IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 485/2012

Reportable

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE **First Appellant**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Second Appellant**

and

SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE **First Respondent**

ZIMBABWE EXILES FORUM **Second Respondent**

and

THE TIDES CENTRE ***Amicus curiae***

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

Coram: NAVSA ADP, BRAND, PONNAN, TSHIQI & THERON JJA

Heard: **1 November 2013**

Delivered: **27 November 2013**

Summary: Rome Statute of the International Criminal Court – crimes against humanity – Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act) – interpretation of s 4 of the ICC Act – competence of South African Police Service to investigate crimes against humanity committed outside of South Africa – ss 13, 17 of the South African Police Service Act 68 of 1995 – powers of the National Director of Public Prosecutions in terms of the National Prosecuting Authority Act 32 of 1998 – circumstances of case warrant initiation of investigation.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Fabricius J sitting as court of first instance).

The following order is made:

1. Leave to appeal is granted.

2. The appeal, save to the limited extent reflected in the substituted order set out in para 3 is dismissed with costs including the costs of two counsel against the appellants, jointly and severally.

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.

3.3. The National Director of Public Prosecutions and the National Commissioner of the SAPS are ordered jointly and severally to pay the costs of the Southern African Human Rights Litigation Centre and the Zimbabwe Exiles Forum, including the costs of two senior counsel and one junior counsel.'

JUDGMENT

Navsa ADP, (Brand, Ponnan, Tshiqi & Theron JJA CONCURRING):

Introduction

[1] On 8 May 2012 the North Gauteng High Court (Fabricius J) decided an application to review a decision of the Acting National Director of Public Prosecutions (the NDPP), its Head of Priority Crimes Litigation Unit (the HPCLU) and the Acting National Commissioner of the South African Police Service (the Commissioner) not to institute an investigation into alleged crimes against humanity of torture committed by Zimbabwean police and officials against Zimbabwean citizens in Zimbabwe, in favour of the two applicants, the Southern African Human Rights Litigation Centre (SALC) and the Zimbabwe Exiles Forum (the ZEF). The NDPP, the HPCLU and the Commissioner were the first, second and fourth respondents respectively. The third respondent, the Director General of Justice and Constitutional Development (the Director General), was cited because of his obligations in terms of domestic legislation when a decision by the National Prosecuting Authority (NPA) not to prosecute has been made. That will be elaborated upon below. Having decided the case in favour of the SALC and the ZEF, the high court issued the following order:

'1. THAT the decision taken by the first, second and fourth respondents in refusing and/or failing to accede to the first applicant's request dated 16 March 2008 that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe, is reviewed and set aside.

2. THAT the relevant decisions to refuse such a request is declared to be unlawful, inconsistent with the Constitution and therefore invalid.

3. THAT the applicants' request as aforesaid must be assessed by the first, second and fourth respondent, having regard to South African international law obligations as recognised by the Constitution.

4. THAT the second respondent is ordered to render all possible assistance to the fourth respondent in the evaluation of the request by the first applicant for the initiation of an investigation, the second respondent is ordered to manage and direct such investigation as provided for in terms of the applicable Presidential Proclamation and NPA as amended.

5. THAT the Priority Investigation Unit referred to in chapter 6A of the South African Police Service Act 1995 as amended shall in accordance with Section 205 of the Constitution and in so far as it is practicable and lawful, and with regard to the domestic laws of the Republic of South Africa and the principles of international law, do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket.

6. THAT in so far as the investigation by this unit is concerned it is recorded that the fourth respondent is unable to ensure the safety of any witnesses in Zimbabwe, and cannot take responsibility for, or be held accountable for the safety of any witnesses, or any prospective witnesses, or prospective witnesses in Zimbabwe or who will have to travel from Zimbabwe to South Africa and return.

7. THAT the investigating unit will not procure or secure the attendance of witnesses located in Zimbabwe. If the assistance of the applicants can facilitate this process, the applicants must render such assistance.

8. THAT in the event of the applicants being able to secure the attendance of the witnesses in South Africa, the applicants will ensure that the witnesses enter South Africa legally and in compliance with any and all relevant immigration laws of South Africa and Zimbabwe.

9. THAT the respondents, if necessary through collaborative efforts with the Department of Home Affairs and the Department of International Relations and Co-operation, will provide the required assistance to ensure the attendance of such witnesses in South Africa, including through the provision of visas and the waiving for the need of a passport (i.e. allowing the use of an emergency travel document) where appropriate.

10. THAT it is recorded that any request for mutual legal assistance in terms of the International Co-operation and Criminal Matters Act 75 of 1996, which may be made in the investigative process, will be dealt with by the second respondent in co-operation with the investigating unit referred to.

11. THAT the priority crimes units (the investigating unit) will without undue delay communicate all findings to the second respondent. After the aforementioned investigation has been completed, the second respondent is ordered to take a decision whether or not to institute a prosecution. If a prosecution is recommended accordingly, second respondent must refer his decision to the first respondent for confirmation. The record of any such decision is to be submitted to the applicants.

12. THAT the second and fourth respondent are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved, including the costs of two senior counsel and one junior counsel.'

[2] I pause to state that initially the applicants sought limited relief. The material parts of the amended Notice of Motion read as follows:

'1. Reviewing and setting aside the decision taken on or about 19 June 2009 by the First, Second and/or Fourth Respondent refusing and/or failing to accede to the First Applicant's request originally dated 16 March 2008 that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe ("the impugned decision(s)").

2. Declaring the impugned decision(s) to be unlawful, inconsistent with the Constitution and invalid.

3. Declaring that the delay by the Respondents in arriving at the impugned decision(s) constitutes a breach of sections 179 and 237 of the Constitution.

4. Ordering the First, Second and Fourth Respondents to reconsider the First Applicant's request originally dated 16 March 2008.

5. Ordering those Respondents that oppose the relief sought by the Applicants to pay the costs of this application jointly and severally (the one paying the others to be absolved).'

As recorded in para 32 of his judgment, Fabricius J invited the parties to propose an order to expand upon the original Prayer 4. That led to the order in the form finally issued by the court below.

[3] Fabricius J then dismissed, with costs, an application for leave to appeal by the abovementioned respondents. A consequent application for leave to appeal to this Court was referred to oral argument in terms of section 21(3)*(c)*(ii) of the Supreme Court Act 59 of 1959 and, further, the parties were to be prepared if called upon to address the Court on the merits. The motivation for having referred the matter to oral evidence was a peremption point taken by the SALC and the ZEF, as respondents in this Court, which was later abandoned. It was agreed at the commencement of proceedings before us that the merits of the appeal should be heard on the basis that an order granting leave would issue.

