IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT 02/2014
SCA case no: 485/12
NGHC case no: 77150/09

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Applicant
and	
SOUTH AFRICAN LITIGATION CENTRE	First Respondent
ZIMBABWE EXILES FORUM	Second Respondent

FILING NOTICE

PLEASE TAKE NOTICE that the following documents have been filed:

1. Respondents' Statement of Fact

DATED at PRETORIA on 20 MARCH 2014

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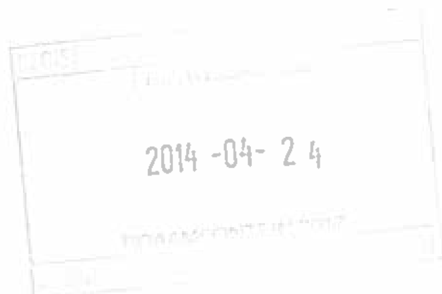
PRETORIA LAW CLINIC

Attorney for the Respondents



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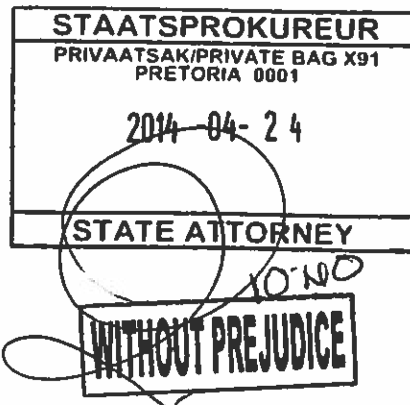


THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 02/14

In the matter between:

NATIONAL COMMISSIONER, SAPS — Applicant

and

SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE — First Respondent

ZIMBABWE EXILES FORUM — Second Respondent

RESPONDENTS' PRACTICE NOTE

THE NAMES OF PARTIES AND THE CASE NUMBER

1. These details appear in the heading.

NATURE OF THE PROCEEDINGS

2. This application for leave to appeal has arisen 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*").

3. The respondents laid their complaint with the PCLU and handed the torture docket to them on 16 March 2008. The NPA only informed SALC on 19 June 2009 that SAPS declined to investigate the matter. It in other words took the authorities 15 months to decide not to do an investigation. The respondents instituted review proceedings in the North Gauteng High Court. The Court declared that the decision not to investigate was unlawful, inconsistent with the Constitution and therefore invalid.

4. The Court further ordered the applicant to initiate an investigation into international crimes contemplated in the ICC Act, in respect of torture committed in Zimbabwe and instructed them to pay the costs of the application, including costs for three counsel.

5. The applicant appealed to the Supreme Court of Appeal ("*SCA*"), after having been denied leave to appeal by the High Court on the grounds that there was no reasonable prospect that another Court would come to a different conclusion.

6. The SCA dismissed the appeal with costs including the costs of three counsel. SAPS did not challenge the terms of the High Court order on appeal to the SCA

at all. It raised no criticism of them. The SCA only toned them down because the presiding judge suggested that the High Court order was unduly prescriptive and invited the parties to submit a toned down alternative. SAPS again did not suggest that there was anything untoward in the proposal to issue a toned down order.

7. The SCA set aside the decision not to investigate and ruled that the applicant, on the facts of this case, is empowered to investigate the alleged offences irrespective of whether or not the perpetrators are present in South Africa. The applicant was ordered to initiate an investigation in terms of the ICC Act. In paragraph 3.2 of its order the SCA issued a declaratory order which declares SAPS's duties "*on the facts of this case*".

8. This is an application for leave to appeal against the judgment and order of the SCA.

9. The only real issue for determination on appeal – and this was the sole question that SAPS raised before the SCA on appeal – is whether the South African Police Service ("*SAPS*") has the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who come to South Africa from time to time.

ISSUES TO BE ARGUED

10. Whether it is in the interests of justice for leave to appeal to be granted.

11. Whether the power to investigate international crimes is sourced in s 4(3) of the ICC Act.

12. Whether in terms of the Constitution, the South Africa Police Services Act, and international law, the applicants, and the institutions they oversee, are competent in law to investigate international crimes contemplated in the ICC Act committed outside of South Africa.

13. Whether the SCA's order is a just and equitable remedy on the facts of this case.

RELEVANT PORTIONS OF THE RECORD

14. The respondents are of the view that it is necessary for the entire record to be read.

ESTIMATED DURATION OF THE ARGUMENT

15. It is estimated that the respondents' oral argument will take no longer than 2 hours.

16. The respondents anticipate that argument will be completed in one day in the event that application for leave to appeal is granted and the merits of the appeal are argued.

SUMMARY OF THE ARGUMENT

1. This appeal arises in the context of South Africa's obligations to investigate and prosecute international crimes assumed through its ratification of the Rome Statute and subsequent enactment of the ICC Act.

2. Despite the applicant's efforts to widen the issues for consideration, the only issue on appeal before this Court should be: whether the SAPS has the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who come to South Africa from time to time.

3. In the High Court and the Supreme Court of Appeal the applicant's case was limited – in its answering papers and in its written and oral submissions – to the contention that it is not competent for SAPS to do so because SAPS derive their power to investigate such a crime from s 4(3) of the ICC Act.

4. The applicant contends that the ICC Act only allows SAPS to investigate such a crime if and when suspects are present in South Africa.

5. The respondents submit that the applicant does not derive its power to investigate crimes against humanity from s 4(3) of the ICC Act. They have the power to do so on the following 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 secondly, the applicant has Constitutional powers in terms of section 205 (3) of the Constitution and statutory powers, in terms of section 17 D (1) (a) of the SAPS Act, to investigate all crimes alleged to have been committed under South African law, including those that are considered to the most serious crimes of concern to humankind.

6. The respondents submit that international law does not prohibit investigations *in absentia* and that state practice varies from country to country because it is a matter left to domestic policy.

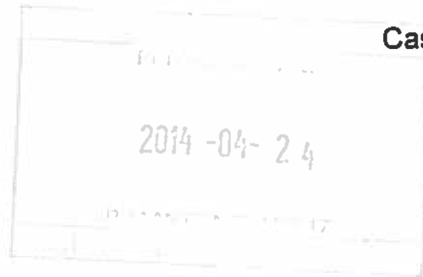
7. With respect to the issue of remedy, the respondents submit that the applicant's complaint that the SCA substituted its decision instead of referring the matter back to SAPS for consideration, is unfounded. The SCA did not in fact substitute its decision for that of SAPS. Paragraph 3.2 of its order is a declaratory order which declares SAPS's duties "on the facts of this case".

8. The effect of its order is to say that, on the facts of this case, SAPS is under a duty to investigate the docket and does not have a discretion to decline to do so. Accordingly, the SCA's order was a just and equitable – and practical – order that

indicated, in the circumstances of this case, that SAPS is obliged to do the investigation.

