

# NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE V SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE AND ANOTHER 2015 (1) SA 315 (CC)

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## Introduction

On 30 October 2014 the Constitutional Court of South Africa (CC) handed down a judgment in an appeal from the National Commissioner of the South African Police Service in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and another* (the 'judgment').<sup>1</sup> The court confirmed the decision of the Supreme Court of Appeal (SCA) in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*.<sup>2</sup> The case concerned the investigative powers and obligations of the National Prosecuting Authority ('NPA') and the South African Police Service ('SAPS') in relation to alleged crimes against humanity (widespread torture) perpetrated by Zimbabwean nationals in Zimbabwe. It involved a consideration of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('ICC Act').<sup>3</sup> Put differently, the case involved the exercise of jurisdiction by a South African 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. The court ordered that the SAPS are indeed empowered to investigate the

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<sup>1</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another* 2015 (1) SA 315 (CC) ('the Decision').

<sup>2</sup> *National Commissioner of the South African Police Service v Southern African Human Rights and Litigation Centre* 2014 (2) SA 42 (SCA). For a summary of this judgment see Dire Tladi 'Introductory note to *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (SUP CT APP S AFR) (2015) 54 *International Legal Materials* 152.

<sup>3</sup> Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

alleged offences, irrespective of whether or not the alleged perpetrators are present in South Africa and, more importantly, that there was a duty on South African authorities to do.

## Background

In March 2007, a year prior to the national elections in Zimbabwe, Zimbabwean police allegedly committed potential crimes against humanity, in particular, acts of torture.<sup>4</sup> It is alleged that the Zimbabwean police committed these crimes on instruction of the ruling party.<sup>5</sup> It is important to emphasise that the allegations concerned acts of torture in Zimbabwe, against Zimbabwean nationals and by Zimbabwean nationals who were not present in South African territory.

The Southern African Litigation Centre ('SALC') collated an evidence docket concerning the commission of these alleged crimes.<sup>6</sup> This docket – known as the 'torture docket' – not only included evidence relating to the commission of the crimes, but included a comprehensive memorandum outlining the substance and procedure concerning the prosecution of crimes against humanity.<sup>7</sup> The SALC decided not to address the 'torture docket' to the Zimbabwean law enforcement agencies owing to considerations of fairness and justice.<sup>8</sup>

On 16 March 2008 the 'torture docket' was handed to the Priority Crimes Litigation Unit ('PCLU') of the NPA.<sup>9</sup> The SALC memorandum requested the NPA, through the PCLU, to consider the content of the 'torture docket' in order to decide whether or not to initiate an investigation under the Implementation of the ICC Act into the alleged acts of torture.<sup>10</sup> The memorandum stressed that in accordance with the ICC Act, the court has jurisdiction over acts of torture and crimes against humanity wherever they are committed.<sup>11</sup>

On 19 June 2009 the SAPS informed the SALC that it did not intend to initiate the investigation.<sup>12</sup> Following this decision, the SALC and Zimbabwean Exiles' Forum applied to the High Court for an order reviewing and setting aside the decision not to investigate.<sup>13</sup> The High Court issued a declaratory order that the applicant's decision not to

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<sup>4</sup> The Decision (n1 above) para 9.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id* para 10.

<sup>7</sup> *Id* para 11.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id* para 14.

<sup>13</sup> *Id* para 16.

investigate the alleged acts of torture of Zimbabwean nationals in the territory of Zimbabwe by the Zimbabwean police (also Zimbabwean nationals) during March 2007 was both unconstitutional and unlawful.<sup>14</sup> Dismissing the appeal by the government, the Supreme Court of Appeal held that in terms of the ICC Act, the SAPS are empowered to investigate the alleged crimes committed in foreign territory.<sup>15</sup> The court further held that investigations could proceed irrespective of whether the alleged perpetrators were present in the sovereign territory of South Africa.<sup>16</sup> The court ordered the authorities to initiate such investigations.<sup>17</sup> The SAPS sought leave to appeal to the CC regarding the extent to which it had a duty to investigate these allegations of torture committed in Zimbabwe against Zimbabwean nationals.<sup>18</sup>

### **Decision of the Constitutional Court**

The core legal question the Constitutional Court had to consider was whether, in light of South Africa's international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity outside of South African territory.<sup>19</sup> If this is answered in the affirmative, the question arises under what circumstances this duty to investigate is triggered. In answering this, the court treated the following issues in sequence: the relationship between international law and the South African Constitution; considerations regarding jurisdiction; whether the SAPS has a duty to investigate international crimes; and, finally, if such a duty may be limited.

#### *Jurisdictional considerations*

The court started its analysis of the concept of jurisdiction by contrasting the understanding of jurisdiction within South African criminal law with the international law understanding of the concept.<sup>20</sup> The court relied on the *SS Lotus* case<sup>21</sup> to give content to the concept of jurisdiction under international law. It highlighted the five jurisdictional grounds recognised by international law as bases for jurisdiction – territoriality; nationality; passive personality; the protective principle;

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<sup>14</sup> Ibid.

<sup>15</sup> Id para 17.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Id paras 20–21.

