CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 02/14

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Applicant
and	
SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE	First Respondent
ZIMBABWE EXILES' FORUM	Second Respondent
and	
JOHN DUGARD AND THREE OTHERS	First to Fourth Amici Curiae
TIDES CENTER	Fifth Amicus Curiae
PEACE AND JUSTICE INITIATIVE	Sixth Amicus Curiae
CENTRE FOR APPLIED LEGAL STUDIES	Seventh Amicus Curiae

Neutral citation:	*National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J
Heard on:	19 May 2014
Decided on:	30 October 2014

Summary: Section 205(3) of the Constitution — South African Police Service — duty to investigate crime

Section 231(4) of the Constitution — domestication of international agreements

Section 232 of the Constitution — application of customary international law

Section 4(3)(c) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 — presence of an accused for the purposes of an investigation

Universal jurisdiction — application — limiting principles

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the North Gauteng High Court, Pretoria):

1. Leave to appeal is granted.

2. Subject to paragraph 3 below, the appeal is dismissed.

3. The order of the North Gauteng High Court is set aside and replaced with the following:

   "(a) The decision of the National Commissioner of the South African Police Service to decline to investigate the complaint laid by the Southern African Human Rights Litigation Centre is reviewed and set aside.

   (b) The South African Police Service must investigate the complaint."

4. The applicant must pay the costs of the Southern African Human Rights Litigation Centre (first respondent) and the Zimbabwe Exiles' Forum (second respondent) in this Court, the Supreme Court of Appeal and the North Gauteng High Court, including the costs of three counsel where applicable.

JUDGMENT

MAJIEDT AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] During the course of South Africa's transition to a democratic state, former President Nelson Mandela outlined what was to become South Africa's future foreign policy. He stated:

> "South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations. . . . The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources *and the commitment* that will allow us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future."[1] (Emphasis added.)

[1] Mandela "South Africa's Future Policy: New Pillars for a New World" (1993) 72 *Foreign Affairs*.

[2] This outline of South Africa's future foreign policy is echoed in the preamble of the Constitution where it is stated:

> "We, the people of South Africa, . . . adopt this Constitution as the supreme law of the Republic so as to—
>
> . . .
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

[3] The extent of our country's responsibilities as a member of the family of nations to investigate crimes against humanity lies at the heart of this case.

[4] This application for leave to appeal concerns the extent to which the South African Police Service (SAPS) has a duty to investigate allegations of torture committed in Zimbabwe by and against Zimbabwean nationals. It calls upon us to establish South Africa's domestic and international powers and obligations to prevent impunity[2] and to ensure that perpetrators of international crimes committed by foreign nationals beyond our borders are held accountable. We must determine what the law requires of us as South Africans and of our country as part of the community of nations in respect of these types of crimes.

[2] A state's duty to prevent impunity, which can be defined as the exemption from punishment, is particularly pronounced with respect to those norms, such as the prohibition on torture, that are widely considered peremptory and therefore non-derogable – even in times of war or national emergency – and which, if unpunished, engender feelings of lawlessness, disempower ordinary citizens and offend against the human conscience. See Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (OUP, New York 1995) at 4-6 and Garner *Black's Law Dictionary* 9 ed (Thomson Reuters, New York 2009).

[5] Leave to appeal is sought against a judgment of the Supreme Court of Appeal[3] dismissing an appeal against a decision of the North Gauteng High Court, Pretoria (High Court). The High Court had issued a declaratory order that the applicant's decision not to investigate the alleged torture in Zimbabwe of Zimbabwean nationals by the Zimbabwean police during March 2007 was unlawful and constitutionally invalid. The Supreme Court of Appeal declared that—

> "on the facts of this case . . . the SAPS are empowered to investigate the alleged offences [of torture] irrespective of whether or not the alleged perpetrators are present in South Africa; [and] the SAPS are required to initiate an investigation under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 into the alleged offences."

Parties

[6] The applicant is the National Commissioner of the SAPS (National Commissioner) who is appointed in terms of section 207(2) of the Constitution to "control" and "manage" the police service. The National Commissioner is directly affected by the order of the Supreme Court of Appeal and is the only applicant before us.

[7] The first respondent is the Southern African Human Rights Litigation Centre (SALC), a non-governmental organisation based in Johannesburg which is an initiative of the International Bar Association and the Open Society Initiative for Southern Africa. It provides support to human rights and public interest litigation

[3] *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* [2013] ZASCA 168; 2014 (2) SA 42 (SCA) (Supreme Court of Appeal judgment).

within Southern Africa. The second respondent is the Zimbabwe Exiles' Forum (ZEF), an organisation concerned with achieving justice and dignity for victims of human rights violations occurring in Zimbabwe. Its particular focus extends to exiled victims of human rights abuses in Zimbabwe.

[8] Seven amici curiae were admitted and presented both written and oral argument. The first four amici are international law experts with an interest in international criminal law. The fifth amicus is the Tides Center, a non-profit public benefit corporation based in California, which was admitted as an amicus in this matter before the Supreme Court of Appeal. The sixth amicus is the Peace and Justice Initiative (PJI), a non-governmental organisation registered under Dutch law and based at The Hague. PJI is a network of international law professionals that comprises many current and former members of various international criminal tribunals. The seventh amicus is the Centre for Applied Legal Studies (CALS), a human rights organisation and law clinic established in 1978 and based at the University of the Witwatersrand Law School. We are indebted to counsel for the parties and the amici for their helpful arguments on a complex legal question.

Factual background

[9] In March 2007, a year before national elections in Zimbabwe, the Zimbabwean police, allegedly acting on instructions from the ruling political party, the Zimbabwe African National Union – Patriotic Front (ZANU–PF), raided Harvest House in Harare. This is the headquarters of the main opposition party, the Movement for

Democratic Change (MDC). During the raid more than 100 people were taken into custody, including workers in nearby shops and offices. These individuals were detained for several days and allegedly tortured by the Zimbabwean police. The detention and torture was allegedly part of a widespread and systematic attack on MDC officials and supporters in the run-up to the national elections.

[10] SALC compiled detailed evidence of the alleged torture. It obtained 23 sworn written statements. Seventeen of the deponents attested to being tortured whilst in police custody. These deponents stated that they were subjected to severe pain and suffering, as a result of beatings with iron bars and baseball bats, waterboarding, forced removal of their clothing, and electric shocks applied to their genitals and thighs. They were also subjected to mock executions during which they were hooded and a gun was pressed against their heads. The deponents further stated that they were tortured in order to obtain confessions regarding their purported involvement with the MDC. The remaining six affidavits, deposed to by Zimbabwean lawyers, medical practitioners and family members of the victims, corroborated the torture allegations.

