbabwean supporters of MDC in and around the general election Zimbabwe in 2008 and has requested the SAPS to launch an investigation on the basis of the information gathered. The precedent established by this case will have an impact on whether the SAPS will investigate these allegations. Record – Tides: 7-8, paras 12 to 14.

4. While the Center supports the outcome and much of the reasoning of the Supreme Court of Appeal in its judgment (*"the SCA judgment"*), the SCA judgment is (at least on one interpretation of the reasoning) unduly restrictive in its articulation of the relevance of the possible presence of an alleged perpetrator in South Africa – and thus the possibility of any eventual prosecution⁶ – to any duty to investigate international crime.⁷

5. The Center's central submission to this Court is that South African investigative authorities, pertinently the South African Police Service (*"SAPS"*) and, at times, the National Prosecuting Authority (*"NPA"*),⁸ must conduct reasonable investigations into allegations of international crimes, which must be conducted despite the absence of an alleged perpetrator in South Africa during the course of any investigation and despite there being no prospect of the alleged perpetrator voluntarily being present in South Africa at any time.

6. The Center's submission contrasts with the Applicant's submissions, which place primary emphasis on actual or likely voluntary presence of an alleged perpetrator to trigger any duty to investigate.

⁶ The presence of an accused in South Africa and the prospects of prosecuting him or her are inter-linked. In terms of section 35(3)(e) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*), a person must be present when being tried. Thus, if an accused's presence in South Africa cannot be secured, a prosecution may not be possible. It would only be possible if section 35(3)(e) was limited by a law of general application in terms of section 36 of the Constitution. This falls outside the scope of these submissions, however.

⁷ Record: Vol 13, p 1243, para 57, SCA judgment.

⁸ The parties have addressed the investigative duties of the NPA under the National Prosecuting Authority Act 32 of 1998 (*"the NPA Act"*). See Respondents' heads, para 39.

7. The Center's submissions are closely aligned with the Respondents', and more particularly their submission that presence is a requirement to secure adjudicative rather than enforcement jurisdiction.⁹ The Center adds to the respondents' in three respects:

- 7.1. Firstly, the Center emphasises the mechanisms available to the South African law enforcement authorities to secure the presence in South Africa of an alleged perpetrator for purposes of trial¹⁰ not only where voluntary presence is a prospect but also through involuntary means, such as extradition.¹¹
- 7.2. Secondly, the Center places emphasis – in delineating when and why South Africa's investigative authorities must investigate international crimes – not only on the possibility of a domestic prosecution but also on the duty of South Africa to position itself to co-operate with the International Criminal Court (*'the ICC'*) and foreign states in their investigations and prosecutions of international crime, consistently with the principle of complementarity.¹²
- 7.3. Thirdly, when delineating when and why investigative authorities, such as the SAPS, should conduct an investigation, other factors, and most pertinently the availability of evidence in South Africa and the

⁹ In other words, that the presence of the accused is required at the trial stage and not at the investigative stage. See Respondent's heads of argument, paras 44-49.

¹⁰ The question of whether international and foreign law requires the presence of an accused at his or her trial is addressed by other parties and *amici*, and the Center makes no submissions thereon. It is noted, however, that in South African law, section 35(3)(e) of the Constitution would apply.

¹¹ The Respondents rely on the possibility of voluntary presence of the alleged perpetrators as a factor that justifies the SCA decision. See the Respondents' heads of argument, para 68.4

¹² See article 1 of the Rome Statute.

complementarity principle, are of greater importance than the anticipated presence of the accused.

8. For the above reasons the presence, anticipated or otherwise, in South Africa of the accused is, at most, a secondary consideration.

9. We deal with the following issues in turn:

9.1. The duty to investigate international crimes;

9.2. Factors constraining the duty to investigate;

9.3. The materiality of the presence of the accused; and

9.4. Conclusion.

10. In these submissions, reliance is placed on domestic, international and foreign law. It is well-established that, while this Court applies South African law, international law may form part of South African law,¹³ courts *must* consider international law when interpreting South African law,¹⁴ and may consider foreign law.¹⁵ Section 2 of the ICC Act requires a Court applying the Act to

¹³ See section 231(4) of the Constitution, which reads:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

¹⁴ Section 39(1)(b) of the Constitution. See also section 232 of the Constitution, which states:

“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

C.f. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (“*Glenister*”) at paras 179-182.