[4] It is necessary to record that the HPCLU and the erstwhile third respondent, the Director General, have both fallen out of the picture and did not participate in the appeal. Moreover, an application by the Tides Centre, an American-based non-governmental organisation which runs the AIDS-Free World project (which 'pursues the fight against impunity for international crimes, and in particular for rape as a crime against humanity'), for leave to intervene as *amicus curiae* in the appeal had been granted. The Tides Centre was allowed to both file written argument and make oral submissions before this court, which they did, arguing largely in support of the respondents' case.

[5] To those unfamiliar with International Criminal Law, the following instinctive question arises: What business is it of the South African authorities when torture on a

widespread scale is alleged to have been committed by Zimbabweans against Zimbabweans in Zimbabwe? It is that question that is at the heart of this appeal. Put simply and hopefully concisely, this appeal concerns the investigative powers and obligations of the NPA and the South African Police Service in relation to alleged crimes against humanity perpetrated by Zimbabweans in Zimbabwe. It involves a consideration of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act). Put jurisprudentially, this appeal concerns the exercise of jurisdiction by a domestic court (and the logically antecedent exercise of investigative powers by the relevant authorities) over allegations of crimes against humanity – in particular, the crime of torture – committed in another country. This will be dealt with in due course. First, an introduction to the now-respondents and a discussion of the background follows.

[6] The SALC is an initiative of the International Bar Association and the Open Society Initiative for Southern Africa. Its aim is to provide support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the Southern Africa region. The SALC's model is to work in conjunction with domestic attorneys in each jurisdiction who are interested in litigating important cases involving human rights or the rule of law. The stated mission of the ZEF is 'to combat impunity and achieve justice and dignity for victims of human rights violations occurring in Zimbabwe with particular emphasis on the exiled victims'.

The Background

[7] On 16 March 2008 the SALC sent a detailed memorandum, approximately 50 pages long (when redacted) to the HPCLU, the second respondent in the court below, in which allegations of crimes against humanity involving mainly torture were made against 'Zimbabwean officials'. I shall in due course explain the expression 'crimes against humanity' and deal with the concept of torture and give it factual, legislative and juridical content. The memorandum alleged that named members of 'the law and order

unit' – presumably a unit of the Zimbabwean Police Services – engaged in acts of torture against mainly members of the official opposition political party in Zimbabwe, the Movement for Democratic Change (MDC). It was alleged that the acts of torture were knowingly perpetrated on a widespread or systematic basis. Moreover, it was suggested that the acts of torture were aimed primarily at the political opponents of or those suspected of being opposed to the ruling party, namely Zimbabwe African National Union-Patriotic Front (ZANU-PF). It appears from the memorandum that the torture of such opposition activists occurred subsequent to a raid on Harvest House, the headquarters of the MDC, allegedly conducted in the aftermath of a bombing incident.

[8] The memorandum also referred to similar claims of abuse against other victims by members and/or supporters of the ruling party, documented by internationally reputable human rights' organisations, including Amnesty International and Human Rights Watch, which indicated that this was all part of an orchestrated attempt by the ruling party to clamp down on and punish dissidents and opposition members.

[9] The memorandum alleged that the acts of torture carried out by lower level state officials also implicated senior officers, six government Ministers and Heads of Department, by virtue of the doctrine of command responsibility. Furthermore, the memorandum suggested that the supporting affidavits contained evidence which, at least on a *prima facie* basis, implicated superior officers in the Law and Order Unit. The memorandum and supporting affidavits, which are referred to collectively as the docket of the SALC, allegedly contain corroborating accounts, including the testimony of doctors, lawyers and family members as well as medical records. In the months that followed the incidents, so the memorandum noted, many of the alleged perpetrators visited South Africa on both official state and personal visits.

[10] In the papers before this Court, the docket has been redacted to the extent that the names of those officials allegedly implicated have been removed. According to the Commissioner, the SALC saw fit to release information to the South African media from which the perpetrators could be identified or their identities deduced thus compromising the victims, witnesses and the investigation. Whilst the SALC denies that allegation, it does appear that at least some material facts contained in the docket were released to the media. The undesirability of such conduct is to be deprecated in the strongest terms because it presents additional challenges which affect the practical outcome of this matter, to be addressed further below.

[11] A perusal of the affidavits in the docket allegedly provided by victims of the torture present a graphic picture. They describe severe physical assaults being perpetrated, which included the use of truncheons, baseball bats, fan-belts and booted feet. There are accounts of victims being suspended by a metal rod between two tables; of being subjected to water boarding; and of electrical shocks being applied to the genitals of some of them.

[12] In the memorandum, drafted by eminent counsel, submissions are made about the legal foundation for jurisdiction on the part of the SAPS and NPA to investigate and prosecute in South Africa crimes against humanity perpetrated elsewhere. It is contended that South Africa's international obligations – as derived from customary international law and international treaties to which it is a party – and incorporated into domestic legislation, obliged the SAPS and NPA to investigate the complaints of widespread and systematic torture set out in the docket.

[13] Para 4 of the memorandum reads as follows:

‘4. In this memorandum we take the liberty of urging the NPA to institute an investigation and, if the evidence is sufficient, subsequent prosecution in South Africa of Zimbabwean officials alleged to be guilty of the crime against humanity of torture, committed in Zimbabwe.’

It is therefore clear from the memorandum that the request to investigate and ultimately prosecute was addressed to and directed at the NPA and the HPCLU. Put simply, that was the respondents’ first port of call.

[14] A great deal is made by the respondents of what they describe as the inexplicable delay as the NPA in its various guises interacted and communicated with the Minister of Justice and Constitutional Development (the Minister), the Director General and the administration of the International Criminal Court (the ICC). It is, for present purposes, not necessary to explore whether there was justification for the delay.

[15] On 19 June 2009, more than a year after the docket had been sent to the HPCLU, and after interaction between the NDPP and the Commissioner’s office, the former wrote to the SALC stating that it had been advised by the latter that the SAPS did not intend to initiate an investigation into the above matter. It appears that the HPCLU, the NDPP, the Director General and the Commissioner considered the matter closed. It was that attitude that led to the application being launched by the respondents during December 2009 in the court below for an order that the HPCLU, the NDPP and the Commissioner be compelled to investigate the complaint set out in the docket.