[11] Out of concern about the alleged collapse of the rule of law in Zimbabwe, the safety of the victims and the possibility that the Zimbabwean courts would not hold the perpetrators accountable, SALC collated the evidence into a dossier (torture docket). This was hand-delivered to the Priority Crimes Litigation Unit

(PCLU) of the National Prosecuting Authority (NPA)[4] on 16 March 2008, slightly less than a year after the Harvest House incident. The torture docket was submitted to the PCLU together with a comprehensive memorandum (SALC memorandum) in which the substance and procedure of prosecuting crimes against humanity were outlined.[5] In order to protect the safety of the torture victims, it was agreed between representatives of SALC and the PCLU that the names of the victims and of the alleged perpetrators would be kept strictly confidential. As a result, these names do not appear in the papers. Furthermore, the torture docket itself is not part of the papers. The SALC memorandum and the accompanying evidence in the torture docket are of crucial importance in this case. They consist of more than 50 pages of detailed legal and factual submissions providing guidelines on the prosecution of crimes against humanity such as torture. The SALC memorandum concludes by requesting the NPA, through the PCLU, to consider the memorandum and the evidence so that it may expeditiously decide whether to initiate an investigation, under the Implementation of the Rome Statute of the International Criminal Court Act[6] (ICC Act), into the alleged acts of torture. SALC also proffered its assistance for "*the further gathering of evidence* and/or provision of advice regarding international criminal law in relation to the acts alleged against the named perpetrators".[7]

[4] Established in terms of section 7 of the National Prosecuting Authority Act 32 of 1998 (NPA Act). See also the Presidential Proclamation Regarding Determination of Powers, Duties and Functions of a Special Director of Public Prosecutions, GN 46 *GG* 24876, 23 March 2003.

[5] The SALC memorandum was compiled by the three counsel who appeared for SALC in this Court.

[6] 27 of 2002.

[7] Emphasis added.

[12] The gravamen of SALC's submissions is that South African law-enforcement agencies are legally obliged under the ICC Act to investigate international crimes (including torture) and to hold the perpetrators of these crimes accountable in South African courts. Not all instances of torture constitute crimes against humanity, but it was undisputed that if the allegations in this case are proved, the conduct of the Zimbabwean police officers could amount to crimes against humanity and thus an international crime. The SALC memorandum sought the investigation of the alleged crime of torture not only against the Zimbabwean police, but also against their superiors in the police and in government on the basis of the doctrine of "command responsibility".[8] It was not at issue during the proceedings in the High Court, the Supreme Court of Appeal or this Court that the torture complaints were never brought to the attention of the Zimbabwean law-enforcement agencies. On the contrary, the case has been conducted throughout on the basis that the Zimbabwean authorities have failed to act on the torture allegations. SALC attached reports by reputable human rights organisations to its founding affidavit in the High Court. It averred that these reports not only confirmed the widespread and systematic torture alleged in the torture docket, but also demonstrated that the perpetrators were not being prosecuted and were acting effectively without restraint. In its answer the SAPS did not deny these assertions, electing instead to dismiss them as inadmissible evidence. The reports do not form part of the record in this Court. Nevertheless, given that the SAPS did not

[8] The SALC memorandum relies on *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landžo (Appeals Chamber)* IT-96-21-A (ICTY) at para 198, which discusses the nature of command responsibility. The Tribunal stated:

> "As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control."

actively deny SALC's allegations, there is enough before us to form the ineluctable conclusion that the Zimbabwean authorities have failed to act on the torture allegations.

[13] SALC's approach to the NPA was met with inertia. Spurred on by a further letter of enquiry from SALC, the Acting National Director of Public Prosecutions (NDPP), Advocate Mpshe SC, finally replied more than eight months after the submission of the torture docket. The NDPP stated that SALC's representations had been considered, but that the allegations first had to be evaluated by the SAPS before the NPA could take a decision. He had therefore referred the matter to the Acting National Commissioner of the SAPS, Mr Tim Williams (Mr Williams), for this purpose. SALC responded expressing its disappointment with what it regarded as an "inordinate delay". It repeated its offer of assistance in identifying and transporting witnesses from Zimbabwe to South Africa and requested that a final decision be made by 30 January 2009. This letter was sent not only to the NDPP, but also to Mr Williams, and to Advocate Anton Ackerman SC (Mr Ackerman), the Head of the PCLU. The latter was the only recipient to respond, but he simply reiterated that the NDPP had referred the matter to the SAPS for its consideration.

[14] SALC directed its last letter on 20 April 2009, before the litigation, to these parties as well as to the Director-General of the Department of Justice and Constitutional Development. The deadline of 1 May 2009 for a decision on whether to initiate an investigation was not met. Instead the NDPP sent a letter on

19 June 2009 informing SALC that he had been advised by Mr Williams that the SAPS did not intend to initiate an investigation.

[15] The reasons for this decision were furnished in a letter sent by Mr Williams to the NDPP, who later endorsed them. They were that the SAPS was unable to initiate an investigation because the matter had been inadequately investigated and that further investigations would be impractical, legally questionable and virtually impossible. The letter states:

> "As you are most probably aware, the so called 'docket' contains a number of 'statements' which are unsigned and which contain allegations of torture being committed by Zimbabwean officials. The information therein is, in addition to the above, of such a nature that it is insufficient to constitute evidence in an investigation into contraventions of the [ICC] Act. . . . At this stage, the docket contains nothing more than mere allegations and I do not see my way clear [of] involving the SAPS in an investigation, the legality of which is questionable and which can have far-reaching implications for the [SAPS] and the country in general."

The High Court

[16] SALC and ZEF applied to the High Court for an order reviewing and setting aside the decision not to investigate. The High Court granted the application in more detailed terms than the relief originally sought in the amended notice of motion. This relief came about after the High Court invited the parties to propose an expanded order. The High Court ordered that the decision of the first, second and fourth respondents in that Court (the NDPP, the Head of the PCLU and the National Commissioner respectively), refusing to initiate an investigation under the

ICC Act, be reviewed and set aside. It further held that the decision was inconsistent with the Constitution and South Africa's international law obligations.

Supreme Court of Appeal

[17] The Supreme Court of Appeal upheld the High Court's decision but trimmed down its order considerably. Importantly, the Court ordered that the SAPS must initiate an investigation into the alleged acts of torture. In contrast, the High Court ordered that the NDPP, the Head of the PCLU and the National Commissioner only reconsider their original decision. The Supreme Court of Appeal's order, in part, reads:

> "3. The order of the court below is set aside and substituted as follows:
>
> 3.1. The decision of the South African Police Service (the SAPS) taken on or about 19 June 2009, to not investigate the complaints laid by the Southern African Human Rights Litigation Centre (the complainants) that certain named Zimbabwean officials had committed crimes against humanity against Zimbabwean nationals in Zimbabwe (the alleged offences), is reviewed and set aside.
>
> 3.2. It is declared that, on the facts of this case:
>
> 3.2.1. the SAPS are empowered to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa;
>
> 3.2.2. the SAPS are required to initiate an investigation under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 into the alleged offences."

[18] Like the High Court, the Supreme Court of Appeal held that the Constitution, the South African Police Service Act[9] (SAPS Act) and the ICC Act required the SAPS to initiate an investigation into the torture allegations. A significant part of the Supreme Court of Appeal's underlying reasons for this finding concerned the interpretation of section 4 of the ICC Act.