¹⁵ Section 39(1)(c) of the Constitution

consider and where appropriate apply conventional international law, customary international law and comparable foreign law.

II. THE DUTY TO INVESTIGATE INTERNATIONAL CRIMES

11. Two related submissions form the premise of the Center's submissions. These are, first, that SAPS must investigate crime and, second, that 'crime' includes international crimes such as torture. As the Center is in broad agreement with the respondent's submissions on these points,¹⁶ they are only briefly made and elaboration provided if relevant to the Center's distinct submissions.
12. In terms of section 205 of the Constitution,¹⁷ one of the objects, and accordingly duties,¹⁸ of the SAPS is to investigate crime.
13. Section 4(1) of the ICC Act recognises the crimes of genocide, crimes against humanity and war crimes (defined above as "*international crimes*") as crimes in

¹⁶ See Respondents' heads of argument, 18 to 33.

¹⁷ Section 205(3) of the Constitution provides:

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law." (Emphasis added.)

¹⁸ *Glenister* at para 176.

South Africa and under South African law.¹⁹ Torture is a crime against humanity.²⁰

14. The ICC Act also serves *inter alia* to enable domestic prosecutions of international crime²¹ and to enable co-operation with the ICC with its own investigations.²² This includes specified duties to cooperate with and render assistance in relation to ICC investigations.²³
15. The duty to investigate international crimes is complemented by the South African Police Service Act 68 of 1995 (*"the SAPS Act"*). Importantly, that Act enables the investigation of international crime by appropriately skilled persons at a national level.²⁴ The duty to investigate torture specifically is reinforced by

¹⁹ Section 4(1) of the ICC Act:

"Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment."

C.f. sections 5 and 7 of the Implementation of the Geneva Conventions Act 8 of 2012.

²⁰ Part 2 of Schedule 1 to the ICC Act, incorporating the definition found in article 7 of the Rome Statute. Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*"the Torture Convention"*); article 5 of the African Charter on Human and Peoples' Rights (*"ACHPR"*). South Africa signed the Torture Convention on 23 January 1993 and ratified it on 10 December 1998, and signed and ratified the ACHPR on 9 July 1996. See further IT-95-17 / 1 T10 (Trial Chamber of ICTY, Judgment, 10-12-1998), 121 ILR 213, 260 (*"Furundzija Case"*) which categorises torture as a crime under customary international law.

²¹ See sections 4(3), 3(d), 3(e) and 5 of the ICC Act.

²² See Chapter 4 and in particular section 14 of the ICC Act.

²³ See section 14 (a) to (l). The instances include in respect of the identification and whereabouts of persons or the location of items, taking evidence, questioning persons, serving documents, examination of places, execution of searches and seizures, providing records, protecting victims and witnesses and preserving evidence, dealing with the proceedings, property and assets and instrumentalities of crime and other assistance.

²⁴ Sections 16 and 17D(1)(a) of the SAPS Act, read with the preamble to the SAPS Act. C.f. section 22 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (*"the Terrorism Act"*).

the Prevention and Combating of Torture of Persons Act 13 of 2013 (*"the Torture Act"*).²⁵

16. The SAPS Act²⁶ and other statutes²⁷ impose various duties and confer various powers on domestic authorities to co-operate with foreign states in fighting crime. Thus, section 16(2)(i) enables SAPS to assist with investigations in South Africa where requested by an international police agency or the police of a foreign country. The Cooperation Act creates mechanisms to assist foreign states who request assistance with obtaining evidence for their own use.
17. At international law, foreign states are required to cooperate, investigate and, where appropriate, prosecute, *inter alia*, torture and crimes against humanity²⁸ by:
 - 17.1. The Rome Statute,²⁹
 - 17.2. The Torture Convention,³⁰ and

²⁵ See section 9 of the Torture Act read with the preamble and section 2 thereof.

²⁶ Section 16(2)(i).

²⁷ See generally the International Co-operation in Criminal Matters Act 75 of 1996 (*"the Cooperation Act"*); sections 15 and 22 of the Terrorism Act.

