

ZIMBABWE TORTURE CASE



NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE V SOUTHERN AFRICA LITIGATION CENTRE & ANOTHER

On 30 October 2014, a unanimous Constitutional Court held that the South African Police Service (SAPS) have a duty to investigate allegations of crimes against humanity committed in Zimbabwe, by Zimbabweans, against Zimbabweans, based on the allegations detailed in a dossier compiled by the Southern Africa Litigation Centre (SALC) and the Zimbabwe Exiles Forum (ZEF). The Court also ordered the SAPS to begin investigations without further delay.

After a description of the parties and an explanation of the [factual background](#), Justice Majiedt tackled the issue on appeal which concerned the extent to which the SAPS have a duty to investigate allegations of torture that amount to crimes against humanity, committed in Zimbabwe, by and against Zimbabwean nationals. The Court's task, as framed by Justice Majiedt, was to establish South Africa's domestic and international powers and obligations to prevent impunity, by ensuring that perpetrators of international crimes committed by foreign nationals beyond South Africa's borders are held accountable.

Central to the judgment are the following issues:

- a) in terms of international and domestic law, the presence of the suspect is not required for investigations but is required for prosecution; and
- b) universal jurisdiction is applicable, but must be subject to the principles of subsidiarity and practicability.

The Court drew a clear distinction between investigation and prosecution of international crimes on the basis of universal jurisdiction. Whereas the dominant position in international law suggests that the presence of the accused in a state is a prerequisite to prosecution, there is no such presence requirement as a prerequisite to investigation.

In terms of domestic law, the Court ruled that the Constitution requires the presence of an accused during his or her trial, and that it is silent on whether presence is required for investigations. In the Court's view, the exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside South Africa's territory, may occur in the absence of a suspect without violating the Constitution or international law.

The Court then noted several reasons for following this approach, including that requiring presence for an investigation would render futile South Africa's attempts to combat extraterritorial crimes against humanity, because it would not be practicable to initiate charges or prosecution against an accused, who is only temporarily within the state, without a certain level of prior investigation.

Justice Majiedt indicated that to understand the issue of presence, the following three jurisdictional distinctions should be made: (1) prescriptive jurisdiction, which empowers states

ZIMBABWE TORTURE CASE



to prohibit conduct through their common law or domestic legislation; (2) adjudicative jurisdiction, which allows states to enforce prohibitions on conduct through such means as investigations and prosecutions; and (3) enforcement jurisdiction, which refers to the state's capacity to determine the outcome of adjudications, particularly by enforcing judgments and remedies rendered against proscribed conduct.

The judgment then links the different types of jurisdiction to universality, which is an integral component of this case. Justice Majiedt reasoned that domestic criminal jurisdiction based on universality applies to prescriptive jurisdiction, but can also apply to adjudicative jurisdiction as long as the latter is subject to the constraints of territoriality. The Court concluded that investigations – which constitute an exercise of adjudicative jurisdiction – are permitted under the principles governing universal jurisdiction, as long as they are confined to the territory of the investigating state.

The judgment indicates, however, that the universal jurisdiction to investigate international crimes is not absolute, and is subject to at least two limiting principles: subsidiarity and practicability.

The principle of subsidiarity establishes that South Africa may investigate international crimes committed abroad only if the state with traditional jurisdiction is unwilling or unable to prosecute, and only if the investigation is confined to the territory of the investigating state. In this case, the Court found that it was very unlikely that the Zimbabwean police would have pursued the investigation with sufficient zeal, due to the high profiles of the accused. The Court made it clear that if Zimbabwe were able and willing to investigate and prosecute the alleged instances of torture, there would be no place for South Africa to do so.

The principle of practicability requires that before assuming universal jurisdiction over an extraterritorial international crime, South African authorities must consider whether embarking on an investigation is reasonable and practicable in light of the particular circumstances of the case. The Court found that foremost among these considerations are whether the investigation is likely to lead to a prosecution, and accordingly, whether the alleged perpetrators are likely to be present in South Africa either on their own, or through an extradition request. Other factors that would contribute to this likelihood include geographical proximity of South Africa to the place of the crime. However, in all cases, the ultimate enquiry is “whether, all relevant considerations weighed, the SAPS acted reasonably in declining to investigate crimes against humanity committed in another country”.

Justice Majiedt concluded the judgment by making it clear that South Africa would not be a safe haven for perpetrators of crimes against humanity and that the nation must honour its international and domestic law commitments. Finding that the refusal to investigate was wrong in law, the Court dismissed the appeal and ordered that an investigation commence without delay. The SAPS were also ordered to pay the costs, including the costs of two senior counsel and one junior counsel.