Leave to appeal

[19] This application for leave to appeal raises a constitutional issue. This Court is required to consider the extent to which section 205(3) of the Constitution imposes a duty on the SAPS to investigate the crimes against humanity of torture allegedly committed in Zimbabwe by and against Zimbabwean nationals.[10] Leave to appeal should be granted.

In this Court

[20] The National Commissioner attacks the Supreme Court of Appeal's judgment on three primary grounds, namely that it: (a) adopted an absolutist position on universal jurisdiction; (b) granted relief not sought; and (c) predetermined the manner in which the SAPS is required to exercise its investigatory discretion.

[21] We have to determine whether, in the light of South Africa's international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity

[9] 68 of 1995.

[10] See [50] for the full text of section 205(3).

committed beyond our borders. If so, under which circumstances is this duty triggered?

International law and the South African Constitution

[22] It is appropriate to start this enquiry by understanding the place of international law within the Constitution. In *Glenister II*,[11] Ngcobo CJ enunciated the significance of international law to the Constitution:

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."[12]

[23] The Constitution enjoins South African courts, tribunals and other fora to consider international law when interpreting the Bill of Rights[13] and provides that legislation must be interpreted purposively[14] in accordance with international law.[15]

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[11] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*).

[12] Id at para 97.

[13] Section 39(1)(b).

[14] See *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 51.

[15] Section 233 states:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

See also *Glenister II* above n 11 at para 201 where this Court stated:

> "It is possible to determine the content of the obligation section 7(2) imposes on the State without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision . . . to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact."

Section 231(4) provides for the domestication of international law through national legislation. It reads that "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation". Section 232 states that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

[24] The Constitution provides that: (a) customary international law is part of our domestic law insofar as it is not inconsistent with the Constitution or an Act of Parliament; (b) international treaty law only becomes law in the Republic once enacted into domestic legislation; and (c) national legislation should, in turn, be interpreted in the light of international law that has not been domesticated into South African law by national legislation but that is nonetheless binding upon it.[16]

Jurisdiction in international law

[25] The next stage of the enquiry requires us to examine jurisdiction in an international law context. The exercise of domestic criminal jurisdiction is understood to manifest at three levels:[17] (a) prescriptive (or legislative) jurisdiction which empowers states through their common law or domestic legislation to prohibit certain conduct; (b) adjudicative (or judicial) jurisdiction which authorises states to enforce the proscribed conduct by means of, amongst other things, investigations and

[16] See *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35 and *Progress Office Machines CC v South African Revenue Service and Others* [2007] ZASCA 118; 2008 (2) SA 13 (SCA) at para 6.

[17] Some international law scholars suggest that adjudicative and enforcement jurisdiction can be read together. See O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2 *Journal of International Criminal Justice* 735 at 735-7 and Brownlie *Principles of Public International Law* 5 ed (Clarendon Press, Oxford 1998) at 301.

prosecutions; and (c) enforcement (or executive) jurisdiction by which states are capacitated to determine the outcome of matters pursued through the exercise of adjudicative jurisdiction by, for example, enforcing decisions on proscribed conduct.

[26] In the *Lotus Case*,[18] the Permanent Court of International Justice, the predecessor to the International Court of Justice, laid down two complementary principles of territoriality, namely that states: (a) may not exercise their power in any form in the territory of another state, unless there is a permissive rule to the contrary; and (b) retain a wide measure of discretion to exercise jurisdiction within their own territory, with regard to acts committed beyond their borders. The second principle allows states to exercise prescriptive, adjudicative and enforcement jurisdiction solely within the confines of their territory.

[27] Alongside the principle of territoriality, international law recognises four other grounds or bases on which domestic criminal jurisdiction may be founded (*rationes jurisdictionis*). These are nationality, passive personality, the protective principle and universality or universal jurisdiction.[19] The Rome Statute,[20] which is discussed further below, bases the jurisdiction of the ICC on the first two conventional bases of jurisdiction, namely territoriality or nationality.[21] Universal jurisdiction is

[18] The case of the S.S. Lotus (*France v Turkey*) (1927) PCIJ Series A, No 10 (*Lotus Case*) at 18-9.

[19] The principle of universal jurisdiction is discussed below. See Brownlie above n 17 at 303-8. See also Agarwal *International Law and Human Rights* 14 ed (Central Law Publications, Allahabad 2007) at 207-11 and Henkin *International Law: Politics, Values and Functions* (Martinus Nijhoff, London 1990) at 277-309.

[20] Rome Statute of the International Criminal Court, 1 July 2002 (Rome Statute). The International Criminal Court (ICC) was established by article 1 of the Rome Statute and is a permanent international court vested with criminal jurisdiction. It should be noted that Zimbabwe is not a party to the Rome Statute.

[21] Id at article 12(2).

not accorded to the ICC. However, the exercise of universal jurisdiction has found support in international law, subject to the observance of certain principles.

[28] International law scholars suggest that in order for universal jurisdiction to comply with the dictates of international law, three general principles should be observed: (a) "there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction"; (b) "the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed"; and (c) "elements of accommodation, mutuality, and proportionality should be applied".[22]

[29] The exercise of enforcement jurisdiction is confined to the territory of the state seeking to invoke it. The principle of non-intervention safeguards the principle of territoriality. Domestic criminal jurisdiction based on universality therefore applies to prescriptive jurisdiction but can also apply to adjudicative jurisdiction, subject to the constraints of territoriality. Accordingly, investigations and the exercise of adjudicative jurisdiction confined to the territory of the investigating state are not at odds with the principles of universal jurisdiction. I now turn to consider the principle of complementarity under the Rome Statute.

[22] Brownlie above n 17 at 313. See also Agarwal above n 19 at 211.

Complementarity under the Rome Statute

[30] The ICC, created by the Rome Statute, exercises complementary jurisdiction over the most serious crimes of international concern. These include the crimes against humanity of torture.[23] International criminal law and the ICC system in particular are premised on the principle of complementarity.[24] States parties may take the lead in investigating and prosecuting international crimes.[25] The ICC will only undertake investigations and prosecutions as a court of last resort where states parties are unwilling or unable to do so. The primary responsibility to investigate and prosecute international crimes remains with states parties.[26]

[31] The preamble to the Rome Statute affirms that states parties are determined "to put an end to impunity for the perpetrators of [grave] crimes and thus to contribute to the prevention of such crimes" and it recalls "that it is the *duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes".[27]

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[23] Rome Statute above n 20 at article 7(1)(f).

[24] El Zeidy *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, London 2008) at 157. See also *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 172, where Sachs J stated in respect of the domestic prosecution of international crimes that—

> "[t]he recent establishment of the [ICC] represents the culmination of a centuries-old process of developing international humanitarian law. It in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law".