The NDPP’s case

[16] In opposing the application in the court below, the Acting NDPP took issue with the SALC and the ZEF about his power to initiate the investigation requested by them. He adopted the attitude that the NPA has limited investigative capacity, located exclusively in the investigating directorates provided for by s 7 of the National

Prosecuting Authority Act 32 of 1998 (the NPA Act).[1] According to the NDPP the Directorate of Special Operations was the only investigating directorate in existence at the time when the SALC made the request for the investigation to the HPCLU. The HPCLU was appointed as a special Director of Public Prosecutions in terms of s 13(1)*(c)* of the NPA Act.[2] The Presidential Proclamation in terms of which the HPCLU was appointed empowered him to 'manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. of 27 of 2002) . . .'.[3] The legislation referred to is the South African statute which permits the exercise of criminal jurisdiction in respect of crimes against humanity committed elsewhere. Whether the phraseology 'manage and direct' encompasses the initiation of investigations is, for reasons that will become apparent, no longer relevant. On behalf of the respondents it is accepted that presently, because of recent amendments to the South African Police Service Act 68 of 1995 (the SAPS Act), a special Police Directorate popularly referred to as the Hawks is where a complaint of the kind contained in the docket should initially be made. That Special Directorate, in turn, is entitled to require the NDPP to designate a Director of Public Prosecutions to investigate the offence by interrogating witnesses in terms of the NPA Act. Thus, the HPCLU has rightly fallen out of the picture as a litigant. What is later set out as the legislative basis for initiating and continuing an investigation will, of course, have an impact on the ultimate order made by this court.

[17] In his answering affidavit, the then Acting NDPP stated that when he was appointed to that office in September 2007, his enquiries revealed that the primary

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[1] Section 7 of the Act enables the President by proclamation in the Government Gazette to establish one or more Investigating Directorates in the *Office of the National Director*, in respect of such offences or criminal or unlawful activities as set out in the proclamation. An investigation by such directorate is enabled in terms of s 28 of the NPA Act.

[2] Section 13(1)*(c)* of the NPA Act reads as follows:

'(1) The President, after consultation with the *Minster* and the *National Director* –

. . .

(c) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the *Gazette*.'

[3] Proclamation by the President of the Republic of South Africa of 24 March 2003, GN 46, *GG* 24876, 23 May 2003.

focus of the unit headed by the HPCLU was crimes which implicated national security, and that it was performing a purely prosecutorial function in respect of those cases. The unit made decisions on whether or not to prosecute and the practice was that all matters requiring investigation were referred to the SAPS. It appears that the unit in any event did not have any investigators within its staff compliment, which position persists. Thus it was submitted on behalf of the NDPP that all that the HPCLU could lawfully do was to refer the request to the then Acting National Commissioner. When he, for reasons that will be spelt out later, decided not to investigate, the Acting NDPP was 'satisfied' that the Commissioner's views, set out in some detail later, accorded with the NPA's own attitude.

[18] The Acting NDPP records that when he first became aware of the memorandum by the SALC urging an investigation, his immediate concern was whether South African authorities could legitimately entertain what is effectively a foreign matter. He subsequently studied documentation sent to him by the HPCLU and identified that, even though the SALC sought the initiation of an investigation, it was ultimately 'urging a prosecution'. In this regard he points to the memorandum dedicating most of its attention, not to investigative matters, but to prosecution issues. Both the Acting NDPP and the HPCLU thought it best to refer the matter to the Commissioner and to interact with him because, in their view, the issue fell within his mandate. Because the Acting NDPP was concerned that, upon becoming aware of the request, the Zimbabwean authorities may take up the matter with the South African Government, he therefore also interacted with the Director General of the then Department of Foreign Affairs. In short, the Acting NDPP was concerned about the impact of the envisaged investigation on relations with Zimbabwe. The then Acting NDPP also approved a request by the HPCLU to travel to The Hague to take advice from the Prosecutor of the International Criminal Court, the relevance of which will become apparent in due course. However, the Minister declined to sanction the visit.

[19] Nevertheless, the Minister and his Deputy were concerned about the political impact of the envisaged investigation. One of the considerations was that the President of South Africa's role as mediator between the opposition and ruling parties of Zimbabwe would be compromised. The delay complained of by the SALC is countered by the Acting NDPP on the basis of the time that it took to get legal opinions and to communicate with interested parties and to have necessary meetings in order to finally arrive at a conclusion.

[20] The Acting NDPP received a letter from the Commissioner supplying the following reasons for a decision not to initiate an investigation:

'32.1 The statements compiled by the First Applicant fell short of a thorough Court-directed investigation;

32.2 SAPS could not conduct the investigation which would be necessary to overcome the shortcomings identified in the above statements via legitimate channels;

32.3 SAPS could not accept the offer of the First Applicant to gather evidence on its behalf for the valid reasons stated;

32.4 The undertaking of an investigation could hamper the existing and ongoing investigation of crimes committed in South Africa where cooperation from the Zimbabwean Police is necessary;

32.5 The undertaking of an investigation could also negatively impact on South Africa's international relations with Zimbabwe.'

[21] The view adopted by the Acting NDPP was that, as the crimes sought to be investigated were allegedly wholly committed in Zimbabwe by one group of Zimbabwean citizens against another, such further investigations that would have to be conducted for a court-directed investigation would have to be conducted in Zimbabwe. He took the position that any investigations in that country could only be undertaken with the co-operation of Zimbabwean authorities. In the view of the Acting NDPP, that

state's sovereignty was implicated and there was real potential for a negative impact on mutual co-operation in related and other matters.

[22] The Acting NDPP was not comforted by the offer of assistance by the SALC and the ZEF in making witnesses available and ensuring that everything that could be done on South African soil would be facilitated by them. In his view, the offer could not be taken up because the respondents were not objective parties and had a vested interest in the outcome of the investigations. Moreover, in the view of the Acting NDPP, matters of national interest and policy involve value judgments that intrude upon decisions to prosecute in cases such as the one under discussion.

[23] Telescoped, the NDPP's case, both in the court below and before us, is that it is not the correct first port of call when a complaint of the kind in question is to be made and that the SAPS is the responsible authority in that regard. Before us, it was rightly accepted by counsel on behalf of the NDPP that, given the legislative construct dealt with later in this judgment, the assistance of a special division within the NPA could be sought by the police in the event of an investigation being launched by the latter.