²⁸ Each international crime tends to have its own relevant instruments and surrounding commentary. For example, the crime of genocide is the focus at an international level of the Convention on the Prevention and Punishment of the Crime of Genocide (*"the Genocide Convention"*). On the facts of this matter it is appropriate to focus on crimes against humanity, including torture and rape.

²⁹ Article 5 of the Rome Statute, read with the preamble, recognises genocide, crimes against humanity, war crimes and the crime of aggression as crimes over which **"every State [has a duty] to exercise its criminal jurisdiction"** in an attempt **"to end impunity for the perpetrators of these crimes and this to contribute to the prevention of such crimes"**.

Mail & Guardian Media Ltd and Others v Chipu NO and Others 2013 (6) SA 367 (CC) (*"Chipu"*) at para 24.

See also articles 86 and 93 of the Rome Statute.

³⁰ Articles 7, 9 and 12 of the Torture Convention.

17.3. Various non-binding international resolutions, including:³¹

17.3.1. The United Nations ("UN") General Assembly;³²

17.3.2. The UN Human Rights Committee ("HRC");³³ and

17.3.3. The African Commission on Human and People's Rights ("*the African Commission*").³⁴

³¹ The non-binding Princeton Principles on Universal Jurisdiction (2001) provide at principle 4:

"1. A state shall comply with all international obligations that are applicable to: prosecuting or extraditing persons accused or convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and under-taking such other necessary and appropriate measures as are consistent with international norms and standards."

2. A state, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another state, provided that the requesting state has a good faith basis and that the evidence sought will be used in accordance with international due process norms." (Emphasis added.)

³² UN General Assembly Resolution 2583 (XXIV) of 15 December 1969 which reiterates the importance of proper investigation into crimes against humanity by:

"[Calling upon] all states concerned to take the necessary measures for the thorough investigation of...crimes against humanity, as defined in article 1 of the Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity...and for the detection, arrest, extradition and punishment of all...persons guilty of crimes against humanity..."

See also Article 2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("*Istanbul Principles*") recommended by UN General Assembly Resolution 55/89 of 4 December 2000 which provides that:

"[S]tates shall ensure that complaints and reports of torture or ill treatment are promptly and effectively investigated, Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred".

³³ *Madoui v Algeria* (2008) AHRLR 3 (HRC 2008) at paras 7.9 and 9-10; See also *Muteba v Zaire* Communication 124/1982 (25 March 1983), UN Doc Supp No. 40 (A/39/40) at 182 (1984).

³⁴ The 61st Resolution of the African Commission (made at its 32nd ordinary session, held in Banjul, The Gambia, from 17th to 23rd October 2002) on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa ("*The Robben Island Guidelines*") states that States should promote and support co-operation with international mechanisms (articles 2 and 3), that extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards (article 8), and that (at article 18) States should:

"Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated".

18. South Africa has thus assumed an obligation both in international and under domestic law to recognise crimes against humanity as crimes in South Africa, to investigate and prosecute these crimes and to assist the ICC, and indeed foreign states, in investigating and prosecuting crimes against humanity in their jurisdictions.
19. The obligation to investigate, however, cannot be and is not unconstrained. It is an obligation to be exercised reasonably and lawfully. It is not reasonable, practical nor useful – and in certain cases may not be lawful³⁵ – for the SAPS to investigate all international crimes worldwide, regardless of their connection or lack thereof to South Africa.

The 87th Resolution of the African Commission (made at its 38th Ordinary Session held in Banjul, The Gambia from 21 November to 5 December 2005) on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court:

“1. Urges the Member States of the African Union to ensure that the perpetrators of crimes under international human rights law and international humanitarian law should not benefit from impunity;

....

5. Encourages the Assembly of Heads of State and Government of the African Union to urge its Members States to condemn and reject impunity.”

(Emphasis added.)

³⁵ A state may not exercise its power in any form in the territory of another state unless there is a permissive rule to the contrary. See Permanent Court of International Justice, *The Case of the SS ‘Lotus’, France v Turkey*, PCIJ Series A. No.10 (1927), cited with approval in *Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 (W) at 473G-H. See also Dugard *International Law: A South African Perspective* (4th ed.) at 146-147. The Supreme Court of Appeal, in its judgment, held at paragraph 56 that:

“It will be recalled that the exercise of enforcement jurisdiction is limited to within a state’s own territory. Accordingly, the competence to investigate only persists within South Africa’s borders, absent the consent or cooperation of foreign states.”