[25] As a court of last resort the ICC is meant to supplement, not to replace, national jurisdictions. See Cryer et al *An Introduction to International Criminal Law and Procedure* 2 ed (CUP, New York 2010) at 153.

[26] Id at 153-4. See also Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2 ed (Nomos Verlagsgesellschaft, Baden-Baden 2008) at 15.

[27] Emphasis added.

[32] The need for states parties to comply with their international obligation to investigate international crimes is most pressing in instances where those crimes are committed by citizens of and within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity. If an investigation is not instituted by non-signatory countries in which the crimes have been committed, the perpetrators can only be brought to justice through the application of universal jurisdiction, namely the investigation and prosecution of these alleged crimes by states parties under the Rome Statute.

South Africa's jurisdiction in respect of the international crime of torture

[33] South Africa was the first African state to domesticate the Rome Statute into national legislation. This was done in terms of section 231(4) of the Constitution through the enactment of the ICC Act.[28] The international crimes over which the ICC exercises jurisdiction,[29] including the crimes against humanity of torture, are listed in schedule 1 to the ICC Act and have thus become statutory crimes in our national law.

[34] It is clear that a primary purpose of the Act is to enable the prosecution, in South African courts or the ICC, of persons accused of having committed atrocities, such as torture, beyond the borders of South Africa.[30] In enacting the ICC Act, South Africa declared its commitment to—

[28] See *Mail & Guardian Media Ltd and Others v Chipu NO and Others* [2013] ZACC 32; 2013 (6) SA 367 (CC); 2013 (11) BCLR 1259 (CC) at para 24.

[29] Crimes against humanity, war crimes and genocide.

[30] Long title, preamble and section 3(d)-(e) of the ICC Act.

> "bringing 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 . . . , or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the [ICC]".[31]

[35] Torture, even if not committed on the scale of crimes against humanity, is regarded as a crime which threatens "the good order not only of particular states but of the international community as a whole".[32] Coupled with treaty obligations,[33] the ban on torture has the customary international law status of a peremptory norm from which no derogation is permitted.[34]

[36] As a result of the absolute ban on torture, "the torturer has become, like the pirate or the slave trader before him, *hostis humani generis*, an enemy of all [hu]mankind".[35] This statement, albeit in a civil case, applies equally to criminal

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[31] Id at preamble.

[32] Dugard et al *International Law: A South African Perspective* 4 ed (Juta & Co Ltd, Cape Town 2011) at 157-8 and 160.

[33] See the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, 10 December 1984 (Convention against Torture).

[34] See *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 at para 33; *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 197-9; and *Prosecutor v Anto Furundzija (Trial Judgment)* IT-95-17 (ICTY) at paras 147-57. See also article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, which states:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[35] *Filártiga v Peña-Irala* 630 F 2d 876 (2d Cir 1980) (*Filártiga*) at 890. In this landmark case concerning a civil claim arising out of acts of torture perpetrated by a Paraguayan official against a Paraguayan citizen in Paraguay, a US court claimed civil jurisdiction over the extraterritorial crime, being one against humanity, pursuant to the Alien Tort Statute 28 USC at section 1350. Although the US Supreme Court, in *Kiobel v Royal Dutch Petroleum Co* 133 S Ct 1659 (2013) at 1664 and 1669, recently held that the presumption against

cases. Torture attracts universal condemnation and all nations have an interest in its prevention, regardless of the nationality of the perpetrator or of the place where it has occurred. The Court in *Filártiga* held further that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations".[36]

[37] Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid[37] require states, even in the absence of binding international treaty law, to suppress such conduct because "all states have an interest as they violate values that constitute the foundation of the world public order".[38] Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.[39]

[38] Furthermore, along with genocide[40] and war crimes[41] there is an international treaty law obligation to prosecute torture.[42] The Convention against Torture, an

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extraterritorial application applies to claims under the Alien Tort Statute, the Court's ruling in no way undermined the *Filártiga* Court's conclusion that the torturer is considered an enemy of all humankind.

[36] *Filártiga* id at 880.

[37] Dugard et al above n 32 at 157-69.

[38] Id at 157.

[39] The crime of torture, pursuant to section 231(4) of the Constitution, finds further reference in South African law through the Prevention and Combating of Torture of Persons Act 13 of 2013 (Torture Act).

[40] See the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 at articles 1-2, 4 and 6 and the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Serbia and Montenegro*), 26 February 2007 (ICJ).

[41] Geneva Convention I at article 49; Geneva Convention II at article 50; Geneva Convention III at article 129; and Geneva Convention IV at article 146.

[42] Convention against Torture above n 33 at articles 4-5 and 7.

international convention drafted specifically to deal with the crime of torture, obliges states parties to "ensure that all acts of torture are offences under its criminal law", together with an "attempt to commit torture" and "complicity and participation in torture".[43]

[39] South Africa has fulfilled this international law obligation through the recent enactment of the Torture Act.[44] In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act. Regional and sub-regional law also permits South Africa to take necessary measures against crimes against humanity, including torture.[45]

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[43] Id at article 4(1). See also Nowak and McArthur *The United Nations Conventions against Torture: A Commentary* (OUP, New York 2008) at 249.

[44] See above n 39.

[45] On a regional level, both South Africa and Zimbabwe have signed and ratified the African Charter on Human and Peoples' Rights, 27 June 1981 (African Charter) and are therefore bound by it. The African Charter, in article 5, protects the rights to dignity and to be free from all forms of exploitation and degradation, including torture and cruel, inhuman or degrading punishment and treatment. The African Commission on Human and Peoples' Rights (African Commission), the institution charged with ensuring compliance with the African Charter, has declared that the prohibition in article 5, which includes torture, must be interpreted to include the widest possible array of physical and mental abuse. See *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000). This suggests that there is an obligation under article 5 for South Africa to investigate torture allegations.

On a sub-regional level, both South Africa and Zimbabwe are members of the Southern African Development Community (SADC), established in terms of the SADC Treaty, 17 August 1992. In *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at paras 5-6 and 11, this Court noted that the SADC Treaty has been ratified by our Parliament and is therefore binding upon South Africa. Zimbabwe ratified the SADC Treaty on 17 November 1992. As parties to the SADC Treaty, South Africa and Zimbabwe are bound by a number of mutual legal commitments, primarily through various SADC Protocols. These include, for present purposes, the protection of human rights, specifically in the context of the conduct of elections, co-operation in respect of the combating of various crimes that affect the sub-region and, most importantly, a specific commitment to offer "the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions" in investigations, prosecutions and court proceedings. See the SADC Protocol on Mutual Legal Assistance in Criminal Matters, 3 March 2002 at article 2(1) and (3).

There are also non-binding international resolutions that require member countries to act against crimes against humanity, including torture. See United Nations (UN) General Assembly Resolution 2583, 15 December 1969,

[40] Because of the international nature of the crime of torture, South Africa, in terms of sections 231(4), 232 and 233 of the Constitution and various international, regional and sub-regional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations. The exercise of universal jurisdiction is, however, subject to certain limitations.