The Commissioner's case

[24] The Commissioner, in his answering affidavit, confirms the communication with the NDPP's office and the receipt of the docket. He, in turn, referred it to senior police officers for advice. He also attended meetings with, amongst others, the SALC and someone from the office of the State Law Advisor: Department of Justice and Constitutional Development as well as with someone from the office of the Chief State Law Advisor: Department of Foreign Affairs. The advice that the Commissioner obtained prior to the launch of the application by the SALC and the ZEF from someone who was then a Colonel in the SAPS was that he had perused the entire docket and was of the

opinion that the docket was not only inadequately investigated but that further investigation would be impractical and virtually impossible. It is necessary to quote the relevant parts of the then Colonel and now Senior Superintendent Bester's affidavit filed in support of the Commissioner's case:

'The so called "dossier" was provided to me by the SAPS Legal Services with a view to advising on, from an investigative point of view, the adequacy or not of the "dossier".

4.1 While it was apparent to me from the "dossier" that those affidavits which were attested to, did not comply with the formalities provided for in South African Law for a valid affidavit, I was more concerned by the fact that I was not able to verify the identities of the deponents and establish that they are indeed who they say they are. There is also no indication as to who drafted the affidavits and accordingly I am not in a position to ascertain more information on the deponents. I also noted a number of similarities in the statements which created the impression that words may have been put into the deponents mouth, a factor which could reflect negatively on the investigation.

4.2 The statements were also in my opinion mostly very vague. Statements to the effect that X, Y and Z were "either actively or passively" involved in the assault or torture is on its own insufficient and more detail on the person's actions and precisely how he was identified would need to be obtained. As the alleged perpetrators are identified in the statements insufficient, evidence exists for a warrant to be issued.

4.3 I could also find no concrete evidence which could sufficiently implicate those persons who it is suggested should [be] prosecuted on the basis of their command responsibility. That upon which the SALC appears to base its request for such a prosecution is, to a large extent based on hearsay and deductions, without a factual basis.

5.

Following my evaluation of the "dossier" I came to the conclusion that the same was not sufficient to sustain any form of prosecution, is that which as before me did not constitute evidence and could at best and without verification and/or corroboration amount to nothing more than mere allegations.

6.

It was clear to me the matter would clearly have to be reinvestigated in its entirety and that what was before me is nothing more than an indication of possible witnesses and a broad outline on what they could possibly testify to.'

[25] A further affidavit was filed in support of the Commissioner's case by Brigadier Clifford Marion, who set out his views on the deficiencies in the docket. The material part of his affidavit reads:

'7.

I deem it relevant at this stage to explain what a Court-directed investigation is. Such an investigation has as its primary object the gathering of evidence relevant to the commission of a crime in a manner so as to enable a prosecutor to make a properly informed decision whether or not to prosecute and in the event of a prosecution being instituted, to ensure the conviction of the accused. Such an investigation includes the following:

7.1 A proper identification of the elements of the crime sought to be investigated;

7.2 The taking of witness statements in a coherent manner so as to establish the elements of the crime and all other relevant facts without any ambiguity;

7.3 The corroboration and verification of all issues raised in the statements of the witnesses or other evidence;

7.4 The gathering of evidence in an admissible manner, e.g. if a search is conducted, this must comply with all the relevant legal prescripts;

7.5 The securing, in an uncontaminated manner, of all relevant documentary and physical exhibits;

7.6 The utilisation of forensic tests and other expert evidence, e.g. fingerprint evidence, DNA analysis, medical examinations, etc;

7.7 The compilation of photograph albums and/or video footage of crime scenes;

7.8 Maintaining a complete and accurate record of the investigation and of the police officers involved therein.

The SAPS conduct investigations in an objective and impartial manner and consequently, if suspects are identified, then they are informed of the allegations against them. Should they elect to provide an exculpatory version, this version must also be fully investigated.'

[26] In addition, Marion noted that the fact that the names of the alleged perpetrators had been placed in the public domain 'has a number of undesirable consequences' which result from their attention being drawn to any investigation into their alleged conduct. In particular:

'11.

. . . The inappropriate public disclosure of sensitive information during the course of an investigation also serves to alert the targets of such investigation of this fact. This may lead either to the suspects absconding or evidence being destroyed or tampered with.'

[27] It is necessary to record that Marion considered the assertion by the respondents that the perpetrators visit South Africa regularly to be without factual foundation and purely speculative. Marion had regard to the immigration officer's database which revealed visits to South Africa at points of arrival and departure. His preliminary investigation revealed that:

'27.1 11 of the alleged torturers have never visited South Africa;

27.2 The remaining alleged torturer did not visit South Africa at all throughout 2008, but only on limited occasions thereafter in January 2009 and once in 2010;

27.3 The Minister implicated in paragraph 8.1 of the First Applicant's memorandum last visited the country in January 2008;

27.4 The Head of Department mentioned in paragraph 8.3 of the same document did not visit the country at all in 2008, but only on certain occasions in 2009. These visits were only of a few hours duration and most likely, he was in transit through the country. He has not visited the country in 2010.

27.5 The Minister referred to in paragraph 8.5 of the same document visited the country only once in 2008 (a visit of less than 24 hours duration) and has subsequently never visited the country again;

27.6 Only the Head of Department mentioned in paragraph 8.2 and the Minister mentioned in paragraph 8.6 of the same document have visited the country on a regular basis in 2008, 2009 and 2010.

27.7 The Head of Department mentioned in paragraph 8.4 has never visited the country.'

[28] The Commissioner adopted the attitude that the SAPS was not and still is not under the law 'permitted or entitled to conduct such investigation which would, in any event, have been highly impracticable, if not impossible'. Furthermore, the Commissioner stated:

'I have already demonstrated that that obligation is limited territorially and cannot extend beyond the borders of South Africa. Although it holds true that the SAPS has a duty, once they become aware that a crime has been committed, to trace the alleged offender and bring him or her before Court and produce all available evidence, that duty cannot arise under the present circumstances, when the alleged offender is a foreigner, who is not even present in the Republic of South Africa, or reasonably expected to be present in the near future.'

[29] Passages quoted from the answering affidavits on behalf of the Commissioner in this and the following paragraph are significant. At para 44 of the answering affidavit of the then Commissioner, the following appears:

'The most fundamental provision is section 205 of the Constitution. Upon a proper reading and interpretation of section 205 it is clear that the obligations on the SAPS to investigate crime are territorially limited to the inhabitants of the Republic and their property.'

[30] At para 149 of the same affidavit he stated the following:

'The domestic ICC Act does not enjoin the SAPS to investigate crimes extra-territorially referred to therein. "International law" similarly places no such obligation on the SAPS. Instead, as already stated above, international law (including agreements and conventions giving effect thereto) places a strict obligation on, *inter alia,* the SAPS not to encroach upon the sovereignty of another state. I am advised that it is therefore significant that the First Applicant failed to point to any specific provision in either the domestic ICC Act or to what it refers as "international law", which would provide a basis for the SAPS's alleged obligation. I therefore reject the contentions made in these paragraphs and repeat my evidence given in paragraphs 43 to 56 *supra*.'