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 02/14



In the matter between:

NATIONAL COMMISSIONER, SAPS — Applicant

and

SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE — First Respondent

ZIMBABWE EXILES FORUM — Second Respondent

RESPONDENTS' SUBMISSIONS

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WHAT THE CASE IS ABOUT AND IS NOT ABOUT

Introduction

1. The judgments of the High Court and the Supreme Court of Appeal have been universally welcomed and praised by the international law scholars who have published on it, Justice Goldstone,[1] Professor Werle,[2] Professor Chenwi[3] and Professor Gevers.[4] Justice Goldstone for instance said that the SCA's judgment was "*innovative and welcome*" and commented on its significance as follows:

> "*The decision of the South African court correctly recognised that the system established by the Rome Statute is intended to bring an end to impunity for atrocity crimes and to that end requires all Member States to act as best and efficiently as they are able to reign in alleged perpetrators of these heinous crimes ....*
>
> *It is to be hoped that the approach of the South African court will be followed by the courts of other nations that share a commitment to bring justice to the many tens of thousands of victims of international criminality.*"

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1 Richard Goldstone, "Universal Jurisdiction: A Growing Legal Phenomenon", International Judicial Monitor: Winter 2014 issue, available at http://www.judicialmonitor.org/current/globaljudicialperspective.html

2 Werle and Bornkamm "*Torture in Zimbabwe under scrutiny in South Africa*" (2013) 11 J Int Criminal Justice 659

3 Chenwi "*Universal Jurisdiction and South Africa's perspective on the investigation of international crimes*" (2014) 131 SALJ 27

4 Gevers "*Southern African Litigation Centre v National Director of Public Prosecutions*" (2013) 130 SALJ 293

2. SAPS focused on a single argument in the High Court hearing and on appeal to the SCA. It now seems to have abandoned that argument and seeks instead to raise false issues based on distortions of the SCA's judgment.

The only real issue

3. SAPS's main argument in the High Court was that its power to investigate crimes against humanity is derived from s 4(3) of the ICC Act. It means that, if a crime against humanity is committed on foreign soil by a foreign perpetrator on a foreign victim, SAPS does not have the power to investigate the crime until the perpetrator enters South Africa.

4. This was the only basis on which SAPS attacked the High Court's judgment on appeal to the SCA.[5] Its heads of argument put it as follows:

> *"Simply put, in order for not only SAPS but also the NPA and our courts to enforce the provisions of s 4(3)(c) of the Domestic ICC Act, the offender must be physically present in the Republic after having committed the offence. To suggest otherwise would mean that the enforcement jurisdiction far exceeds the prescriptive jurisdiction of s 4(3)(c). We reiterate that the investigation by the SAPS and any subsequent prosecution or criminal trial, relate to the enforcement of the prescriptive jurisdiction of s 4(3)."*[6]
>
> *"The presence of an offender is therefore not only required in respect of the trial, but any investigative process preceding same."*[7]
>
> *"In the absence of the rationes jurisdictionis dictated by section 4(3)(c) of the Domestic ICC Act, the order granted by the court a quo ineluctably leads to a*

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5 SAPS SCA Heads of Argument p 35 paras 101 to 114

6 para 103

7 para 104

brutum fulmen. The SAPS cannot be expected to investigate a crime which is not deemed to have been committed in the Republic."[8]

5. The SCA addressed this issue in paragraphs 52 to 56 of its judgment and concluded that,

   "It is clear that the SAPS, in the form of the Hawks, has the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially".[9]

6. We shall submit with respect that this conclusion was clearly correct. Section 4(1) of the ICC Act makes it a crime under South African domestic law for anybody to commit an international crime subject to the Rome Statute, wherever it might occur. Section 205(3) of the Constitution authorises SAPS to investigate all crimes under South African domestic law and not only those committed within South Africa. Section 17D(1)(a) of the SAPS Act moreover expressly provides that one of the functions of the Hawks is to investigate "*national priority offences*" which include any offence under the ICC Act.

7. SAPS's submissions obfuscate its position on this issue. It only mentions the relevant provisions of the SAPS Act in footnotes 111 to 114 on page 30. It seems to accept that they authorise the Hawks to investigate crimes under the ICC Act. When it summarises its conclusions in paragraph 88 however, SAPS contradicts itself on this score:

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[8] para 109

[9] para 55

7.1. It seems to say in paragraph 88(ii), on the one hand, that SAPS may initiate an investigation only "*once a perpetrator is present in South Africa*" and then only after he or she has been arrested.

7.2. It says in paragraph 88(iv), on the other hand, that SAPS has a discretion to initiate an investigation "*despite the absence of the suspect from South Africa at the time an investigation is contemplated*".

The first false issue

8. SAPS says in paragraphs 1 and 2 of its submissions that the question in this case, formulated by Professor Werle in his article on the High Court judgment, is whether,

> "*South African authorities (can) realistically be expected to open up criminal proceedings whenever a crime envisaged in the ICC Act is committed anywhere in the world, just because the suspects might one day enter South African territory.*"

9. But this is neither the question in the case nor a question formulated by Professor Werle. It is a caricature of the question in the case. SALC and ZEF accepted, and the SCA held, that the question whether the South African authorities were under a duty to investigate an international crime, depended on the circumstances of every case. The SCA's order indeed made it clear that it was based "*on the facts of this case*".

10. It is also clear from Professor Werle's article that he was not under any misapprehension about the true question in the case.[10] In his discussion of the High Court judgment, he identified "*the central domestic legal question*" to be "*whether and*

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[10] Werle "*Torture in Zimbabwe under scrutiny in South Africa*" (2013) 11 J Int Criminal Justice 659

when South African law enforcement authorities are obliged to initiate criminal proceedings in universal jurisdiction cases".[11] He started this discussion by stating the obvious:

> "*South African authorities cannot realistically be expected to open up criminal proceedings whenever a crime envisaged in the ICC Act is committed anywhere in the world, just because the suspects might one day enter South African territory. There must be additional elements justifying the conclusion that the prosecution and the police are obliged to investigate. In particular, there must be a reasonable prospect that proceedings will be successful, meaning that they may lead to the prosecution of the suspects in South Africa or support prosecutions elsewhere by securing evidence.*"

11. He then applied this approach to the facts of this case and agreed with the High Court that they imposed a duty on the South African authorities to investigate the case:

> "*Against this background, South African authorities are under a duty to initiate criminal proceedings in the present case. Such proceedings have a reasonable prospect of success. There is evidence that some suspects travel to South Africa occasionally and there are no indications that this might be different in the future.*"[12]

The second false issue

12. Having disposed of the only contention SAPS had advanced on appeal, the SCA need not have gone any further. It went further however, of its own accord, from paragraph 57 of its judgment, to consider issues SAPS had not raised.