Is presence a requirement for the investigation of international crimes?

[41] The answer to this enquiry lies in the proper interpretation of the provisions of section 4 of the ICC Act which regulates the jurisdiction of South African courts in respect of international crimes. Section 4(1) and (3) reads:

> "(1) 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.

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which "[calls upon] all states concerned to take the necessary measures for the thorough investigation of crimes against humanity" and article 2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by UN General Assembly Resolution 55/89, 4 December 2000, which dictates that—

> "States 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".

Regional legal resolutions and guidelines contain similar obligations for African countries. So, for example, it has been resolved that states should "[e]nsure that whenever persons who claim to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated". See African Commission, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 17-23 October 2002 at article 18. And that member states are exhorted to fight against perpetrators of these types of international crimes benefiting from impunity whereby the African Commission "[u]rges 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". See African Commission, Resolution on Ending Impunity in Africa and the Domestication and Implementation of the Rome Statute of the International Criminal Court, 5 December 2005 at article 1.

. . .

(3) *In order to secure the jurisdiction of a South African court for purposes of this Chapter*, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if—

(a) that person is a South African citizen; or

(b) that person is not a South African citizen but is ordinarily resident in the Republic; or

(c) *that person, after the commission of the crime, is present in the territory of the Republic*; or

(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic." (Emphasis added.)

[42] Section 4(1) creates crimes and punishment. Section 4(3) sets the limits to universal jurisdiction. When a person commits an envisaged crime outside of the Republic our courts will have jurisdiction only if at least one of the connecting factors is present. The accused person must be a citizen of, or ordinarily resident in, our country, must have committed the crime against a citizen or a person ordinarily resident within the country, or must be present in the country after the commission of the offence.

[43] Only the connecting factor in section 4(3)(c) requiring presence of the accused bears some relevance to the facts in this matter. On the back of section 4(3)(c) the SAPS contends that it has no duty to investigate the alleged torture in Zimbabwe because the suspects are not present in South Africa. That contention, however, holds true only as far as the prosecution of a crime in a South African court is concerned.

Our Constitution requires that an accused person be present during her or his trial,[46] but it does not set presence as a requirement for an investigation. More precisely, section 4(3) sets the jurisdictional limits of South African courts. However, it is silent on the circumstances under which our country has the duty to investigate international crimes committed outside of our territory.

[44] The Supreme Court of Appeal held that "anticipated presence" of the suspects in South Africa would suffice for purposes of the connecting factor required in section 4(3). The amici contend forcefully that no presence of any sort is required by the Constitution, the ICC Act or international law for an investigation to be initiated. They argue that imposing this requirement would render the ICC Act less effective by limiting its application solely to the South African territory.

[45] On the other hand, the SAPS argues that section 4(3) of the ICC Act requires the suspect's presence in South Africa before any investigation may commence. In this regard it relies heavily on writings by certain commentators to the effect that "[u]niversal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every state is empowered to investigate and prosecute the occurrence of an international crime)".[47]

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[46] Section 35(3)(e) reads:

> "Every accused person has a right to a fair trial, which includes the right to be present when being tried."

[47] Du Plessis "South Africa's International Criminal Court Act: Countering Genocide, War Crimes and Crimes against Humanity" (2008) 172 *Institute for Security Studies* at 4 accepting that the ICC Act only gives rise to conditional or qualified universal jurisdiction, quoting Cassese "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1 *Journal of International Criminal Justice* 589 at 592.

[46] There is no unanimity amongst international law scholars on whether presence is a requirement for investigation. The debate is largely centred on adjudicative jurisdiction for the purposes of prosecution, an aspect which needs not concern us in this case.[48] We are seized with an enquiry into whether presence is a factor at all when it comes to the exercise of universal jurisdiction for an *investigation* of an international crime. Paragraph 3(b) of the 2005 Resolution of the Institut de Droit international declares that the accused's presence is required to exercise universal jurisdiction "*apart from acts of investigation and requests for extradition*".[49] It permits investigations in the absence of a suspect, but requires that the accused be present before the trial starts.[50] This reasoning is in line with the Rome Statute which

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[48] There is a substantial body of thought that regards the exercise of universal jurisdiction in absentia as repugnant to human rights norms and values. See, for example, Kreβ "Universal Jurisdiction over International Crimes and the *Institut de Droit international*" (2006) 4 *Journal of International Criminal Justice* 561 at 578.

[49] Emphasis added.

[50] Kreβ above n 48 at 576, where he states:

> "*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-à-vis the state where the suspect is present. *If this is the correct view of* 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*." (Emphasis added.)

See also the joint separate opinion in the Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), 14 February 2002 (ICJ) at paras 56 and 59 (*Arrest Warrant Case*), where Justices Higgins, Kooijmans and Buergenthal considered the principles enunciated in the *Lotus Case* for the investigation of international crimes and stated:

> "Some jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law. . . . No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return 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*." (Emphasis added.)

See also Kreβ above n 48 at 577, who refers to the joint separate opinion in the *Arrest Warrant Case* for the view that there is no international law rule that prohibits an investigation of an international crime in the suspect's absence. He states:

distinguishes between investigation and prosecution in Part V.[51] Article 17 of the Rome Statute, which concerns the admissibility of cases, also draws a distinction between investigation and prosecution and by implication leaves it to states parties to determine where to draw the line between these two phases of criminal proceedings.

[47] The Supreme Court of Appeal undertook an informative examination of comparative foreign and international law, which we need not repeat here.[52] It would appear that the predominant international position is that presence of a suspect is required at a more advanced stage of criminal proceedings, when a prosecution can be said to have started. This position accords with the section 4(3) requirement of presence for the purposes of prosecution. In regard to presence for purposes of investigation, customary international law is less clear.[53] Scholars point out, however, that presence is generally not required for an investigation and there is no international law rule that imposes that requirement.[54] This reasoning conforms to our Constitution which requires an accused "to be present when being tried".[55] Accordingly, the

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> "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 a suspect 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. This scheme is concerned with an *obligation* to search for an alleged offender or to *extradite* him or her. *While a presence requirement is imperative within such an obligatory scheme, the same is not true as regards a permissive rule concerning the commencement of investigations*, a request for extradition and even a *trial in absentia*." (Emphasis added and footnotes omitted.)

[51] Articles 53-61.

[52] See Supreme Court of Appeal judgment above n 3 at paras 57-65. See also Woolaver "Prosecuting International Crimes in South Africa: Interpreting the Requirement of the Accused's Presence in South African Territory under the Implementation of the Rome Statute of the ICC Act" (2014) 131 *SALJ* 253 at 261-5.

[53] Woolaver id at 266.

[54] See, for example, Kreβ above n 48 at 577.

[55] See above n 46.

exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law.