[31] It is with respect, difficult to discern a consistent thread in the reasoning of the court below. Fabricius J concluded that the HPCLU, the NPA and the SAPS all have obligations in terms of the applicable law to investigate the matter placed before them by the SALC and the ZEF. Before making the order, the learned judge stated that it was not his intention to place any obligation on the first and second respondents over and above those required by the relevant legislation. That notwithstanding, he made the extensive order set out in para 1 above.

The Law

[32] As far as can be ascertained, this case is the first in which the question of South Africa's competence to investigate crimes against humanity has arisen directly. It is therefore necessary to contextualise this dispute within the broader parameters and principles of Public International Law (PIL). A core principle of PIL which has assumed customary status is that of state sovereignty. Sovereignty dictates that states are

empowered to act at their discretion within their own territory.[4] A state's jurisdiction, being 'the authority that a state has to exercise its governmental functions by legislation, executive and enforcement action, and judicial decrees over persons and property',[5] is derived from its sovereignty.

[33] As far back as 1927, the Permanent Court of International Justice outlined the strictures imposed by international law upon a state. In the case of *The S.S. Lotus*[6] the following was said:

'Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'

[34] In this regard a distinction is generally drawn between three forms of jurisdiction.[7] *Prescriptive* jurisdiction empowers states to proscribe certain conduct through either their common law or national legislation; *enforcement* jurisdiction enables states to enforce those prescriptions, including through investigations and prosecutions; and *adjudicative* jurisdiction is the state's capacity to determine the outcome of a matter pursued through the exercise of enforcement jurisdiction by way of, *inter alia*, adjudicating what has been prescribed.

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[4] J Crawford *Brownlie's Principles of Public International Law* (8 ed, 2012) at 447. See *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI Article 2(1).
[5] J Dugard 'Jurisdiction and international crimes' in J Dugard SC, M du Plessis, A Katz SC and A Pronto *International Law: a South African Perspective* (4 ed, 2011) at 146.
[6] *The Case of the S.S. Lotus (France v Turkey)* (1927) PCIJ Series A No. 10 at 18-19.
[7] See R O'Keefe 'Universal jurisdiction: Clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735 at 736.

[35] In the context of prescriptive criminal jurisdiction, international law traditionally recognises several bases for jurisdiction, including territoriality, nationality, residence, and the commission of acts which are considered to prejudice a state's safety and security.[8]

[36] Thus the restrictions on jurisdiction are not absolute and in *Lotus* the Court went on to say:

'It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'[9]

Despite this, a state's capacity to *enforce* and *adjudicate* over its domestic laws is severely restricted to its own territory, absent the consent of a foreign state.

[37] In the decades following World War II concern about continuing abuses of human rights led the international community and individual states to start thinking more seriously about measures to combat such offences both within their own countries and internationally. Crimes that struck at the whole of humankind and impinged on the

[8] J Dugard 'Jurisdiction and international crimes' in Dugard *et al International Law: a South African Perspective* (4 ed, 2011) at 148-154.
[9] *The Case of the S.S. Lotus (France v Turkey)* (1927) PCIJ Series A No. 10 at 19.

international conscience led to greater efforts to ensure that their perpetrators do not go unpunished. This has rightly been described as a struggle against impunity. The intention was that crimes against humanity of the kind described above should be criminally punishable.

[38] Alongside developments at the level of international criminal law there were international efforts promoting human rights. In relation to the latter, a former South African Chief Justice had the following to say:

'During the second half of the last century, we saw the establishment of human rights orders in the democracies of Europe, Canada, and India; the embrace of constitutionalism and respect for fundamental rights and freedoms in various countries emerging from repression in Europe, Asia, Africa, and South America; and a growing respect in established democracies for the importance of human rights and fundamental freedoms. These changes were strengthened by regional conventions upholding human rights in Europe, America, and Africa, the most effective of which has been the European Convention on Human Rights and Fundamental Freedoms. The influence of the [United Nations] Charter and the Universal Declaration is apparent in these developments.'[10]

South Africa itself experienced a monumental change: from the scourge of an apartheid state to a democracy based on the Rule of Law and respect for human rights. I pause to observe that it is a sad indictment against humanity that, as international human rights instruments proliferate, so do human rights' violations.

[39] This increased consciousness of human rights and fighting impunity gave rise to an emerging and sometimes contested additional basis for prescriptive jurisdiction, namely the idea of universality[11] which suggests that states are empowered to proscribe conduct that is recognised as '[threatening] the good order not only of particular states

[10] A Chaskalson 'How Far Are We from Achieving the Goals of the United Nations' Declaration of Human Rights?' (2009) 24 *Maryland Journal of International Law* 75 at 76.
[11] J Crawford *Brownlie's Principles of Public International Law* (8th ed, 2012) at 467.

but of the international community as a whole. They are crimes in whose suppression all states have an interest as they violate values that constitute the foundation of the world public order'.[12] Accordingly, this basis for jurisdiction is not tied to the state's territory or some other traditional connecting factor, but is rather grounded in the universal nature of the offence committed. At customary international law, such international crimes include piracy, war crimes, crimes against humanity, genocide and torture.[13]

[40] Developments at the level of conventional international law have, to an extent, mirrored that at customary international law, with the establishment of the International Criminal Court by way of the Rome Statute[14] in 1998 being a codification of sorts thereof. Du Plessis[15] describes the factual history leading up to the drafting and adopting of the Statute as follows:

'The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome Conference. The conference was specifically organized to secure agreement on a treaty for the establishment of a permanent international criminal tribunal. After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it . . . , and 21 abstained. By the 31 December 2000 deadline, 139 states had signed the treaty. The treaty came into force upon 60 ratifications. Sixty-six countries – six more than the threshold needed to establish the court – had ratified the treaty by 11 April 2002 . . . To date, the Rome Statute has been signed by 139 states and ratified by 117 states. Of those 117 states, a significant proportion – 31 – are African. South Africa is a party to the Statute and has been a vocal endorser of the International Criminal Court. One significant absentee amongst the ratifications is that of the United States.'

[41] The preamble to the Statute reads as follows:

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[12] J Dugard 'Jurisdiction and international crimes' in Dugard *et al International Law: a South African Perspective* (4 ed, 2011) at 157.
[13] *Ibid* at 157-158.
[14] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).
[15] M du Plessis 'International criminal Courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute' in Dugard *et al International Law: a South African Perspective* (4 ed, 2011) at 173.