(Emphasis added.)

The Center expresses no opinion on whether the framework of mutual legal assistance currently existing between states, in the form of a variety of multilateral and bilateral treaties, might amount to a permissive rule that allows some degree of consensual intrusion into the territory of another state. It is not an issue that falls to be decided in the present application.

20. The question is: What factors may lawfully constrain the SAPS' duty to investigate international crimes?

III. FACTORS CONSTRAINING THE DUTY TO INVESTIGATE

21. In this section, the Center deals with factors that it contends may lawfully be taken into account by the SAPS in determining when to investigate an alleged international crime.
22. We submit that there is no closed list of factors, and that it would be undesirable for the Court to seek to articulate any list. The investigation of international crimes presents wide-ranging and peculiar challenges. Each case falls to be judged on its own merits. Further, the facts of a specific case are before this Court. Furthermore, the investigating authorities are best equipped and trained, in general, to determine which investigations are worth pursuing, subject to the Constitution and legislation.
23. However, the Center submits that the SAPS' discretion must be guided by at least the following principles:
- 23.1. Complementarity with the ICC
 - 23.2. Co-operation with foreign states;
 - 23.3. The availability of evidence within South Africa concerning the alleged international crime.

24. First, the principle of complementarity. This principle originates from articles 1 and 17 of the Rome Statute.³⁶ In context of the Rome Statute and the ICC, it operates to prevent the ICC from investigating and prosecuting any criminal matter where the foreign state or states with jurisdiction are genuinely willing and able to carry out such investigations and prosecutions themselves.³⁷
25. The principle of complementary provides an important guiding principle to limiting the scope of SAPS' duty to investigate. There is nothing to be gained by SAPS attempting to replicate an investigation of an international crime that occurred in a foreign state or affects foreign nationals, if a foreign state with territorial or nationality-based jurisdiction is already conducting a genuine investigation.³⁸ Its functions may legitimately be limited to assisting that state subject to law.
26. Where the ICC is conducting an investigation in line with the principle of complementarity, the duties on domestic authorities to investigate and otherwise assist the ICC are spelled out in the ICC Act.

³⁶ Article 1 of the Rome Statute provides:

"An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute".

(Emphasis added.)

See also section 3(d) of the ICC Act.

³⁷ The African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes provides for a similar concept at article 4(2):

"in exercising jurisdiction under this law, the Courts shall accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that State is willing and able to prosecute".

³⁸ This principle might be considered to be the corollary of the principle of *aut dedere aut judicare* (see, *inter alia*, *Chipu* at para 23).

27. Secondly, co-operation with foreign states. A similar consideration can and, it is submitted, should³⁹ apply between states where a foreign state is asserting universal jurisdiction. Where another foreign state is carrying out a genuine investigation of a crime, has a stronger connection to it, and is better placed to do so, the SAPS may (depending on the circumstances) be justified in limiting its investigations to providing any assistance requested by that State.
28. Thirdly, the SAPS must pay due regard to the availability of evidence in South Africa.⁴⁰ Indeed, save where another foreign state is willing and able to prosecute a crime, or that the ICC intends to assert jurisdiction, availability of evidence in South Africa is the central factor at least to trigger a preliminary investigation.
29. An investigation, after all, is largely a gathering of evidence. If, for whatever reason, important evidence (such as witnesses) of an international crime is available in South Africa, the SAPS is obliged – we submit – to take reasonable steps to obtain such evidence. Indeed, the greater the evidence available to the SAPS of the commission of an international crime, the more pressing the duty on the SAPS to investigate.

³⁹ If two states investigate and prosecute the same international crime, not only is there a clear risk of wasting resources, but the alleged perpetrator may be convicted and punished for the same crime twice, which would violate the fundamental criminal justice principle of *ne bis in idem*. See section 35(3)(m) of the Constitution and article 20 of the Rome Statute.

⁴⁰ The evidence need not originate in South Africa. In this case, an offer was made to the SAPS to bring witnesses from Zimbabwe to South Africa. That would be more than sufficient for the SAPS to at least initiate an investigation.