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[11] 671

[12] 672

13. The first issue it considered in paragraphs 58 to 66 of its judgment, was whether there was a rule of international law that the suspect be present when an international crime was investigated, that is, whether international law prohibited "*investigations in absentia*". Its review of state practice showed that Canada, Germany, the United Kingdom, the African Union and the Princeton Principles permit investigations in the absence of the suspect while only Denmark and France require the suspect to be present. The SCA concluded in paragraph 66 that, "*If there is a prospect of a perpetrator's presence, I can see no reason ... why an investigation should not be initiated*". This was no more than a finding that it was competent to launch an investigation in the absence of the suspect. The SCA did not suggest that SAPS was under a duty to launch such an investigation whenever it was competent to do so.

14. SAPS now distorts this finding by asserting that the SCA held that SAPS is under a duty to investigate any international crime in the suspect's absence "*whenever there is a mere (i.e. and not – entirely – discountable) prospect that the perpetrator ... may in future be present in South Africa.*"[13] SAPS makes this distortion the centrepiece of its submissions by branding it an "*extreme variant of absolutism as regards universal jurisdiction*"[14]; "*an inexorable duty to investigate in absentia*"[15]; "*an absolute duty to prosecute*"[16]; "*a more burdensome standard on investigative authorities than the ICC Act imposes on prosecuting authorities*"[17]; and an obligation "*to commence investigations into allegations of torture in countries like China and Russia*".[18]

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13 SAPS Submissions p 4 para 6, p 25 para 51, p 27 para 52 and p 48 para 88(1)

14 SAPS Submissions p 4 para 6

15 SAPS Submissions p 20 para 40

16 SAPS Submissions p 22 para 45

17 SAPS Submissions p 26 para 51

18 SAPS Submissions p 27 para 52

The third false issue

15. Another issue the SCA raised of its own accord in paragraphs 68 and 69 of its judgment, was the terms of the High Court's order. SAPS did not quibble about them on appeal at all. In the course of the hearing of the appeal, however, the presiding judge suggested to counsel for SALC and ZEF that the High Court's order might be unduly prescriptive and invited them to formulate a less intrusive order. They did so after the hearing. SAPS made no submissions on this issue in reply, did not put forward a draft order of its own and did not comment on the SALC-ZEF draft at all. Despite the fact that SAPS never raised any objection to the terms of the High Court order or those proposed by SALC and ZEF, the SCA toned down the SALC-ZEF draft yet further for the reasons set out in paragraph 69 of its judgment.

16. SAPS now says in paragraph 5 of its submissions that the SCA "*issued a mandamus*"; that it did so "*mero motu: a mandamus was not part of the relief sought from it*" and that the SCA "*compounded its extraordinary approach in this respect by refusing to submit the impugned decision to the decision-maker*". But nothing can be further from the truth. SAPS did not challenge the terms of the High Court's order on appeal at all. Despite its failure to do so, the SCA intervened and toned down the High Court's order of its own accord. SAPS's latter day vitriol directed at the SCA is thus wholly misguided.

The scheme of our submissions

17. The remainder of our submissions are organised as follows:

17.1. We discuss the state's duty to investigate and prosecute crimes against humanity under the Rome Statute and the ICC Act. It forms the backdrop against which the issues in the case must be considered.

17.2. We address the only issue SAPS raised on appeal to the SCA, whether it has the power to investigate crimes against humanity committed in Zimbabwe by Zimbabweans who visit South Africa from time to time. We submit it has the power to do so in terms of s 205(3) of the Constitution and s 17D(1)(a) of the SAPS Act.

17.3. We consider whether international law prohibits "*investigations in absentia*", that is, whether it requires the suspect to be present when crimes against humanity are investigated. We submit that there is no such requirement under international law. State practice varies from country to country because it is a matter left to domestic policy.

17.4. We conclude on the issue of remedy. We submit that SAPS's complaint that the SCA substituted its decision instead of referring the matter back to SAPS for consideration, is unfounded.

THE DUTY TO PROSECUTE INTERNATIONAL CRIME

18. Both international law and domestic law impose duties on the state and SAPS in particular to prosecute crimes against humanity. The duty to prosecute necessarily also carries with it a duty to investigate such crimes.

19. The international duty to prosecute such crimes stems from conventional and customary international law. For over sixty years there has been an international conventional duty to prosecute genocide[19] and war crimes[20] *under certain circumstances*. While crimes against humanity are not subject to a *specialised* treaty, a number of international resolutions have been adopted in support of extending the obligation to prosecute to crimes against humanity.[21] Further, torture itself carries with it an international obligation to prosecute such acts in certain circumstances.[22]

20. The widespread ratification of these instruments, together with a growing international recognition of the fact that perpetrators of crimes that shock the conscience of

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[19] See Article I, II, IV, VI *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, which came into force on 12 January 1951; and decision of the International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007.

[20] All four of the Geneva Conventions 1949 contain a common article setting out an obligation either to prosecute individuals alleged to have committed or ordered the commission of war crimes, regardless of their nationality; or to 'hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case'. See Article 49 Geneva Convention 1; article 50 Geneva Convention II; Article 129 Geneva Convention III; and article 146 Geneva Convention IV.

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

[22] Article 4, 5 and 7 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

humanity must be punished, has led a number of scholars to conclude that a customary international law obligation to prosecute exists in respect of such crimes, including crimes against humanity.[23] This court has itself has raised the question of whether there is a duty to prosecute such crimes, but has not yet ruled definitively on the issue.[24]

21. The preamble of the Rome Statute of the International Criminal Court – the culmination of the abovementioned recognition – itself confirms this emerging norm, stating: "*[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.*"

22. The European Union has confirmed such a duty for its members in respect of ICC crimes.[25] And African states have placed themselves firmly on the side of recognising that such a duty exists:

22.1. The African Union's Constitutive Act proclaims as a founding principle in article 4(h) "*the right of the Union to* ***intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances,***

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23 See for example Cherif Bassioni, as cited in Werle, *Principles of International Criminal Law*, 2005, at fn 350, page 64.

24 In *S v Basson* 2007 (3) SA 582 (CC) the Constitutional Court recognised this potential, although it ultimately left the question open, noting (para. 147): "*For the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute*". Earlier however, it noted – in *S v Basson* 2005 (1) SA 171 (CC) – that "*international law obliges the state to punish crimes against humanity and war crimes*".

25 See the Decision of the Council of the European Union on Justice and Home Affairs (the Council) which declares that ICC crimes "must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation." Council Decision 2003/335/JHA of 8 May 2003, Official Journal L 118, 14/052003 P.0012-0014, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf, preambular paras. 1, 6.

namely: war crimes, genocide and crimes against humanity"[26] (our emphasis).