'**Conscious** that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must no go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, . . .'

[42] The Rome Statute's structures of international criminal justice are grounded in the core principle of complementarity. The Statute devises a system of international criminal justice wherein the primary responsibility for the investigation and prosecution of those most responsible for serious violations of international law rests with domestic jurisdictions.[16] In principle, a matter will only be admissible before the ICC where the State Party concerned is either unable or unwilling to investigate and prosecute,[17] which operates so as to ensure 'respect for the primary jurisdiction of States' and is based on 'considerations of efficiency and effectiveness'.[18]

[43] By way of its enactment of the ICC Act, the South African legislature complied with its obligations as a State Party to the Rome Statute to take measures at national

[16] Rome Statute Article 1 read alongside Preamble para 4 and Articles 17 & 18.
[17] Rome Statute Article 17(1).
[18] Office of the Prosecutor, *Informal Expert Paper: The principle of complementarity in* practice (30 March 2009) ICC-01/04-01/07-1008-AnxA at 3.

level and to ensure national criminal jurisdiction over the crimes set out in the Rome Statute.[19] The long title of the ICC Act reads as follows:

'To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for cooperation by South Africa with the said Court; and to provide for matters connected therewith.'

[44] The preamble to that Act gives good insight into its motivation:[20]

'MINDFUL that-

- ∗ throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law
- ∗ the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;
- ∗ the Republic of South Africa is committed to-
    - ∗ 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 of the International Criminal Court, 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 International Criminal Court, created by and functioning in terms of the said Statute; and
    - ∗ carrying out its other obligations in terms of the said Statute; . . .'

[19] Preamble to the Rome Statute read alongside Articles 1 and 5. These crimes are war crimes, genocide and crimes against humanity.
[20] AJ Burger *A Guide to Legislative Drafting in South Africa* (2009) at 45.

[45] The primary objects of the ICC Act are set out in sections 3(*a*) and (*b*) and read as follows:

'The objects of this Act are-

(a) to create a framework to ensure that the Statute is effectively implemented in the Republic;
(b) to ensure that anything done in terms of this Act conforms with the obligations of the Republic in terms of the Statute; . . .'

[46] In the Act 'a crime against humanity' is defined as 'any conduct referred to in Part 2 of Schedule 1'. The crimes listed in that part of Schedule 1 include murder, extermination, deportation or forcible transfer of a population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization or any other form of sexual violence of comparable gravity, persecution of any identifiable group or collectivity based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, enforced disappearance of persons, apartheid, and *torture*. In the same Schedule, torture is defined as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain arising only from, inherent in or incidental to, lawful sanctions'. Put simply, in relation to the present case, the acts complained of, if established, would amount to punishable offences in terms of the ICC Act.

Interpreting the provisions of the ICC Act

[47] I now turn to consider the Commissioner's case relating to the interpretation of the provisions of the ICC Act, which is the fulcrum upon which the present appeal turns. It is difficult to discern a coherent and consistent view by the Commissioner. The attitude appears at times to be that the ICC Act has no extra-territorial application and that conduct committed in another country is not a crime in South Africa. At other times it appears to be that an insufficient basis has been laid for a proper investigation and that further investigation would be impractical if not impossible because, in order to conduct such an investigation, a visit to Zimbabwe and interviews there with Zimbabweans would be necessary and that could only be done with the co-operation of Zimbabwean authorities, which may not be obtained. Furthermore, South Africa's relations with Zimbabwe would be negatively impacted. The case on behalf of the NDPP was rather more restricted, namely that the power to initiate investigations in cases such as the one under discussion lies with the SAPS.

[48] In support of the view set out in the preceding paragraph, it was contended on behalf of the Commissioner that ss 4(1), 4(2) and 4(3) of the ICC Act precluded an investigation being initiated. It is necessary to consider those provisions and the Commissioner's assertions in that regard.

[49] Section 4 of the Act, entitled 'Jurisdiction of South African courts in respect of crimes', reads as follows:

'(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.

(2) Despite any other law to the contrary, including customary and conventional international law, the fact that a person –

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior,

is neither –

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.

(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.'

[50] It was contended on behalf of the Commissioner that the crimes contemplated in s 4(1) are only deemed to have been committed once one or more of the connecting factors in relation to the alleged perpetrators set out in subsections 4(3)*(a)* to *(d)* has been established. More particularly in the present case, so the contention went, actual presence in South Africa by the perpetrator is required in terms of s 4(3)*(c)*. In support of that contention it was rightly submitted that it is a fundamental principle of our criminal law that a person being prosecuted should be present during his trial. Thus, s 35(3)*(e)* of our Constitution guarantees that a person may not be tried *in absentia*. It was

submitted on behalf of the Commissioner that since the actual presence in South Africa of the alleged perpetrators could not be firmly established, it was futile and wasteful to initiate an investigation in respect of a prosecution that had no prospect of getting off the ground. It was submitted that on the facts (particularly given the publicity to which I alluded in para 10) it was highly improbable that any of the alleged perpetrators would in the future set foot in South Africa. The core contention on behalf of the Commissioner was that for the purposes of s 4(3)*(c)* a crime could not be considered to have been committed until and unless the alleged perpetrator set foot on South African soil and that, in any event, the facts were such that an investigation with a view towards a prosecution and adjudication was fanciful.

[51] These submissions in relation to the interpretation and application of s 4 of the ICC Act are patently fallacious. In the light of the progressive development of the idea of universality, prescriptive jurisdiction is no longer necessarily limited in the manner suggested on behalf of the Commissioner. Section 4(1) read with the definitions of 'crimes' and 'crimes against humanity' and Part 2 of Schedule 1 makes the alleged conduct complained of by the respondents, notwithstanding that it was allegedly committed extraterritorially, a crime in terms of our law. As best as can be discerned, the submission on behalf of the Commissioner was that the conduct complained of is only *deemed* to have been committed upon the perpetrator's arrival in South Africa. This submission on behalf of the Commissioner has as a corollary that once a perpetrator departs the country the conduct complained of ceases to be a crime. Moreover, the express and clear provisions of the Act do not allow such a construction and it is at odds with the fundamental principle of criminal law that conduct can only constitute a crime and attract a punishment if it was criminalised at the time that it occurred. This is expressed as the *nullum crimen, nulla poena sine praevia lege poenali* principle.[21] Read correctly, the provision criminalises such conduct at the time of its commission, regardless of where and by whom it was committed.

[21] J Burchell & J Milton *Principles of Criminal Law* (3 ed, 2010) at 104.