[48] This approach is to be followed for several valid reasons. Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation. By way of example, it is only once a docket has been completed and handed to a prosecutor that there can be an assessment as to whether or not to prosecute.[56]

[49] The alleged acts of torture were perpetrated in Zimbabwe, by and against Zimbabwean nationals. None of the perpetrators is present in South Africa. However,

[56] See *Mashinini and Another v S* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA) at para 15, where the Court stated:

> "After the police have concluded their investigations, the docket is given to the prosecutor. He or she gains access to all documents and statements in the docket. Based on this, he or she decides on which charge(s) to prefer against an accused person. The [police] plays no role in this critical choice by the prosecutor."

the duty to combat torture travels beyond the borders of Zimbabwe. Torture, as a crime against humanity, is listed in schedule 1 to the ICC Act and forms part of the category of crimes in which all states have an interest under customary international law.[57] South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request. The contention by the SAPS that it could not investigate without a suspect's presence must therefore fail.

The duty on the SAPS to investigate international crimes

[50] Our international law commitments to investigate crimes against humanity, including torture, must be discharged through our law-enforcement agencies. Section 205(3) of the Constitution outlines the SAPS's constitutional duties. It states:

> "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."

[51] In *Glenister II*, Moseneke DCJ and Cameron J, writing for the majority, stated:

> "It is equally clear that the national police service, amongst other security services, shoulders the *duty* to prevent, combat and *investigate* crime".[58] (Emphasis added.)

[52] Section 205(2) of the Constitution further provides:

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[57] Dugard et al above n 32 at 154.

[58] See above n 11 at para 176. See also *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 45 and 61.

> "National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces."

[53] Section 17C(1) of the SAPS Act, the national legislation enacted in terms of section 205(2) of the Constitution, establishes the Directorate for Priority Crime Investigation (DPCI, commonly known as the Hawks) within the SAPS. Section 17D(1)(a) of that Act provides that the functions of the Hawks "are to prevent, combat and *investigate* national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate".[59] In section 17A, national priority offences are defined to mean "organised crime, *crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof*, as referred to in section 16(1)".[60]

[54] Section 16(1) refers to crimes listed in section 16(2)(iA) that identifies national priority offences as the "commission of any alleged offence mentioned in the Schedule". Item 4 of the schedule to the SAPS Act states that a national priority offence includes "any offence referred to in Schedule 1 to the [ICC Act]". Item 1(f) of part 2 of schedule 1 to the ICC Act includes the crime against humanity of torture as a national priority offence that requires national prevention or investigation.

[59] Emphasis added.

[60] Emphasis added.

[55] The Supreme Court of Appeal held that the SAPS has the requisite power to investigate the allegations of torture. I would go further. There is not just a power, but also a duty. While the finding that the SAPS does have the power to investigate is unassailable, the point of departure is that the SAPS has a duty to investigate the alleged crimes against humanity of torture. That duty arises from the Constitution read with the ICC Act, which we must interpret in relation to international law.[61]

[56] The Constitution and the ICC Act make it clear that, whilst empowered to investigate crime, the SAPS also bears a duty to do so. This emerges from the interpretation of section 205(3) of the Constitution in *Glenister II*, read with the relevant provisions outlined above. By way of contrast, section 179(2) of the Constitution affords the prosecuting authority a "power" and thus a discretion to institute criminal proceedings.[62] The word "power" does not appear in section 205(3) of the Constitution in relation to investigating crime.

[57] The statutory designation of international crimes under the SAPS Act domesticated into our law by the ICC Act requires the SAPS to prioritise these types of crimes and indeed imposes a duty on it to do so. For present purposes we must focus on the investigation of one type of domesticated international crime, the crime of torture.

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[61] See [22] to [24].

[62] Section 179(2) reads:

> "The prosecuting authority has the *power* to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings." (Emphasis added.)

[58] There is a further ground that underscores this duty. This is the mutual assistance available between the SAPS and the PCLU within the NPA. In terms of section 17D(3) of the SAPS Act, the Head of the Hawks may request the NPA to assist in the investigation of a national priority offence.[63] In turn, section 13(1)(c) of the NPA Act permits the President to appoint Special Directors to perform the functions assigned to them by the President. Section 24(3) provides that Special Directors shall exercise the powers, carry out the duties and perform the functions conferred, imposed on or assigned to them by the President. By a proclamation dated 24 March 2003, Mr Ackerman was appointed by the President as a Special Director with a mandate "to manage and direct the investigation and prosecution of crimes contemplated in [the ICC Act]".

[59] Section 24(7) of the NPA Act provides that a Special Director who is of the opinion that a matter connected with or arising out of an offence requires further investigation may request assistance from the SAPS. The SAPS is then obliged to comply with the request for assistance "so far as [is] practicable".[64]

[60] The effect of the relevant domestic legal provisions is that—

[63] Section 17D(3) of the SAPS Act reads:

> "The National Head of the [Hawks] may, if he or she has reason to suspect that a national priority offence has been or is being committed, request the [NDPP] to designate a Director of Public Prosecutions to exercise the powers of section 28 of the [NPA Act]."

[64] See Redpath "Failing To Prosecute? Assessing the State of the National Prosecuting Authority in South Africa" (2012) 186 *Institute for Security Studies* at 52 for an overview of the specialised units of the NPA.

(a) torture as a crime against humanity is proscribed as a crime under our domestic law in terms of section 232 of the Constitution and section 4(1) of the ICC Act;

(b) the SAPS is permitted under international law and has a duty in our domestic law to investigate crime and, in particular, high priority crimes like torture as a crime against humanity and the customary international law nature of the crime of torture underscores the duty to investigate this type of crime; and

(c) the SAPS, and in particular the Hawks as the specialised unit within the SAPS, has the obligation in our domestic law to investigate torture in terms of section 4(1) of the ICC Act.[65]

Limiting the duty to investigate international crimes

[61] We have found that our applicable legislative scheme, understood in the light of international customary law and other international obligations, places an obligation on our country through the SAPS to investigate crimes against humanity, including torture, committed outside our territory. However, the universal jurisdiction to investigate international crimes is not absolute. It is subject to at least two limitations. The first limitation arises from the principle of subsidiarity. It requires that ordinarily

[65] The current structure of the SAPS Act provides that this matter falls squarely within the mandate of the Hawks. It should have been reported to the Directorate of Special Operations (DSO) for investigation when it was first brought to the attention of the South African authorities. And that is why the NPA was SALC's first port of call because the DSO was located within the NPA. Unfortunately, the time between, on the one hand, when the SALC memorandum and the torture docket were delivered to the NPA and, on the other hand, when the decision not to investigate was made coincided with the demise of the DSO. At the time, the Hawks had not yet come into operation. When it did, on 6 July 2009, the decision not to investigate had already been taken despite the fact that the application to challenge that decision was launched five months after the coming into operation of the Hawks. This would probably explain why the Hawks did not play the prominent role it should have in the investigation.

there must be a substantial and true connection between the subject-matter and the source of the jurisdiction. And once jurisdiction is properly founded, the principle of non-intervention in the affairs of another country must be observed; investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state. Simply put, we may not investigate or prosecute international crimes in breach of considerations of complementarity and subsidiarity.