30. But the converse also applies: if there is no or only marginal evidence available to the SAPS, it need not continue with any investigation (or the subsequent prosecution).⁴¹ This criterion, if properly employed, would thus protect and prevent the SAPS from fruitlessly pursuing international crimes in distant locations that, for all practical purposes, lie beyond the SAPS' reach.
31. The operation of the above principles may be illustrated by theoretical example. Assume that in three countries – Zimbabwe, Botswana, and Canada – an identical crime against humanity is committed. Assume too that in none of the three cases is there any prospect that the perpetrators will voluntarily enter South Africa.
32. In the cases of Botswana and Zimbabwe, key witnesses flee to South Africa.
33. Only in the case of Botswana is there a credible investigation into the crime against humanity. The credible investigation could be by either the ICC or local authorities.
34. What obligations would rest on the SAPS?
35. In the case of Canada, it is likely that the SAPS need not pursue its investigation. The SAPS likely has no meaningful access to the evidence of the crime in Canada. It cannot perform an investigation of any value or carry out a prosecution with any chance of success.

⁴¹ To be clear, if there is only marginal evidence, but the marginal evidence points to the need for further investigations which may reveal material evidence, then the SAPS should investigate.

36. In the case of Botswana, the SAPS should assist either the ICC or the local authorities with their investigations in accordance with law. In other words, the SAPS would carry out such investigations as are required by law, but would not do so with a view to facilitating any prosecution in South Africa.
37. In the case of Zimbabwe, the SAPS should at least endeavour to carry out a full investigation. It has important evidence, in the form of the key witnesses, and there is no other credible authority who will bring those responsible for the international crime to justice.
38. Crucially, and logically, however, it is only after an investigation has commenced and in some cases, is either well underway or even complete that SAPS can take a rational or reasonable decision regarding its next step. A number of options will present themselves:
- 38.1. The available evidence may not justify any further investigation and/or prosecution, and the matter will be closed;
- 38.2. Whether or not the evidence is sufficient to justify a domestic prosecution, the SAPS must observe the principle of complementarity and its duties to co-operate with foreign states. That may entail assistance with investigations with the appropriate body.⁴²

⁴² Article 90 of the Rome Statute specifically contemplates the situation where a state receives a request for the extradition of an accused from both the ICC and another foreign state. Article 11 of the Southern African Development Community ("SADC") Protocol on Extradition ("*the SADC*

38.3. Where available evidence is sufficient to warrant further investigation and / or domestic prosecution and the principle of complementarity and duties of co-operation do not mitigate against domestic prosecution, the domestic authorities must then either:

38.3.1. Retain the evidence and remain in readiness to arrest and prosecute a perpetrator likely to come to South Africa; or

38.3.2. Take such steps as are required to secure the presence of the alleged perpetrators in South Africa, for example through extradition or via issuing an international arrest warrant so that third-party foreign states may take action if he or she travels through their territory.

39. Which option/s would be employed would depend on the facts and the circumstances of each investigation. For example, if the foreign state where the crime allegedly occurred is not a party to the Rome Statute, then the ICC would lack jurisdiction, and complementarity with the ICC would not be a factor.

40. The Center submits, however, that the likely voluntary presence of the alleged offender is, in principle, irrelevant to the existence of any duty to investigate. It is only relevant insofar as the likely voluntary presence of an alleged offender may provide an additional reason to investigate. However the

Protocol) also provides for concurrent requests. South Africa signed the SADC Protocol on 3 October 2002.

absence of an alleged offender and an absence of voluntary likely presence is not in itself a reason not to investigate.

IV. MATERIALITY OF THE PRESENCE OF THE ALLEGED OFFENDER

41. In this section, we motivate why the absence of an alleged offender and the likelihood of voluntary presence does not determine the existence of any duty to investigate.

42. The SCA found that there is no absolute requirement that an accused be present in South Africa before an investigation into the alleged crime commences.⁴³

43. The Center submits that while this is the correct conclusion, it appears (at least on one interpretation) to have been reached on the wrong grounds. The effect is that the SCA appears to have limited the boundaries of the duty to investigate international crime unduly.