Investigative competence

[52] In their heads of argument, the respondents submit the following emphatically:

'2. The only issue in this appeal is whether the South African Police Service ("*SAPS*") and the National Prosecuting Authority ("*NPA*") have the power to investigate crimes against humanity allegedly committed in Zimbabwe by Zimbabwean nationals who come to South Africa from time to time.'

To determine that issue it is necessary to consider the powers of the SAPS and the NPA in relation to the investigation of crimes generally as well as those crimes proscribed in the ICC Act more specifically. On this aspect it is necessary to look at the Constitution and domestic legislation.

[53] Section 205(3) of the Constitution provides:

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

[54] Section 13(1) of the SAPS Act reads as follows:

'Subject to the Constitution and with due regard to the fundamental rights of every person, a member [of the SAPS] may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.'

Section 17C of the same Act establishes within the SAPS a special Directorate for Priority Crime Investigation, and sets out the composition of that Directorate, which as I have stated is now known as the Hawks. The effects of ss 16(1), 16(2)(*iA*) and Item 4 of the Schedule to the SAPS Act is to classify all offences under the ICC Act as 'national priority offences'. Importantly, s 17D(3) provides that if the head of the Special

Directorate has reason to suspect that a national priority offence has been committed, he or she may request the NDPP to designate a Director of Public Prosecutions 'to exercise the powers of section 28' of the NPA Act, that is, to investigate the offence by interrogating witnesses in terms of s 28 of the NPA Act.

[55] Whilst it is true that s 4(3) of the ICC Act does not expressly authorise an investigation prior to the presence of an alleged perpetrator within South African territory, it also does not prohibit such an investigation. In fact, there is no mention of an investigation in relation to an envisaged prosecution and adjudication. However, as set out above, the necessary investigative powers are located in the Constitution and related legislation, namely the SAPS Act and the NPA Act. Having regard to the proper interpretation of s 4 read with s 1 and Schedule 1 to the ICC Act, and the provisions referred to in the preceding paragraphs, it is clear that the SAPS, in the form of the Hawks, has the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially.

[56] It will be recalled that the exercise of enforcement jurisdiction is limited to within a state's own territory. Accordingly, the competence to investigate only persists within South Africa's borders, absent the consent or co-operation of foreign states. I think it is necessary to record that the respondents have not called for the requested investigation to extend outside of the borders of South Africa. In fact, they offered to make the victims and other Zimbabwean nationals available to the South African authorities in South Africa. Put more explicitly, the respondents submit that it is not necessary for the South African authorities to travel to Zimbabwe to conduct the investigation there. In summary therefore, to the extent that the investigation is limited to within South Africa's own borders, the relevant authorities are empowered to investigate the commission of any crimes criminalised by the ICC.

Whether the circumstances warrant an investigation

[57] Having located the competence to initiate investigations of crimes of the kind under discussion, and given that the alleged conduct concerned constitutes a crime under the ICC Act, it is necessary to turn to the question of whether, in the circumstances of this case, an investigation is warranted. There is force in the submission on behalf of the Commissioner that, if there is no likelihood of the alleged perpetrator's future presence in South Africa, an investigation as a basis for a prosecution that has no prospect of getting off the ground is useless. As stated earlier adjudicative competence is subject to fair trial rights and compliance with the requirements of subsections 4(3)*(a)* to *(d)* of the ICC Act.

[58] As PIL has no conclusive rule governing the initiation of investigations where the suspect is neither present nor likely to be within the state's territory, comparable States' Party to the Rome Statute have dealt with a 'presence threshold' as giving rise to the duty to investigate in different ways. While I do not endeavour to examine those approaches exhaustively, it would be an instructive exercise to outline those which the parties have referred to and which best reflect the options that arise.[22]

[59] Under Canadian law, the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 addresses crimes of universal jurisdiction. Section 8(b) of that Act provides that a person accused of the crimes proscribed by the Act may be prosecuted if they are present within Canadian territory after the commission of the crime. While this provision is yet to be judicially interpreted, legal academics note that judicial pronouncements in similar matters indicate that some form of presence would be required before the commencement of any formal legal proceedings with a view towards a prosecution, but that no similar requirement would be imposed regarding the initiation of an

[22] Of course this is also consistent with s 2 of the ICC Act which provides that conventional international law, customary international law and *comparable foreign law* may all be considered when interpreting and applying the Act's provisions.

investigation.[23] Nevertheless, Canada's Federal Prosecution Service Deskbook – which outlines guidelines for the establishment and application of prosecutorial policy – stipulates that a fundamental principle guiding the prosecutor's discretion whether or not to institute a prosecution is the 'existence of a reasonable prospect of conviction'.[24] Presence would therefore be the guiding principle, and could thereby be extended to cover the initiation of investigations.

[60] Under Danish law, s 8(5) of the Penal Code[25] provides for universal jurisdiction over certain international crimes. The Danish criminal justice structures, particularly the Special International Crimes Office (SICO), require as a matter of policy that a suspect be present within the territory before an investigation can commence. Moreover, the ongoing nature of that investigation is dependent on the suspect's continued presence.[26] The SICO comprises both investigators and prosecutors, with the prosecutors vested with the sole discretion as to whether or not to investigate a complaint.

[61] The French system appears to require 'actual presence' for an investigation to commence. An investigation may persist despite the suspect having left French territory. In addition, in certain cases, trials *in absentia* are permitted in the courts' exercise of universal jurisdiction, a notable development.[27]

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[23] F LaFontaine 'The unbearable lightness of international obligations: When and how to exercise jurisdiction under Canada's *Crimes Against Humanity and War Crimes Act*' (2010) 23 *Revue Quebecoise de Droit International* 1 at 20-24.
[24] Public Prosecution Service of Canada, *The Federal Prosecution Service Deskbook* at s. 16.3.
[25] Penal Code (*Straffeloven*) 1930, section 8(5).
[26] Human Rights Watch 'Universal Jurisdiction in Europe: The State of the Art' Volume 18, No. 5(D) (June 2006) at 46.
[27] *Ibid* at 56.

