

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 17, 2014  
CORRESPONDENTS' REPORTS

SOUTH AFRICA<sup>1</sup>

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On 30 October 2014, the Constitutional Court of South Africa found that the South African Police Service ('SAPS') has a duty to investigate crimes against humanity committed abroad subject to certain limitations, specifically subsidiarity and practicability. The case concerned the application and limitations to South Africa's exercise of universal jurisdiction under the *Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002* ('ICC Act').

Factual Background

In March 2007, the Zimbabwean Police, acting under the direction of the Zimbabwean African National Union-Patriotic Front ('ZANU-PF'), the then ruling party in government, raided the headquarters of the main opposition party, the Movement for Democratic Change ('MDC'). Some MDC supporters were detained and tortured by the Zimbabwean Police. The torture was committed as part of a widescale and systematic operation executed against the MDC and its supporters in the run up to the 2008 elections. The Southern Africa Litigation Centre ('SALC'), a prominent public interest NGO in South Africa, investigated the matter. The SALC gathered evidence and compiled a docket consisting of victim medical reports along with interviews and affidavits from victims and witnesses. In March 2008, the docket was forwarded for investigation to the National Prosecuting Authority.<sup>2</sup> The docket named six Zimbabwean cabinet ministers in its list of accused persons. In June 2009, SALC received confirmation that SAPS would not investigate the alleged offences.

SALC and the Zimbabwe Exiles' Forum ('ZEF')<sup>3</sup> then applied to the North Gauteng High Court in Pretoria seeking an order to have the decision not to investigate the alleged crimes reviewed. The High Court found in favour of the applicants, declaring that the refusal to investigate must be reconsidered. The National Commissioner of the SAPS and the National Director of Public Prosecutions ('NDPP') then appealed to the Supreme Court of Appeal of South Africa. In November 2013, the Supreme Court of Appeal found in favour of the SALC and ZEF, and held that the SAPS was obligated to investigate the offences, notwithstanding

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<sup>2</sup> Specifically to the Priority Crimes Litigation Unit within the National Prosecuting Authority. In South Africa it is the duty of the police to investigate crime under s 205(3) of the *Constitution of the Republic of South Africa 1996* ('Constitution'). See *Zimbabwe Torture Docket Case* [50].

<sup>3</sup> A South African based organisation that engages in advocacy and litigation in respect of exiled Zimbabweans who have suffered gross human rights abuse in Zimbabwe.

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that the accused persons were not present in South Africa at the time of the investigation.<sup>4</sup> The Supreme Court of Appeal pronounced that the SAPS were obligated to carry out the investigation under the Constitution, the ICC Act, and the *South African Police Service Act 1995*. Much of the discussion centered on whether the presence of the accused persons in South Africa was required for the investigation to take place.<sup>5</sup>

The National Commissioner of the SAPS then appealed the matter to the Constitutional Court of South Africa. Seven *amicus curiae* joined the proceedings, among them notable academics in international law and NGOs from around the world. The hearing took place in May 2014.

The findings of the Constitutional Court

The Constitutional Court considered whether the SAPS had an obligation to carry out a pre-trial investigation into international crimes committed abroad, and if so what circumstances trigger this duty.<sup>6</sup>

*(a) The obligation on the SAPS to investigate international crimes committed abroad*

The Constitutional Court noted the 'special place' of international law in South African law, reiterating, that the Constitution and national legislation must be interpreted in light of international law.<sup>7</sup> The Court then addressed jurisdiction in international law. Citing Brownlie's *Principles of International Law*, the Court stated that universal jurisdiction operates so long as certain principles are met, these being:

- 1) [T]here should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
- 2) the principle of non-intervention in the domestic or territorial jurisdiction of another state should be observed; and
- 3) elements of accommodation, mutuality and proportionality should be applied.<sup>8</sup>

The Court then turned to consider complementarity in the *Rome Statute of the International Criminal Court* ('Rome Statute'). The Constitutional Court noted that a question arose as to states parties' obligations to prosecute international crimes committed in the territory of a non-state party to the Rome Statute. Here the Court noted:

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.<sup>9</sup>

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<sup>4</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168 (27 November 2013).

<sup>5</sup> For further information on this decision see Saidat Nakitto, 'An Analysis of the Supreme Court Decision in the National Commissioner of the South African Police Service and Another v Southern Africa Human Rights Litigation Centre and others' (2013) 3 *International Human Rights Law Review* 146.

<sup>6</sup> *Zimbabwe Torture Docket Case* [21].

<sup>7</sup> *Ibid* [22-24].

<sup>8</sup> *Ibid* [28].

<sup>9</sup> *Ibid* [32].

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Zimbabwe is not a state party to the Rome Statute and the National Commissioner of the SAPS did not dispute that it was unlikely the crimes would be investigated in Zimbabwe.