22.2. In its Report on Universal Jurisdiction, the AU's Office of Legal Counsel noted that article 4(h) "*provides the basis of the practice of the African Union on universal jurisdiction over war crimes, genocide and crimes against humanity*".[27]

22.3. The AU Model Law on Universal Jurisdiction recognises that "*certain crimes are of most serious concern to Member States of the African Union and the international community as a whole and* ***they must not go unpunished***"[28] (our emphasis).

22.4. What is more, the stated purpose of the AU Model law is "*to provide for the exercise ... of universal jurisdiction [by a member state]... over international crimes and for connected matters* ***and to give effect to its obligations under international law***"[29] (our emphasis).

22.5. The proposed amendment to the African Charter – aimed at granting the African Court jurisdiction over such crimes – explicitly recognises the role of "*national, regional and continental bodies and institutions*" in "*preventing*

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[26] Established in 2001 to replace the Organisation of African Unity. See Constitutive Act of the African Union (2001), available at http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm

[27] Report on Model Law, Office of the Legal Counsel of the African Union, 2012, para. 40.

[28] Preamble, *African Union (Draft) Model National Law on Universal Jurisdiction Over International Crimes*, 2012.

[29] Article 1, Ibid.

serious and massive violations of human and peoples rights ... ***and ensuring accountability for them wherever they occur***"[30] (our emphasis).

22.6. Finally, this duty has been recognised at a sub-regional level as well.[31]

23. In addition to this obligation to investigate and prosecute international crimes, South Africa is also obliged to investigate and prosecute grave human rights violations, as a result of the State's duty to provide an effective remedy for such violations.[32] The duty to provide an effective remedy and the duty generally to protect fundamental rights have been authoritatively interpreted by the UN Human Rights Committee to require that state parties must investigate, prosecute and punish those responsible for specific ICC crimes, including torture.[33] While the above international cases involved gross violations of human rights committed within the member states' own territory, the joint effect of section 4(1) and section 4(3) of the ICC Act, however, is to deem the international crimes to be crimes committed in South Africa. These crimes must

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[30] See Preamble, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 2011.

[31] The *International Conference of the Great Lakes Region* (2006) has adopted a *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination* (2006) in terms of which Member States are obliged to prevent and punish international crimes (see articles 8 & 9). Member states are Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia.

[32] See, article 8 of the Universal Declaration of Human Rights, 1948; article 2 of the International Covenant on Civil and Political Rights, 1966; article 1 of the African Charter on Human and People's Rights, 1981; and articles 1 and 4 of the European Convention on Human Rights, 1950). See Roht-Arriaza "State responsibility to investigate and prosecute grave human rights violations in international law" 78 California Law Review 451 (1990) 466 and Orentlicher, "Settling accounts: The duty to prosecute human rights violations of a prior regime" (1991) 100 Yale Law Journal 2537.

[33] Madoui v Algeria (2008) AHRLR 3 (UNHRC, 2008) at paras 7.9 and 9-10; Muteba v Zaire Comm 124/1982, UN Doc A/39/40 (1984); see Report of the Human Rights Committee, General Comment 7(16) para 1, UN Doc E/CN 4/Sub 2/Add 1/963 (1982). In General Comments interpreting art 7 of ICCPR which prohibits torture and cruel, inhuman or degrading treatment or punishment, the Committee asserted that '... Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation'.

accordingly attract the same duties – including the duties "to *carry out a serious investigation of violations committed within its jurisdiction*" – as other domestic crimes committed in South Africa. If this were not the case, the scheme and purposes of the Act would be undermined.

24. Distinct from these *international* obligations, the ICC Act – enacted by Parliament to give effect to South Africa's complementarity obligations under the Rome Statute – places a clear *domestic* obligation on the relevant authorities to investigate and prosecute international crimes, whether they are committed in South Africa or abroad.

25. Accordingly, whatever may be the position under international law as regards a customary international law duty to prosecute, South Africa has domestically accepted that duty for itself. It has done so through the ICC as its catalyst, and no doubt with a keen understanding of its own history as a predator state.

26. The Preamble to the ICC Act records that the obligation imposed on South African authorities under the Act is to "***[bring] persons who commit such atrocities to justice****, either in a court of law of the Republic in terms of its domestic laws where possible,* ***pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court***" (our emphasis).

27. Section 3 (Objects of the Act) stipulates that one of the Act's objects is "*to* ***enable, as far as possible and in accordance with the principle of complementarity ... the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of***

having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances"[34] (our emphasis).

28. Moreover: the Act says that "*[i]f the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority [the Director-General: Justice and Constitutional Development] with the full reasons for his or her decision and the Central Authority must forward that decision, together with the reasons, to the Registrar of the Court.*"

29. We submit that it is therefore clear that our Act has taken universal jurisdiction seriously. Our Act makes it plain that South African criminal law is always applicable to crimes under international law, regardless of where, by whom, or against whom these acts were committed. The applicability of our law is through the crime itself, which affects the international community as a whole.

30. Under the ICC Act, our authorities are under a duty to ensure – "***as far as possible***" – the prosecution of such crimes wherever they occur. This duty is not affected by the fact that a case involves universal jurisdiction in respect of crimes committed abroad:

    30.1. Such crimes are deemed to have been committed in South Africa; and hence, there nothing in the Act which suggests that there is a pecking order of duties in respect of the prosecution or investigation of crimes against humanity, depending on whether they are committed within our territory, by our nationals, or outside our territories. If there is ordinarily a duty to prosecute and hence investigate because a crime against humanity was committed here

[34] Section 3(d).

in Pretoria, then there is ordinarily a duty to prosecute and hence investigate because a crime against humanity was committed in Harare.

30.2. As a matter of statutory interpretation, it must be presumed that the legislature intended that section 4(3)(c) would enable effective prosecutions on the basis of extraterritorial jurisdiction.[35] It is clearly the statutory intention, on a purposive interpretation, that there must also be a concomitant duty on the State to investigate those crimes.

30.3. That duty (and the conjoined obligation to investigate) are conceptually and practically different from the question of whether a Court will ultimately enforce its jurisdiction in respect of such persons under section 4(3)(c) of the Act.

31. Finally, what is important to keep in mind when assessing this duty and its effectuation through the exercise of universal jurisdiction is the nature of the crimes in question – torture, as a crime against humanity.

32. As famously put by the US 2nd Circuit Court in *Filártiga v. Peña-Irala*, 630 F.2d 876, ruling that it could exercise jurisdiction over agents of the Government of Paraguay (in their individual capacity) who were found to have committed the crime of torture against a Paraguayan citizen, using its jurisdiction under the Alien Tort Claims Act, and customary international law:

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35 It is presumed that the *"words of an instrument are to be so construed that the subject*-matter may rather be of force than come to naught (verba ita sunt intelligenda ut res magis *valeat quam pereat).* See L Du Plessis *Re-Interpretation of Statutes* (Durban: LexisNexis Butterworths, 2002) at 187 and the authorities cited there.