43.1. The key paragraph in the SCA judgment is paragraph 66:

“What is set out in the preceding paragraphs reveals that there is no universal rule or practice against the initiation of investigations in the absence of alleged perpetrators. In some jurisdictions anticipated presence is sufficient. Adopting a strict presence requirement defeats the wide manner in which our legislation is framed, and does violence to the fight against impunity. Conversely, adopting a policy that calls

⁴³ The SCA judgment at para 66.

for investigations, despite the absence of any effective connecting factor, is similarly destructive in wasting precious time and resources that could otherwise be employed in the equally important fight against crime domestically. I can understand that, if there is no prospect of a perpetrator ever being within a country, no purpose would be served by initiating an investigation. If there is a prospect of a perpetrator's presence, I can see no reason, particularly having regard to the executive and legislature's earnest assumption of South Africa's obligations in terms of the Rome Statute, and for the reasons set out in the paragraph that follows, why an investigation should not be initiated."⁴⁴

43.2. At various points in its judgment, the SCA deals with the possibility of voluntary future presence in South Africa by alleged perpetrators.⁴⁵ The SCA judgment, only cursorily, foreshadows the possibility of a request for extradition from the Zimbabwean authorities.⁴⁶ The judgment is, further, open to the interpretation that primary emphasis is to be placed on the prospect of voluntary presence in South Africa as a relevant 'connecting factor' and a factor that may materially influence the legality of a decision not to investigate.

44. The Center submits that the "effective connecting factor" can legitimately be the availability of evidence (as explained above). The voluntary presence,

⁴⁴ Emphasis added. See also paragraph 57, where the Supreme Court of Appeal held:

"There is force in the submission on behalf of the commissioner that, if there is no likelihood of the alleged perpetrator's future presence in South Africa, an investigation as a basis for a prosecution that has no prospect of getting off the ground is useless."

⁴⁵ Record: Vol 1, p 85, para 67

⁴⁶ Record: Vol 1, p 85, para 68.

anticipated or otherwise, of the accused can at best provide an additional reason to investigate.

45. It cannot be a guiding principle in determining the existence of any duty to investigate because:

45.1. First, there are duties on domestic investigative authorities to investigate international crime so as to assist the ICC or foreign states with their investigations.

45.2. Secondly, there are practical means by which to secure an accused's presence through, *inter alia*, extradition and/or the issuance of an international arrest warrant.

46. It follows logically that the SAPS cannot, pre-investigation, make a determination about the likely presence of an accused, and then use that decision to terminate the investigation. That would be putting the cart before the horse.

47. As to the first, the SCA confined the issue raised by the case to investigations that are antecedent to the exercise of universal jurisdiction by a domestic court for crimes against humanity.⁴⁷ In doing so, the likely presence of an alleged perpetrator becomes unduly elevated in any assessment of a duty to investigate.

⁴⁷ Record, Vol 1, p 56, para 5.

48. In this regard, section 3(e) of the ICC Act is of particular importance. It explicitly contemplates an investigation by South African authorities into international crimes where the prosecution will not occur in South African territory. The presence of the accused is hence irrelevant in such circumstances.
49. The provisions of the ICC Act are directed at cooperation with the ICC, but it is submitted that there is no basis in law on which SAPS can refuse to cooperate with a lawful investigation that might culminate in a prosecution of an international crime in a foreign country, instead of the ICC.⁴⁸ In such circumstances too, the presence of an alleged perpetrator in South Africa would be wholly irrelevant.
50. In some cases it will be known at an early stage whether it is likely that a foreign state or the ICC will be investigating or prosecuting a crime. But in others, that will only become apparent at a later stage. Accordingly, the duty to investigate will need to be assessed in each case in light of the principle of complementarity and the prospect that a prosecution may not ensue domestically but elsewhere.

⁴⁸ See the Torture Convention at articles 7-9, and in particular article 9(1):

“States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings”.

See also article 3(e) and (k) of the African Union Constitutive Act (South Africa joined the African Union on 6 June 1994); articles 2, 3, 7, and 8 of the Robben Island Guidelines; and the Princeton Principles on Universal Jurisdiction (2001) provide at principle 1 (*supra*).