[62] Somewhat differently, the German Criminal Procedure Code[28] expressly obliges that state's investigative authorities to commence an investigation into complaints of the commission of certain international crimes where the subject is either present or anticipated to be within the territory, provided that no other jurisdiction is carrying out a genuine investigation of the same crimes.[29] Prosecutors are vested with a discretion to refuse to initiate such an investigation if the suspect's presence is not established to be anticipated. In exercising this discretion – being a policy choice – considerations of effective resource allocation and practical capacity are relevant.[30]

[63] The United Kingdom's International Criminal Court Act, 2001 established universal jurisdiction over those crimes within the purview of the ICC. The Act is silent on the question of investigations, the commencement of which have been held to be permissible despite the suspect's absence from the territory. There is, nevertheless, a requirement of either anticipated or actual presence in order for an arrest warrant to be issued.[31]

[64] At a regional level, the African Union's Model Law on Universal Jurisdiction over International Crimes, while requiring the presence of the suspect for the duration of a trial, contains no similar presence requirement for the commencement of investigations.[32]

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[28] Germany, Code of Criminal Procedure, para 153f(2).
[29] Act introducing the Code of Crimes against International Law (*Gesetz zur Einfuhrung des Volkerstrafgesetzbuchs*), BGBI,2002 I, P 2254 (Federal Law Gazette of the Federal Republic of Germany), June 26, 2002.
[30] Human Rights Watch 'Universal Jurisdiction in Europe: The State of the Art' Volume 18, No. 5(D) (June 2006) at 29, 63-64.
[31] *Ibid* at 93-94.
[32] African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI, November-December 2011.

[65] This is consistent with the views expressed in the Princeton Principles on Universal Jurisdiction, which were devised by a group of eminent scholars of international law and aimed to consolidate prevailing approaches to universal criminal jurisdiction, despite not claiming to be either exhaustive or binding. Principle 1(2) requires that the accused person be present before the judicial tribunal trying him or her, but in the commentary to that Principle it is noted that it 'does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition, when the accused is not present'.[33]

[66] What is set out in the preceding paragraphs reveals that there is no universal rule or practice against the initiation of investigations in the absence of alleged perpetrators. In some jurisdictions anticipated presence is sufficient. Adopting a strict presence requirement defeats the wide manner in which our legislation is framed, and does violence to the fight against impunity. Conversely, adopting a policy that calls for investigations, despite the absence of any effective connecting factor, is similarly destructive in wasting precious time and resources that could otherwise be employed in the equally important fight against crime domestically. I can understand that, if there is no prospect of a perpetrator ever being within a country, no purpose would be served by initiating an investigation. If there is a prospect of a perpetrator's presence, I can see no reason, particularly having regard to the executive and legislature's earnest assumption of South Africa's obligations in terms of the Rome Statute *and* for the reasons set out in the paragraph that follows, why an investigation should not be initiated.

[67] The appellants, who throughout the litigation made common cause in resisting the relief sought by the respondents, face the following problems. First, the Commissioner and his advisors and the Acting NDPP and his advisors misconceived their powers under the ICC Act and the related legislation referred to above. They were

[33] 'The Princeton Principles on Universal Jurisdiction' published by the Princeton Project on Universal Jurisdiction (2001) at 44.

mistaken as to the meaning and import of the provisions of the ICC Act and did not fully appreciate the international obligations assumed by South Africa under the ICC Act. Second, the Commissioner's own advisors, Bester and Marion, whilst pointing to deficiencies in the preliminary investigations conducted by the respondents by way of the memorandum, nevertheless appear to recognise that the case they were presented with was not entirely without foundation and was deserving of further and better investigation. There are eyewitness accounts concerning the torture allegations that appear, at least on their face, to be corroborated by medical doctors and records and they appear to dovetail with information gathered by other organisations. The co-operation offered by SALC and the ZEF was too readily dismissed. Interested parties and victims, while not objective, have nevertheless on countless occasions been utilised by the police who maintain *their* objectivity to investigate complaints. The investigations by Marion concerning visits to the country by the alleged perpetrators do not discount entirely the possibility of future visits. This is yet another avenue for further and fuller investigation. Both appellants were fundamentally mistaken as to their competence to investigate crimes against humanity committed extra-territorially. On the basis of everything set out in this paragraph, the decision to not initiate an investigation cannot stand.

[68] It is not for this court to prescribe to the Commissioner how the investigation is to be conducted. What is clear is that on the SAPS' own version an investigation is warranted. No doubt, in conducting that investigation, the SAPS will consider issues such as the gathering of information in a manner that does not impinge on Zimbabwe's sovereignty. The SAPS is free to consider whether a request should be made to Zimbabwean authorities for a prosecution to be initiated there. It should also be left to the SAPS to consider a request for extradition or investigative assistance from the Zimbabwean authorities should they deem that to be necessary. In this regard, considerations of comity and subsidiarity will intrude, as of course will anticipated presence of the perpetrators in this country and resource allocation.

[69] As explained in paragraph 54 above, a request might well be made by the Head of the Special Directorate created to investigate National Priority offences to the NDPP; to designate a Director of Public Prosecutions to assist in the investigations. Counsel representing the respondents was requested during the hearing before us to submit a draft order on the assumption of the respondents being successful on the main issue identified above and to assume further that this court might find that the order granted by the high court was too extensive. We received that draft which included an order that the NPA be ordered to manage and direct the investigation and that the National Head of the Directorate for Priority Crime Investigation of the SAPS be ordered to request the designation of a Director of Public Prosecution to assist with the investigation. In my view, that would be putting the cart before the horse. The investigation should first be initiated and it ought to reveal which of the provisions of the applicable related legislation are implicated. It is at this stage premature to consider and debate which factors might rightfully be taken into account in relation to instituting any future prosecution.

[70] For all the reasons set out above, the following order is made:

1. Leave to appeal is granted.

2. The appeal, save to the limited extent reflected in the substituted order set out in para 3 is dismissed with costs including the costs of two counsel against the appellants, jointly and severally.

3. The order of the court below is set aside and substituted as follows:

‘3.1 The decision of the South African Police Service (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.

3.3. The National Director of Public Prosecutions and the National Commissioner of SAPS are ordered jointly and severally to pay the costs of the Southern African Human Rights Litigation Centre and the Zimbabwe Exiles Forum, including the costs of two senior counsel and one junior counsel.'

_____

MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR FIRST APPELLANT:	A Ferreira SC
	I Ellis
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
FOR SECOND APPELLANT:	C Puckrin SC
	RC Macadam
	SC Bukau
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
FOR RESPONDENTS:	WH Trengove SC
	GJ Marcus SC
	T Mofokeng
	(Heads of argument drafted by WH Trengove SC, GJ Marcus SC and M du Plessis)

Instructed by:

Lawyers for Human Rights, Pretoria

Webbers, Bloemfontein

FOR *AMICUS CURIAE*: N Fourie

J Bleazard

T Mafukidze

Instructed by:

Cliffe Dekker Hofmeyr Inc., Johannesburg

Symington & De Kock Attorneys, Bloemfontein