"Indeed, for purposes of civil liability, ***the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind*** " (our emphasis).

33. A recent reminder by the SCA of the historical reasons why our law finds torture by state agents repugnant is not out of place. See *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 31.

    "[31] The CAT prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency. It is thus a peremptory norm of international law. Our Constitution follows suit and extends the non-derogation principle to include cruel, inhuman and degrading treatment.19 The European Convention on Human Rights does likewise.20 ***The prohibition against torture is therefore one of our most fundamental constitutional values. Having regard to this country's inauspicious pre-constitutional history, when the treatment of criminal suspects and other detainees often involved the use of torture, this is hardly surprising – for it is one of the most egregious of human rights violations. And it is a crime that the CAT requires all member states to investigate thoroughly and to ensure that perpetrators are severely punished*** " (our emphasis).

THE POWER TO INVESTIGATE INTERNATIONAL CRIME

34. SAPS argued in the High Court and in the SCA that it did not have the power to investigate crimes against humanity committed by Zimbabweans in Zimbabwe unless and until the suspects were present in South Africa. The premise of its argument was that SAPS derived its power to investigate such crimes from s 4(3) of the ICC Act which requires, at its lowest, that the suspect be present in South Africa. We submit for the following reasons however that the premise is flawed.

35. Section 4(1) of the ICC Act provides that anybody who commits a "*crime*" (genocide, crimes against humanity or war crimes) "*is guilty of an offence and is liable on conviction to a fine or imprisonment*". It criminalises the international crimes under South African domestic law. It does so unconditionally.

36. Section 4(3) requires the crime, the perpetrator or the victim to have a link with South Africa. The minimum requirement is that the perpetrator be present within South Africa. But the opening words of the section make it clear that such a link is only required "*In order to secure the jurisdiction of a South African court for purposes of this Chapter*". It only makes the jurisdiction of the court conditional on the link. It does not make the criminalisation of the international crime under South African domestic law dependent on such a link at all.

37. Section 205(3) of the Constitution provides that the objects of the police service are, amongst others, to "*investigate crime ... and to uphold and enforce the law*". It authorises SAPS to investigate any crime under South African law which, in terms of s 4(1) of the ICC Act, includes any international crime.

38. The SAPS Act expressly empowers the Hawks to investigate any offence under the ICC Act:

    38.1. Section 17D(1)(a) provides that the functions of the Hawks are *inter alia* to investigate "*national priority offences*".

    38.2. Section 17A defines a "*national priority offence*" to include the crimes described in s 16(1).

    38.3. Section 16(2)(iA) provides that, the crimes described in s 16(1) include the offences mentioned in the Schedule to the SAPS Act.

    38.4. Item 4 of the Schedule lists any offence under the ICC Act as a national priority offence.

39. The Priority Crimes Litigation Unit of the National Prosecuting Authority is also specifically mandated to manage and direct the investigation and prosecution of crimes under the ICC:

    39.1. Section 13(1)(c) of the National Prosecuting Authority Act 32 of 1998 permits the President to appoint Special Directors to perform the functions assigned to them by the President.

    39.2. Section 24(3) provides that a Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to them by the President.

39.3. The President appointed Advocate Ackermann SC as a Special Director by a proclamation dated 24 March 2003.[36] The President mandated him *"to manage and direct the investigation and prosecution of crimes contemplated in"* the ICC Act.

39.4. In terms of s 24(7) of the NPA Act, a Director who is of the opinion that a matter connected with or arising out of an offence requires further investigation, may request SAPS for assistance in the investigation and they are then obliged to comply with the request *"insofar as practicable"*.

39.5. In terms of s 17D(3) of the SAPS Act, the head of the Hawks may in turn request the NPA for assistance with the investigation of a national priority offence.

40. The effect of all these provisions is accordingly that,

- any international crime under the Rome Statute is a crime under South African domestic law in terms of s 4(1) of the ICC Act;
- the Hawks have the power to investigate such a crime in terms of s 205(3) of the Constitution and s 17D(1)(a) of the SAPS Act; and
- the Priority Crimes Litigation Unit of the NPA have the power and duty to manage and direct the investigation and prosecution of such a crime and may call upon SAPS to assist with such an investigation.

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[36] Proclamation 24 March 2003 vol 3 p 210

INTERNATIONAL LAW PERMITS INVESTIGATION IN ABSENTIA

41. The Constitution, the SAPS Act and the NPA Act authorise SAPS and the NPA to investigate international crimes under the Rome Statute without requiring the suspect to be present in South Africa when they do so. The only remaining question is accordingly whether international law sets such a requirement, that is, whether international law prohibits "*investigations in absentia*".

42. The survey of comparative law undertaken by the SCA in paragraphs 59 to 66 of its judgment, shows that state practice varies. Some sources, like Canada, Germany, the United Kingdom, the African Union and the Princeton Principles, permit investigations in absentia while others, like Denmark and France, do not. SAPS accepts that this is so albeit that it insists that the states that allow investigations in absentia "*constitute a small minority*".[37] But numbers do not matter. What matters is that there is no consistency of state practice. The fact that some states permit investigations in absentia, confirms that it is not prohibited under international law. There is no rule of international law which precludes investigations in absentia.

43. The Permanent Court of International Justice set out the founding principles for the exercise of extra-territorial jurisdiction over crimes in the *Lotus Case* as follows:

> *"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,*

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[37] SAPS Submissions p 15 para 31

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. ***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.***" (our emphasis)[38]

44. In the *Arrest Warrant Case*[39] in the International Court of Justice, Justices Higgins, Kooijmans and Buergenthal considered the implications of the Lotus principles for the investigation of international crime in their joint separate opinion and said the following:

> "*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.*"[40]
>
> "***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 the bases of jurisdiction recognised under international law.*"[41]
>
> "*No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return*

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38 PCIJ, "*The Case of the S.S. Lotus*", France v. Turkey (Judgment), 7 September 1927, p 9

39 ICJ, Democratic Republic of The Congo v Belgium, 11 April 2001, Joint Separate Opinion of Justices Higgins, Kooijmans and Buergenthal

40 para 54

41 para 56

below to certain aspects of this facet, but will say at this juncture that ***commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles.***"[42] (our emphasis)

45. The prestigious Institute of International Law adopted a series of principles that govern the exercise of universal criminal jurisdiction under international law. Paragraph 3(b) of their resolution provides that,

"***Apart from acts of investigation and requests for extradition****, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State ....*". (our emphasis)