The Court then turned to look at South Africa's jurisdiction in respect of the crime of torture. The Court noted that torture is a crime to which *jus cogens* status attaches and from which no derogation is permitted.<sup>10</sup> South Africa incorporated the *United Nations Convention Against Torture* into domestic law via a specific act, and jurisdiction over torture on the scale of a crime against humanity was incorporated into domestic law in South Africa by the *ICC Act*. The parties to the case did not dispute that the torture amounted to a crime against humanity.<sup>11</sup>

After examining these sources of international and national law, the Constitutional Court concluded:

Because of the international nature of the crime of torture, South Africa, in terms of section 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 domestic law obligations.<sup>12</sup>

*(b) The 'connecting factors' in South Africa's exercise of universal jurisdiction under the ICC Act*

The Court recognised that there were certain restrictions governing the exercise of universal jurisdiction in South Africa as per section 4 (3) of the *ICC Act*, which reads:

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.

This provision sets out what the Court referred to as the 'connecting factors' between South Africa and an international crime committed extraterritorially, at least one of which factors must be present for a South African Court to establish jurisdiction over the offence. Given that the torture was committed in Zimbabwe, by Zimbabweans against other Zimbabweans, section 4(3)(c) was relied on in this instance.<sup>13</sup> The Court noted that the *ICC Act* was silent, in respect to crimes committed extraterritorially, on whether the accused need be present in South Africa for the investigation prior to the commencement of the trial.<sup>14</sup>

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<sup>10</sup> *Ibid* [35].

<sup>11</sup> *Ibid* [12].

<sup>12</sup> *Ibid* [40].

<sup>13</sup> Some of the Zimbabwean officials named in the docket visited South Africa after the crimes had been committed.

<sup>14</sup> *Ibid* [43].

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After noting the work of the *Institut de Droit International* and the content of the amicus curiae brief submitted by John Duggard and others,<sup>15</sup> the Court stated that there was no international rule that the accused must be present for the pre-trial investigation. The Court held that this was a necessary conclusion for a number of reasons. First, if it were otherwise, investigations into crimes against humanity would be unlikely to occur. Second, upon the anticipated presence of the accused in the investigating state, some level of investigation is required in order to determine if any crimes have been committed that warrant further action. Second, the anticipatory presence of the accused in the forum state would require some form of preliminary investigation to determine if any crimes had been committed. Moreover, in order to determine whether an extradition request should be issued against the accused, an investigation would be required. Thus, the Court rejected the SAPS' argument that they could not carry out an investigation without the presence of the accused in South Africa. The Constitutional Court did not dispute that the presence of the accused was required for the commencement of the trial.<sup>16</sup> The Court also stated that the SAPS not only had the power to investigate the offences, but that they had a duty to do so. This duty stemmed from the Constitution and the ICC Act, interpreted in line with international law.<sup>17</sup>

*(c) Limitations on the exercise of universal jurisdiction by South Africa*

After finding that the SAPS had a duty to investigate the matter, the Court then turned to the important question of the limitations to investigating international crimes: subsidiarity and practicability. Looking first at subsidiarity, the Court found that an investigation may only commence where another state with jurisdiction over the crime (presumably the territorial or state of nationality of the alleged perpetrator(s) or victim(s)) is unable or unwilling to do so.<sup>18</sup> The reason being, that 'the principle of non- intervention in the affairs of another country must be observed'.<sup>19</sup> Here, the Court borrowed from the language of the Rome Statute, in line with its principle of complementarity. The Court linked subsidiarity to the principle of complementarity. The Court noted that it was unlikely that the crimes would be investigated by the Zimbabwean Police, given that cabinet ministers were among the alleged perpetrators. In the event of the crimes being investigated in Zimbabwe, then South Africa would have no authority to do so.

On the issue of practicability, the Court said that the South African authorities must consider if it is reasonable and practicable to carry out the investigation, in respect of each particular case. In making this decision the authorities must consider a number of factors:

- (1) Whether the investigation is likely to lead to a prosecution;
- (2) Whether the accused persons are likely to enter South Africa, of their own accord, or by extradition;
- (3) The geographical location of the crime;
- (4) The likelihood of the accused being arrested for the purposes of prosecution;
- (5) The gathering of evidence; and

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<sup>15</sup> See amicus curiae brief submitted to the Constitutional Court of South Africa by John Dugard, Kevin Heller, Gerhard Kemp, Hannah Woolaver, The Tides Centre and the Peace and Justice Initiative, <[www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Dugard-et-al-submissions.pdf](http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Dugard-et-al-submissions.pdf)>.

<sup>16</sup> *Zimbabwe Torture Docket Case* [43, 47].

<sup>17</sup> *Ibid* [55].

<sup>18</sup> *Ibid* [61].

<sup>19</sup> *Ibid*.