[62] These considerations require that South African investigating institutions may investigate alleged crimes against humanity committed in another country by and against foreign nationals only if that country is unwilling or unable to do so itself. In this matter Zimbabwe was not asked by the alleged victims of torture to investigate the crime. Some of the reasons advanced for approaching South Africa directly were several indications of the collapse of the rule of law in Zimbabwe and that the safety of the witnesses in Zimbabwe could not be guaranteed. As a Court, we cannot go that far. It suffices to say that it was very unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal in view of the high profile personalities to be investigated. It is alleged that six Cabinet Ministers and Directors General and the ruling party itself are implicated as suspects in the commission of these crimes against humanity. If Zimbabwe were able and willing to investigate and prosecute the alleged crimes of torture, there would be no place for South Africa also to do so.

[63] The second limiting principle is practicability. Before our country assumes universal jurisdiction it must consider whether embarking on an investigation into an international crime committed elsewhere is reasonable and practicable in the circumstances of each particular case. That decision must be made in the light of all the relevant circumstances. None of these factors alone should be dispositive of the enquiry. Each case must be determined on its own merits and circumstances.

[64] Foremost amongst 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 on their own or through an extradition request; the geographical proximity of South Africa to the place of the crime and the likelihood of the suspects being arrested for the purpose of prosecution; the prospects of gathering evidence which is needed to satisfy the elements of a crime; and the nature and the extent of the resources required for an effective investigation. In some instances a preliminary investigation to test the reasonableness of undertaking a full-blown investigation may be necessary. In each case the ultimate enquiry is whether, all relevant considerations weighed, the SAPS acted reasonably in declining to investigate crimes against humanity committed in another country.

Analysis of the SAPS's duty and the applicable test with reference to the facts

[65] During early January 2009 Mr Williams referred SALC's covering letter, the SALC memorandum and the torture docket to the Divisional Commissioner: Detective

Service, Commissioner Lalla, who in turn referred them to the Head: Legal Support: Crime Operations, Assistant Commissioner Jacobs.

[66] Assistant Commissioner Jacobs tasked Senior Superintendent Bester, at that time the Commander of the unit within the SAPS commonly known as "Crimes Against the State", with the evaluation of the torture docket, with a specific request to ascertain what type of further investigation, if any, was necessary. Senior Superintendent Bester concluded that the statements in the docket were "*not sufficient to sustain any form of prosecution* [and] did not constitute evidence and could at best and without verification and/or corroboration amount to nothing more than mere allegations".[66] He concluded further that—

> "[i]t was clear to [him that] *the matter would clearly have to be reinvestigated in its entirety* and that what was before [him was] nothing more than an indication of possible witnesses and a broad outline on what they could possibly testify to". (Emphasis added.)

[67] Nearly one year after the evaluation by Senior Superintendent Bester, the Head of the Hawks, Lieutenant General Dramat, sought the assistance of Brigadier Marion.[67] Brigadier Marion was placed in possession of the torture docket, the SALC memorandum and SALC's founding papers in the review application. By this time the review application had been instituted.

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[66] Emphasis added.

[67] Brigadier Marion is a member of the SAPS and is based at the Office of the Provincial Detective Service in KwaZulu-Natal.

[68] Brigadier Marion identified a number of shortcomings in the torture docket that required follow-up. These included that—

(a) many of the statements had not been signed or attested to;

(b) none of the statements indicated that the witnesses required an investigation by the South African authorities nor did they confirm that they were prepared to testify in a South African court;

(c) in several instances the names of the alleged police torturers had been spelt differently;

(d) not all the alleged police torturers implicated by the deponents had been included in the list of implicated suspects;

(e) many of the witnesses' statements would have to be taken down again and this would have to be done in Zimbabwe for the pointing out of the scenes of the alleged torture;

(f) further corroborative statements, particularly from fellow detainees or impartial state officials, were required in respect of key events;

(g) all relevant documents maintained by the Zimbabwean police, for example dockets, cell registers, pocket books and occurrence books, would have to be seized for investigative purposes;

(h) prison records, court records and medical reports in respect of some of the victims would have to be obtained;

(i) photographs of the relevant scenes would have to be taken; and

(j) the implicated parties would have to be approached, informed of the allegations against them and provided with an opportunity to raise a defence that would have to be investigated.

[69] Like Senior Superintendent Bester, Brigadier Marion concluded that "[t]he allegations of torture would have to be re-investigated from scratch". Ironically, Brigadier Marion concluded further that "[w]ere I to take the dossier compiled by [SALC] to a South African prosecutor, I have no doubt that he or she would not be prepared to make a decision on the matter, but [would] *direct that the further investigations outlined above*, be conducted".[68]

[70] Based on the evaluations by Senior Superintendent Bester and Brigadier Marion, Mr Williams stated in his answering affidavit that the assertion by SALC that the torture docket constituted a prosecutable case "is unsubstantiated, nonsensical and conclusively disproved". He also stated that he had been advised that a court will not order the reconsideration of a decision not to investigate "where such investigation will be tantamount to a *brutum fulmen* [useless step]". These strongly worded conclusions are not borne out by the facts and the law. Moreover, the reasons furnished by Mr Williams under Rule 53(1)(b) of the Uniform Rules of Court contain a number of factual and legal misconceptions.

[68] Emphasis added.

[71] The emphasis on a "court-directed" investigation by Brigadier Marion and adopted by Mr Williams in his answering affidavit is misplaced. What the SAPS was being asked to consider was not a complete, perfectly trial-ready investigation, but the commencement of an investigation to determine the prima facie veracity of the torture allegations with a view to placing a docket, supplemented as may have been necessary, before the prosecutor for a decision whether or not to prosecute. It appears to have completely escaped the relevant SAPS senior officials that the Head of the Hawks could call upon the PCLU for assistance in an investigation of this nature in terms of section 17D(3) of the SAPS Act. They failed to utilise this valuable specialised resource.

[72] All that the SAPS had done through Senior Superintendent Bester and Brigadier Marion was to undertake a critical armchair review of the torture docket and the SALC memorandum and to list the shortcomings that necessitated further investigation or a complete re-investigation. That approach begs the very question that was being asked of them by SALC and ZEF. But the position is exacerbated by the SAPS's fatal misconceptions on the facts and the law emanating from Mr Williams's official reasons for the decision not to prosecute.

[73] The SAPS advanced as its first reason that it has no extra-territorial jurisdiction and that the mere anticipated presence of a suspect at some future time in this country was not sufficient to clothe the SAPS with the requisite power and jurisdiction. As set out above, this is a misconception of the SAPS's domestic legal duty. And, for the

reasons stated previously, presence of any kind, even anticipated presence, is not a prerequisite for an investigation into the torture allegations.

[74] A second reason given was that any investigation would be potentially harmful to South Africa–Zimbabwe relations on a political front. The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates and their ilk, the so-called *hostis humani generis*, the enemy of all humankind,[69] accountable for their crimes, wherever they may have committed them or wherever they may be domiciled. An approach like the one adopted by the SAPS in the present case undermines that very cornerstone. Political inter-state tensions are, in most instances, virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned.