46. Professor Kress commented on these principles adopted by the Institute of International Law in an article upon which SAPS places much reliance.[43] He comments on paragraph 3(b) of the Institute's resolution as follows:

"***For all practical purposes, the opening part of this statement is of the greatest importance. It contains the drafter's view that the power of states to exercise universal jurisdiction includes investigative acts in absentia.*** *The criminal investigation may lead to an extradition request vis-á-vis the state where the suspect is present. If this is the correct view of the lex lata, then those national laws on universal jurisdiction, such as the German Code of Crimes Under International Law, which provide a basis for a criminal investigation in absentia, while requiring the presence of the accused for any trial, are in harmony with international law.*"[44]

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[42] para 59

[43] Kress "*Universal Jurisdiction over International Crimes and the Institut de Droit international*" (2006) 4 JICJ 561

[44] 567

*"This brings us back to the evaluation of the pertinent state practice. If the question is posed whether or not there exists legislative and judicial practice in support of the exercise of adjudicative universal jurisdiction in absentia, a 'dispassionate analysis' would still seem to yield the result that states such as Belgium, Germany, Israel, New Zealand and Spain --- which have explicitly provided for such an exercise of jurisdiction --- form a minority, insufficient to assert the creation of a new rule of customary international law. At the same time, **there is, certainly, also insufficient state practice to assert the creation of a rule that would specifically prohibit any investigative act in the absence of support based (only) on universal jurisdiction.** In particular, Judges Higgins, Kooijmans and Buergenthal have convincingly argued in their Joint Separate Opinion in the Arrest Warrant case that it would be fallacious to derive such a prohibitive rule from the aut dedere aut judicare scheme of the Geneva Conventions."*[45] (our emphasis)

47. So too, 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*".[46] It adds however that it "***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***". (our emphasis)

48. SAPS clearly misunderstands the position of the African Union which is entirely in harmony with the views we have mentioned:

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[45] 577

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

48.1. SAPS says in paragraph 61 of its submissions that the AU-EU Expert Report on the Principle of Universal Jurisdiction[47] "*nowhere suggested that any investigation in absentia is required, practical or to be recommended*". It fails to mention, however, that the report makes it clear that international law does not require the suspect to be present:

> "*Where not constrained otherwise by treaty, states tend to exercise universal jurisdiction in a variety of ways.* ***Some national legislation, jurisprudence or practice may require that universal jurisdiction is to be exercised only when the subject is subsequently present on the territory of the forum state; other national law or practice permits the exercise in absentia of such jurisdiction.***"[48] (our emphasis)

48.2. As Geneuss notes:

> "***The authors of the Report do not deem the presence of the accused mandatory for the initiation of an investigation, prosecution or of court proceedings.*** *The Report correctly points out that some states providing for universal jurisdiction require the presence of the presumed offender. However, state practice on the subject seems too scarce and inconsistent to imply the existence of a rule of customary international law prohibiting the exercise of universal judicial jurisdiction in the absence of the alleged offender.*" [49] (our emphasis)

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47 Council of the European Union, 16 April 2009

48 para 10

49 Genuss, "Universal Jurisdiction Reloaded: Fostering a better understanding of Universal Jurisdiction", 7 *JICJ* (2009), 945, p. 955

48.3. One of the recommendations of the report was that "*the AU Commission should consider preparing model legislation for the implementation of measures of prevention and punishment*".[50] The AU Commission prepared such a model law[51] which the AU adopted in 2012. Section 4(1) of the Model Law provides for universal jurisdiction over any person "*provided that such a person shall be within the territory of the State* ***at the time of the commencement of the trial***". (our emphasis)

48.4. The AU position is accordingly quite clearly that international law permits investigations in absentia.

49. The scholars who have published articles on the judgments of the High Court and the SCA have been unanimous in their endorsement and praise of those judgments.[52] None of them suggests that international law does not permit investigation in absentia.

50. SAPS relies in paragraph 17 of their submissions[53] on an incomplete quotation from an article by Professor Werle[54] for its submission that the SCA adopted "*a contrarian*

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[50] Recommendation R2

[51] African Union Model National Law on Universal Jurisdiction over International Crimes

[52] Richard Goldstone, "Universal Jurisdiction: A Growing Legal Phenomenon", International Judicial Monitor: Winter 2014 issue, available at http://www.judicialmonitor.org/current/globaljudicialperspective.html
Werle and Bornkamm "*Torture in Zimbabwe under scrutiny in South Africa*" (2013) 11 J Int Criminal Justice 659
Chenwi "*Universal Jurisdiction and South Africa's perspective on the investigation of international crimes*" (2014) 131 SALJ 27
Gevers "*Southern African Litigation Centre v National Director of Public Prosecutions*" (2013) 130 SALJ 293

[53] SAPS Submissions p 8 para 17 and particularly footnotes 27 and 28

[54] Werle and Bornkamm "*Torture in Zimbabwe under scrutiny in South Africa*" (2013) 11 J Int Criminal Justice 659

position, opposed by eminent international lawyers and judges". This submission is however wholly unfounded because Professor Werle in fact makes it plain that there is no unambiguous support for the view that international law does not permit investigation in absentia:

> *"While universal jurisdiction enjoys wide acceptance in principle, the pre-conditions for its exercise remain controversial. In particular, it is disputed whether universal jurisdiction may be exercised in absentia, that is, without the presence of the suspect in the territory of the state asserting jurisdiction. According to a widely held view, international law requires the presence of the accused in order for a state to exercise universal jurisdiction. Proponents of this view refer to domestic legislation containing provisions to that effect or appeal to fears of judicial chaos.* ***Yet most of them do not address the question at what stage of the proceedings the suspect's presence is required. In particular, it remains unclear whether they regard an investigation in absentia as permissible."*** (our emphasis)[55]

51. SAPS opportunistically argues in paragraphs 36 to 38 of its submissions that,
   - because this case concerns allegations of torture, it is subject to the Torture Convention;[56] and
   - article 6 of the Torture Convention precludes investigations in absentia.

52. But this argument is misconceived for the following reasons:

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[55] 665 to 666

[56] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

52.1. The Torture Convention has been incorporated in South African domestic law by the Prevention and Combatting of Torture of Persons Act 13 of 2013. It came into force on 29 July 2013.