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(6) The nature and extent of resources required for an effective investigation.<sup>20</sup>

The Court stated that in making this decision, a preliminary investigation on the practicality of the investigation may be required.

In assessing whether these factors had been considered by the SAPS in its decision not to investigate the said offences, the Court found that the SAPS had misconceived the legal position in its decision, and its legal duty under the SAPS Act and the ICC Act. Finally, the SAPS had failed to interpret South African national law in line with international law, because, 'ultimately, there is no distinction between national and international high priority crimes domesticated into South African law'.<sup>21</sup>

The Constitutional Court unanimously rejected the appeal and costs were awarded against the appellant. The Court highlighted that constitutional obligations must be carried out without delay, notwithstanding the considerable time that had lapsed since the torture had occurred. The SAPS is now investigating the crime.<sup>22</sup>

Points of note

There are a number of significant issues that arise in this judgment. First, the Rome Statute itself does not demand that states parties exercise universal jurisdiction. The ICC has jurisdiction to hear cases relating to international crimes committed on the territory of a state party, or carried out by nationals of the states parties. Thus, at a minimum states parties are obligated to incorporate the territorial and active personality principles of jurisdiction into domestic law. South Africa was the first African state to incorporate the Rome Statute into its legal system. Interestingly, section 4(3) of the ICC Act on the jurisdiction of South Africa over international crimes does not include universal jurisdiction in express terms.<sup>23</sup> In the judgment, the Constitutional Court interpreted section 4(3) as implying the exercise of universal jurisdiction by the South African authorities.

Second, the Constitutional Court was right to distinguish between the presence of the accused for the pre-trial investigation and the presence of the accused for the commencement of the trial in the manner that it did. State practice shows that many pre-trial investigations related to the exercise of universal jurisdiction begin without the presence of the accused in the forum state.

The investigation by Judge Baltasar Garzón in Spain into crimes committed by General Augusto Pinochet in Chile is perhaps the most famous example of this.<sup>24</sup>

Third, given the recent trend of state legislatures in reducing the scope of the exercise of universal jurisdiction the judgment is a welcome decision. Moreover, it is an example of a non-European state taking steps to apply universal jurisdiction. In Belgium since 2003, the

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<sup>20</sup> Ibid [64].

<sup>21</sup> Ibid [77].

<sup>22</sup> See South African Litigation Centre, 'SALC in the news: Police officers will comply with concourt judgment' (3 November 2014) South African Litigation Centre <[www.southernafricalitigationcentre.org/2014/11/03/salc-in-the-news-police-will-comply-with-concourt-judgment](http://www.southernafricalitigationcentre.org/2014/11/03/salc-in-the-news-police-will-comply-with-concourt-judgment)>.

<sup>23</sup> The active and passive personality principles are provided for in sections 4(3)(a) and section 4(3)(d) respectively. The active personality principle is exercised when the state of nationality of the accused prosecutes the offence. The passive personality principle is exercised when the state of nationality of the victim(s) prosecutes the offence.

<sup>24</sup> In Belgium, investigations commenced into alleged international crimes committed by former US President George H W Bush and former Israeli Prime Minister Ariel Sharon without the presence of the accused. See Steven R Ratner, 'Belgium's War Crime Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888, 890.

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national legislation on extraterritorial jurisdiction has been restricted to the active and passive personality principles, or to accused persons or victims who are resident in the state. Similar steps have been taken in Spain.<sup>25</sup> One of the reasons for this is because the exercise of universal jurisdiction interferes with the forum state's international relations. In the *Zimbabwe Torture Docket Case*, the Constitutional Court did not give much attention to the concern of the SAPS that the investigation would hamper South African–Zimbabwean relations. The Constitutional Court stated that inter-state tension is unavoidable in the application of universal jurisdiction:

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 humanis generis*, the enemy of mankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled.<sup>26</sup>

Finally, it may also be said that this judgment is an example of how the principle of complementarity is supposed to work in the relationship between national courts and the ICC. As the Court noted, the primary responsibility of the prosecution of international crimes rests with the states parties themselves. It may be that this judgment comes from a state particularly dedicated to upholding human rights.<sup>27</sup> On the other hand, perhaps some circumspection of South Africa's commitment to its ICC obligations is warranted, given the state's failure to arrest Sudanese President Al- Bashir in 2015 while he was present in the country. Nevertheless, the *Zimbabwe Torture Docket Case* is an important judgment not only for South Africa, but for other states that may seek to exercise universal jurisdiction. It is a positive move towards preventing impunity for international crimes. Whether the judgment will appeal to other states remains to be seen.

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<sup>25</sup> Elías Esteve Moltó, 'The Great Leap Forward to Impunity' (2015) 13 *Journal of International Criminal Justice* 1121.

<sup>26</sup> *Zimbabwe Torture Docket Case*, [74].

<sup>27</sup> To exemplify this, the first paragraph of the judgment contains a quote from Nelson Mandela.