[75] Third, the SAPS pointed out that it was required to conduct an impartial investigation and that the assistance proffered by SALC was highly problematic. This was so because SALC was said not to be impartial and would, in any event, be tantamount to the representatives of SALC acting as "covert agents" of the SAPS in Zimbabwe, something not permitted by the international law doctrine of state sovereignty. This is a startling proposition. Any complainant in a criminal matter has a vested interest in the outcome of an investigation, namely that justice be done. SALC is in no different a position to any other complainant. What matters most is

[69] See [36].

that the SAPS itself maintains impartiality in an investigation. The averment that SALC would be conducting "espionage" on behalf of the SAPS is wholly untenable. There is nothing improper or unlawful in a non-governmental entity facilitating foreign nationals travelling to and lawfully entering into this country to aid a lawful investigation, particularly one into a crime as grave and heinous in international law as torture.

[76] Lastly and perhaps most importantly, the SAPS took the view that South African courts would have no jurisdiction to adjudicate upon crimes committed in Zimbabwe by and against Zimbabwean nationals without there being any bases for jurisdiction (*rationes jurisdictionis*). The reasoning of the SAPS in this regard cannot be faulted but it is a matter pertaining to enforcement jurisdiction in relation to prosecutions and not investigations.

Conclusion on the merits

[77] The SAPS has misconceived the legal position in its decision not to investigate the torture allegations. It has misconstrued the meaning of its legal duty in terms of the SAPS Act and the ICC Act. It has failed to recognise that the crime of torture has been domesticated into our law by the ICC Act in terms of section 231(4) of the Constitution and that it is law in the Republic in terms of section 232 of the Constitution due to its status as a peremptory norm of customary international law. The SAPS has further failed to recognise that we are required to interpret all national laws in accordance with binding international law as prescribed by section 233 of the

Constitution.[70] Ultimately, there is no distinction between national and international high priority crimes domesticated into South African law.

[78] Given the international and heinous nature of the crime, South Africa has a substantial connection to it. An investigation within the South African territory does not offend against the principle of non-intervention and there is no evidence that Zimbabwe has launched any investigation or has indicated that it is willing to do so, given the period of time since the alleged commission of the crimes. Furthermore, the threshold for the SAPS to decline to investigate, bearing in mind the particular facts and circumstances, has not been met in this case. There is a reasonable possibility that the SAPS will gather evidence that may satisfy the elements of the crime of torture allegedly committed in Zimbabwe.

[79] The SAPS was presented with a detailed dossier of allegations under oath by the victims, in many instances corroborated by sworn statements of independent witnesses and medical reports. Any inadequacies in the statements and any follow-up or supplementation or corrections thereof must form part of a SAPS investigation. SALC has offered its assistance and this has been too readily discounted. In addition, the PCLU may be approached for assistance if the investigation proves to be challenging. Furthermore, Zimbabwe borders our country and the possible presence of the suspects in the future cannot be discounted. The initial spadework has been done. The SALC memorandum sets out the legal roadmap for an investigation.

[70] See [23].

Mr Ackermann of the PCLU recognised and acknowledged its value in his internal memorandum.

[80] The Supreme Court of Appeal was therefore correct to rule that on the facts of this case the torture allegations must be investigated by the SAPS. Our country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.

[81] The SAPS's decision not to conduct an investigation was wrong in law. The High Court and the Supreme Court of Appeal were correct in setting it aside. The Promotion of Administrative Justice Act[71] applies.[72] The SAPS's decision is reviewable on a number of grounds. I agree with the reasoning of the Supreme Court of Appeal that the duty to investigate international crimes may be limited by considerations like resource allocation. This judgment formulates limiting principles and finds that anticipated presence of a suspect in South Africa is not a prerequisite to trigger an investigation. It is only one of various factors that needs to be balanced in determining the practicability and reasonableness of an investigation. Therefore, mainly for the reasons the Supreme Court of Appeal gave, though subject to the qualification stated, the appeal must be dismissed. The next aspect for consideration is the relief that ought to be granted to SALC and ZEF.

[71] 3 of 2000.

[72] See section 6(2).

Remedy

[82] There has already been an inordinate delay in this matter, in large part due to the tardiness on the part of the NPA and the SAPS in processing the request after it was received by the PCLU on 16 March 2008. This is the third court to hear the matter and the litigation process has contributed to the delay. An expedited investigation is of paramount importance as the unearthing of evidence may become more difficult with time. Constitutional obligations must in any event be performed diligently and without undue delay.[73] The Supreme Court of Appeal issued a *mandamus*, trimming down substantially the High Court's extensive order. Both those Courts' orders have been cited. It is not necessary to make a finding on the SAPS's submissions that the High Court erred in issuing an order not asked for by SALC or ZEF (those two parties took issue with these submissions). Given the urgency of this matter, I propose making a similar order to that of the Supreme Court of Appeal. A remittal to the High Court would serve no purpose and would merely add further delay.

Costs

[83] In respect of costs, the principles in *Biowatch* must apply.[74] SALC and ZEF litigated in the interests of justice and constitutional certainty and have been successful in this Court. This case has far-reaching consequences for the application

[73] Section 237 of the Constitution.

[74] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-5.

of the ICC Act in this country and on the manner in which the SAPS, the DPCI, the PCLU and the NPA will, from now on, discharge their constitutional, international and domestic law obligations. It is furthermore a matter of substantial complexity in uncharted terrain. Accordingly, this is one of those rare cases warranting the employment of three counsel.

Order

[84] The following order is made:

1. Leave to appeal is granted.
2. Subject to paragraph 3 below, the appeal is dismissed.
3. The order of the North Gauteng High Court is set aside and replaced with the following:

   "(a) The decision of the National Commissioner of the South African Police Service to decline to investigate the complaint laid by the Southern African Human Rights Litigation Centre is reviewed and set aside.

   (b) The South African Police Service must investigate the complaint."

4. The applicant must pay the costs of the Southern African Human Rights Litigation Centre (first respondent) and the Zimbabwe Exiles' Forum (second respondent) in this Court, the Supreme Court of Appeal and the North Gauteng High Court, including the costs of three counsel where applicable.

For the Applicant:	J Gauntlett SC, F Pelser and M Maenetjie instructed by the State Attorney.
For the First and Second Respondents:	W Trengove SC, G Marcus SC and M du Plessis instructed by Lawyers for Human Rights.
For the First to Fourth Amici Curiae:	A Katz SC, M Bishop and P Adonis instructed by the Legal Resources Centre.
For the Fifth Amicus Curiae:	S Cowen and D Simonsz instructed by Webber Wentzel.
For the Sixth Amicus Curiae:	N Fourie, T Mafukidze and D Block instructed by Cliffe Dekker Hofmeyr Inc.
For the Seventh Amicus Curiae:	J Brickhill instructed by the Centre for Applied Legal Studies.