52.2. The Torture Convention and the Torture Act apply to all acts of torture. If torture is moreover committed "*as part of a widespread or systematic attack directed against any civilian population*", then it also becomes a crime against humanity subject to the Rome Statute and the ICC Act. But this does not preclude the separate and parallel operation of the Torture Convention and Torture Act as well as the Rome Statute and ICC Act. In such a case, proceedings under the Rome Statute and the ICC Act are governed by their provisions and are not subject to the rules peculiar to the Torture Convention and the Torture Act.[57]

52.3. Article 6 of the Torture Convention *inter alia* provides as follows:

> "*1 Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence* ....
>
> *2 Such State shall immediately make a preliminary inquiry into the facts.*"

52.4. SAPS interprets these provisions to mean that a case of torture may only be investigated if the suspect is present and has been arrested. It is an absurd

57 That much is clear from section 7 of the Torture Act which states that "[n]othing contained in this Act affects any liability which a person may incur under the common law *or any other law*".

interpretation which does not permit any investigation before an arrest is made. We submit that the proper interpretation of article 6 is that it is silent on the permissible investigation of torture cases. It merely says that, once a suspect has been arrested, a formal preliminary inquiry into the facts must be made.

52.5. The Torture Act assumes universal criminal jurisdiction for torture in s 6. It does not impose any restriction on SAPS's power and duty to investigate complaints of torture.

53. We accordingly submit that the High Court and the SCA were correct in holding that it was entirely competent for SAPS to investigate international crimes under the ICC Act despite the absence of the suspects. Their finding is indeed wholly uncontroversial.

THE QUESTION OF REMEDY

An investigation is feasible

54. SAPS now argues that its expert evidence demonstrates "*that investigating a prosecutable case was not possible, especially not if the investigation were to be limited to South African territory*".[58] The evidence does however not bear out this submission.

55. The head of the NPA's Priority Crimes Litigation Unit, Advocate Ackermann SC, and the Acting NDPP, Advocate Mpshe SC, both considered the docket and concluded that it warranted further investigation:

    55.1. In a memorandum dated 1 July 2008, Advocate Ackermann reported that,

    > "*After due consideration of all the relevant factors, I recommend that an investigation be instituted as requested by the SALC as set out in their memorandum dated 12 March 2008.*"[59]

    55.2. In a letter dated 10 December 2008, Advocate Mpshe said that he was of the view "*that the allegations must be investigated by the South African Police Service before I can make a decision on the matter*" whether to prosecute or not.[60]

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58 SAPS Submissions p 24 para 49

59 Ackermann Memo 1 July 2008 vol 4 p 420 para 3

60 Mpshe Letter 10 December 2008 vol 2 p 141

55.3. Advocate Ackermann reported to SALC on 15 January 2009 that the NDPP had requested SAPS to investigate the matter.[61]

56. SAPS however refused to do an investigation for the reasons set out in the letter from the Acting National Commissioner of 29 May 2009.[62] As appears from the letter, the main reasons why SAPS would not investigate the case, were that it did not believe that it had the power to do so; that it would negatively affect South Africa's relations with Zimbabwe; and that it would upset the top structures of the Zimbabwean police. The Commissioner mentioned difficulties with the proposed investigation but did not say, and could not sensibly say, that they were insurmountable.

57. The expert evidence on which SAPS relies, is principally that of Brigadier Marion.[63] But he merely explained why it was not possible to do, what he called, "*a court-directed investigation*".[64] His description of such an investigation[65] and his assessment of what it would entail in this case,[66] make it clear that, what he means by a "*court-directed investigation*", is an ideal investigation in which no stone is left unturned. That is why he concludes in paragraph 14 of his affidavit that "*the allegations of torture would have to be re-investigated from scratch*".[67]

58. We accordingly submit that the High Court aptly commented that Brigadier Marion's recommendation was ironically exactly what SALC and ZEF had sought:

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61 Ackermann Letter 15 January 2009 vol 2 p 145

62 SAPS Letter 29 May 2009 vol 4 p 443

63 Marion Affidavit vol 6 p 591

64 p 594 para 7

65 p 595 paras 7.1 to 7.8

66 p 599 para 13

67 p 616 para 14

"Brigadier Marion stated that a prosecutor would not have prosecuted the facts before him, but would have directed that further investigations be conducted. The irony is obvious: this is precisely applicants' point, the crux of their argument is that respondents were in law obliged to conduct an investigation."[68]

The SCA's order

59. SAPS' submissions on remedy must be understood in light of their stance in both the High Court and the SCA. At no point did SAPS take issue with the possibility that it might be compelled to institute an investigation. On the contrary, by its conduct, it acquiesced in that very eventuality. Its *volte face* at this stage is thus not permissible.

60. It is necessary to be reminded of how it came about that the SCA made a positive declaratory order despite the fact that SALC and ZEF had only asked for the decision to be set aside and referred back to SAPS:

    60.1. SALC laid the complaint with the PCLU and handed the docket to it on 16 March 2008.

    60.2. Adv Ackermann recommended as early as 1 July 2008 that "*an investigation be instituted as requested by the SALC as set out in their memorandum dated 12 March 2008*".[69]

    60.3. The NPA only informed SALC on 19 June 2009 that SAPS declined to investigate the matter.[70] It in other words took the authorities 15 months to decide not to do an investigation.

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68 High Court Judgment vol 12 p 1142 para 11

69 Ackermann Memo 1 July 2008 vol 4 p 420

60.4. SALC and ZEF launched their application for review on 9 December 2009.[71]

60.5. After having had access to the record, they filed a supplementary founding affidavit and an amended notice of motion which included a prayer for an order declaring "*that the delay by the respondents in arriving at the impugned decision(s) constitutes a breach of sections 179 and 237 of the Constitution*".[72]

60.6. The High Court heard the application from 26 to 30 March 2012. The judge asked what relief he ought to grant if he were to find that there had been undue delay. That led to the proposed orders submitted by the parties as described in paragraph 32 of the High Court judgment.[73] The important point is that SAPS did not cavil at the time that the court could not or should not issue a mandamus if it should uphold the review.

60.7. The High Court issued a comprehensive mandamus against SAPS.

60.8. SAPS did not challenge the terms of the High Court order on appeal to the SCA at all. It raised no criticism of them. The SCA only toned them down because the presiding judge suggested that the High Court order was overly prescriptive and invited the parties to submit a toned down alternative. SAPS again did not suggest that there was anything untoward in the proposal to issue a toned down order.

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70 NPA Letter 19 June 2009 vol 2 p 151

71 Notice of Motion 9 December 2009 vol 1 p 5

72 Notice of Motion 26 April 2010 vol 1 p 8 prayer 3

73 High Court Judgment vol 12 p 1195 para 32

60.9. SALC and ZEF prepared and submitted a milder order after the hearing. SAPS did not prepare its own proposal and made no comment on the SALC-ZEF draft.

60.10. It is accordingly not open to SAPS now to complain about the terms of the SCA's order.

61. It is an order, moreover, consistent with this court's corrective approach to remedy.

62. Most recently in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*[74], this court laid down certain general principles governing remedy. While recognising the flexibility inherent in s 8 of PAJA and s 172 of the Constitution, the court stressed the following:

62.1. The emphasis of an appropriate remedy must be on the correction and reversal of invalid administrative action (para 29).