51. The second consideration is that there are mechanisms by which the SAPS can compel an accused to face trial in South Africa.
52. The tried-and-tested method for bringing a foreign accused to South Africa to face trial is extradition.⁴⁹ Extradition is an efficient, widely recognised, commonly used tool in the arsenal of the SAPS. It need not be sought only from the home country of the accused, but from any country to which or through which the accused travels.⁵⁰ There is no reason why the SAPS cannot seek the extradition to South Africa of any accused person against whom it has evidence of the commission of an international crime. The SAPS may also circulate an international arrest warrant via Interpol (the so-called Red Notice),⁵¹ which in turn may lead to an extradition.
53. Even where the home country of an accused appears unlikely to extradite the accused, the mere fact that the SAPS have investigated the alleged offence and are ready to apply for extradition, should the alleged offender ever travel to a country that might extradite him or her, helps to close the net around that person.

⁴⁹ See the Extradition Act 67 of 1962 ("the Extradition Act"); *President of the RSA v Quagliani & Two Similar Cases* 2009 (2) SA 466 (CC) ("Quagliani") at paras 1 and 39-49; *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) at paras 28-29; and, *inter alia*, the SADC Protocol on Extradition.

⁵⁰ The exact process to be followed in extradition will depend on the country from which extradition is sought. Extradition is possible even between states which have no treaty concerning extradition, on the basis of comity. See *Quagliani* at para 41 and section 3(2) of the Extradition Act.

⁵¹ See <http://www.interpol.int/Public/icpo/about.asp>. Red Notices seek the arrest or provisional arrest of persons with a view to extradition; see <http://www.interpol.int/Public/Notices/default.asp>.

54. These mechanisms are not perfect, and may not succeed in every case, but they are reasonably available to domestic authorities and investigating authorities will, at least in most cases, only be able to take a decision on whether to use these mechanisms after an investigation has commenced and in some circumstances at a relatively advanced stage of an investigation.
55. The point is that the SAPS cannot know in advance how circumstances may change to allow for the extradition of an accused,⁵² and thus the SAPS cannot proclaim at the outset of an investigation that there is no prospect of securing the presence of the accused.
56. Lastly, the Center has caused an analysis of foreign legislation and case law to be conducted on the duty to investigate as assumed by other foreign States. In its assessment, there is a growing state practice in terms of which “presence” is not required for an investigation. However, this is a topic which the Center understands will be covered by other *amici curiae*, and accordingly makes no submissions thereon.

V. CONCLUSION

⁵² The example of Vito Roberto Palazzolo is instructive. Mr Palazzolo is an Italian citizen who resided in South Africa. He had been convicted in Italy of Mafia-type crimes, and Italy sought his extradition. The Western Cape High Court effectively prohibited the extradition on the basis that South Africa had no counter-part to Mafia-type crimes (see *Palazzolo v Minister of Justice and Constitutional Development and Others* [2010] ZAWCHC 422 (14 June 2010) (unreported)). However, Mr Palazzolo subsequently travelled to Hong Kong and then to Bangkok, where he was arrested at the airport by Thai police after notification of Mr Palazzolo’s travels through Interpol. A Thai court ordered his extradition to Italy in December 2012 (see <http://www.theguardian.com/world/2012/dec/20/thailand-extradite-pizzeria-drug-money-banker>). The point is that even where an extradition may be initially unsuccessful, it may serve as the basis for future success as circumstances change.

57. It is submitted that the above considerations, independently and cumulatively, reveal that the SCA erred in indicating, even if indirectly, that the SAPS may consider the anticipated voluntary presence of an accused when deciding not to investigate an international crime. The question whether leave to appeal should be granted to the applicant raises considerations that, for the most part, fall outside of the ambit of the submissions made by the Center.
58. There is, however, an important public interest in ensuring that South African courts do not give undue priority to any consideration of the likely voluntary presence of an alleged perpetrator in determining whether an international crime can be investigated. Whether considered as part of the application for leave to appeal or the appeal itself, we submit that it is desirable for this Court to clarify the role of this consideration in line with the above submissions.

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12 May 2014

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- 5) International Co-operation in Criminal Matters Act 75 of 1996.
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- 25) *Madoui v Algeria* (2008) AHRLR 3 (HRC 2008).

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