62.2. This emphasis on correction or reversal accords with the rule of law and the principle of legality (para 30).

62.3. The corrective principle applies to correct the wrongs from a declaration of invalidity and serves the public interest by deterring future wrongdoing (paras 29 and 30).

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[74] [2014] ZACC 12 (17 April 2014)

63. In addition, in *Head of Department Mpumalanga, Department of Education v Hoerskool Ermelo*[75], this court recognised (at para 97) that the courts' flexible remedial jurisdiction permits them to "*forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements*".

64. Moreover, in circumstances similar to the present this court has recognised in *President of Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[76] that the failure by an applicant to foreshadow particular relief is no impediment to the court granting appropriate relief.[77] This is particularly so where the option under consideration was put to counsel for SAPS in the course of argument in both the High Court and the SCA and where it did not meet with any resistance.

65. In this regard it must be appreciated that the SCA did not in fact substitute its decision for that of SAPS. Paragraph 3.2 of its order is a declaratory order which expressly declares SAPS's duties "*on the facts of this case*". The effect of its order is to say that, on the facts of this case, SAPS is under a duty to investigate the docket and does not have a discretion to decline to do so. Accordingly, the SCA's order was a just and equitable – and practical – order that declared, in the circumstances of this case, that SAPS is obliged to do the investigation.

66. The appropriateness of its order is apparent from the following considerations:

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[75] 2010 (2) SA 415 (CC)

[76] 2005 (5) SA 3 (CC)

[77] Para 53, read with the SCA's decision in *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at para 44

66.1. While SAPS contends before this court that the merits of the investigation may raise complex evidential questions, they did not arise in this matter before the SCA. The SCA was never faced with an attack by SAPS on the High Court's factual findings. Neither the SAPS nor the NPA attacked the findings by Fabricius J that the docket contained sufficient evidence for an investigation to be opened. Accordingly, the SCA could safely conclude – as it did – that there is sufficient evidence (as accepted by the SAPS on its own version) of serious criminal conduct to warrant further investigation.[78]

66.2. Given the concession by the SAPS in the courts below that an investigation is warranted, concessions recorded and endorsed by both the High Court and the SCA, the only possible conclusion is that an investigation is warranted – not forgetting that such an investigation had already been opened by the SAPS following the decision of Fabricius J in the High Court.

66.3. Given the interpretation of the ICC Act adopted by the SCA, it is also obvious that the SAPS would be bound to open an investigation if the matter were remitted to them for decision-making – it could hardly be the case that the SAPS would refuse to open an investigation in the face of an interpretation of the ICC Act which confirmed the power upon SAPS to take all possible steps to act against alleged torturers accused of crimes against humanity.

66.4. The SCA furthermore was careful in requiring an investigation, but not in any way prescribing how that investigation was to be conducted.

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[78] Hence the SCA stressing in paragraph 68: "*It is not for this court to prescribe to the Commissioner how the investigation is to conducted. **What is clear is that on the SAPS' own version an investigation is warranted.***" (emphasis added)

67. This much was recognised and accommodated by the SCA in its reasoning and order:[79] the SCA went out of its way in crafting its order so as to intrude in the investigative process as little as possible.[80]

68. Furthermore, the SCA's order is justified on the facts of this case.

68.1. The SCA appreciated that the duty of investigation upon SAPS was informed by South Africa's membership of the Rome Statute of the ICC, which exemplifies 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. As the SCA put it: "*This has rightly been described as the struggle against impunity*".[81]

68.2. The SCA further appreciated that 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 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 Priority Crimes Litigation Unit (PCLU) and Directorate of Priority Crimes Investigation (DPCI) – therein.

68.3. It is now six years after the Torture Docket was lodged with the SAPS. Instead of efforts to investigate, the SAPS (with the NPA in partnership at first,

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[79] SCA judgment at para 68

[80] SCA judgment at para 68

[81] SCA judgment at para 37

but now alone) ignored and continues to side-step the obligations that Parliament has entrusted to it. Those obligations are not only to ensure that South Africa does not become a safe-haven for torturers, but also the obligation to ensure – as far as possible – the vindication of the rights of those persons brutalised by the torture in Zimbabwe.

68.4. Furthermore, the evidence before the SCA confirmed that some of the perpetrators had indeed visited South Africa in the past.[82] South Africa and Zimbabwe share economic, cultural and policing ties, which link the two countries. As neighbours in the same region, together with the evidence of past official state and personal visits to South Africa, it is not inconceivable that perpetrators may visit in the future.

68.5. The SCA also relied – correctly – upon the memorandum and evidence contained in the Torture Docket, which indicated, "*at least on a prima facie basis*", that superior officers in the Law and Order Unit of the Zimbabwean Police Services were implicated in torture as a crime against humanity, including acts of torture carried out by lower level state officials.[83] The SCA also recorded the fact that similar claims of abuse against other victims by members and/or supporters of the ruling party were documented by internationally reputable human rights' organisations, including Amnesty International and Human Rights Watch, which indicated that this was all part

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[82] See SCA judgment, para 67. That was the evidence before the High Court and accepted by it – and the evidential finding was not challenged by the SAPS in appealing the High Court's judgment and order

[83] See SCA judgment, para 9

of an orchestrated attempt by the ruling party to clamp down on and punish dissidents and opposition members.[84]

68.6. Upon its own perusal of the affidavits in the docket, the SCA noted that they "*present a graphic picture*": "*They describe physical assaults being perpetrated, which included the use of truncheons, baseball bats, fan-belts and booted feet. There are accounts of victims being suspended by a metal rod between two tables; of being subjected to water boarding; and of electrical shocks applied to the genitals of some of them*".[85]

68.7. Furthermore, the SCA recorded that the duty to investigate arose from the evidence of the SAPS itself: "*What is clear is that on the SAPS' own version an investigation is warranted*".[86]

69. For all these reasons, we submit that the SCA's order was eminently justified.

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84 SCA judgment, para 8

85 SCA judgment para 11.

86 SCA judgment para 68.

PRAYER

70. The respondents ask that the application for leave to appeal be dismissed or, if leave is granted, that the appeal be dismissed and that the applicant be ordered to pay the respondents' costs including the costs of three counsel.

Counsel for the respondents

Wim Trengove SC

Gilbert Marcus SC

Max du Plessis

Chambers, Sandton and Durban

24 April 2014

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT 02/14
SCA case no: 485/12
NGHC case no: 77150/09

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Applicant

2014 -04- 24

and

SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE — First Respondent

ZIMBABWE EXILES FORUM — Second Respondent

RESPONDENTS' LIST OF AUTHORITIES

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Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

Presidential Proclamation, Thabo Mbeki, 25/03/2003

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