<sup>19</sup> Ibid.

<sup>20</sup> Id para 25.

<sup>21</sup> The case of the *SS Lotus* (*France v Turkey*) (1927) PCIJ Series A No 10 ('*SS Lotus*') 19.

and universality.<sup>22</sup> In the *SS Lotus* case the Permanent Court of International Justice specifically considered the jurisdictional grounds of territoriality and nationality and determined that there is no rule of law prohibiting a state from exercising criminal jurisdiction over a foreign national who commits acts outside the state's national jurisdiction.<sup>23</sup>

Jurisdiction under the Rome Statute and the ICC Act is based on the principles of territoriality and nationality.<sup>24</sup> The ICC is not afforded universal jurisdiction.<sup>25</sup> In order for the ICC to function, the Rome Statute provides for complementary jurisdiction over the most serious crimes.<sup>26</sup> The complementarity principle entails that state parties have the primary responsibility to investigate and prosecute crimes (falling under Part II of the Statute).<sup>27</sup> The investigation of and exercise of jurisdiction over ICC crimes, therefore, promotes the complementarity principle in the Rome Statute.

The key question, however, is whether this applies to crimes committed outside of South Africa's borders, by non-South Africans, and against non-South Africans. The court asserted, based inter alia on the permissive jurisdiction doctrine of the *SS Lotus* case, that this is not prohibited under international law. The court – although without referring to authority – stated that universal jurisdiction has found support in international law.<sup>28</sup> This is particularly the case in relation to crimes against humanity and the acts of torture allegedly committed. The court regarded torture as a crime that affects the whole of mankind, and consequently found that all nations have an interest in condemning the act of torture, regardless of the nationality of the accused or the territory where the act has been committed.<sup>29</sup> Although not a central question, the court went into some detail to illustrate that torture is not only an international crime but also a crime under South African law.<sup>30</sup> The court was, however, careful to emphasise that the exercise of authority must be limited to the territory of South Africa.<sup>31</sup> It stated

It is clear that a primary purpose of the Act is to enable the prosecution, in South African court or the ICC, of persons accused of having committed

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> See for the discussion, the Decision (n1 above) paras 26–9.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Id para 27.

<sup>29</sup> Id paras 33–40.

<sup>30</sup> Id paras 33 ff.

<sup>31</sup> Id para 26.

atrocities, such as torture, beyond the borders of South Africa. In enacting the ICC Act, South Africa declared its commitment 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 ... 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.<sup>32</sup>

In the light of the above, the court concluded that the South African authorities may, under international law, exercise jurisdiction over crimes against humanity, including torture committed abroad by non-nationals and against non-nationals. Yet the permissive principles outlined by the court could not, by themselves, be dispositive of the dispute. After all, the proposition that South African authorities may exercise universal jurisdiction cannot dispose of the question whether South Africa must exercise jurisdiction. Put another way, even if the South African authorities have a legal right to exercise jurisdiction, this does not necessarily mean they have a duty to do so. Moreover, the court's analysis of universal jurisdiction does not address the equally pertinent question of whether such jurisdiction is to be exercised in the absence of the accused. It is to these latter questions that we now turn.

### *Duty to investigate crimes where the alleged perpetrators are not present in South Africa*

The Constitutional Court confirmed the Supreme Court of Appeal's interpretation that the ICC Act only requires that a person be present during his or her trial – it does not set presence as a requirement for the launch of an investigation.<sup>33</sup> It will be recalled that section 4(3)(c) of the ICC Act provides that South Africa may exercise jurisdiction where the accused, 'after the commission of the crime, is present in the territory of South Africa'. While the National Commissioner of Police had argued that to exercise jurisdiction, the perpetrator must be present – an interpretation that appears consistent with the clear language of the provision – the Constitutional Court found that the requirement of presence applies only to court processes and not to investigations. The court stated that section 4(3) sets only jurisdictional limits on South African courts relating to prosecution; it is silent on the circumstances that

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<sup>32</sup> Id para 34.

<sup>33</sup> Id para 43.

trigger the duty to investigate crimes committed outside of South African territory.<sup>34</sup> Having surveyed various international and foreign sources, the court concluded that the ‘predominant view’ is that presence is not required for an investigation to take place.<sup>35</sup> Presence is only required at a more advanced stage in the criminal proceedings.<sup>36</sup>

The court confirmed through an analysis of the relevant sections of the Constitution, the SAPS Act,<sup>37</sup> the ICC Act, and the majority opinion in the *Glenister* case,<sup>38</sup> that the Supreme Court of Appeal had been correct in ordering that the SAPS has the power to investigate. The Constitutional Court actually went further than the Supreme Court of Appeal by pronouncing that the SAPS has a duty to investigate allegations of torture.<sup>39</sup>

The Supreme Court of Appeal held that the SAPS has the requisite power to investigate the allegations of torture. I would go further. There is not just a power, but also a duty. While the finding that the SAPS does have the power to investigate is unassailable, the point of departure is that the SAPS has a duty to investigate the alleged crimes against humanity of torture. That duty arises from the Constitution read with the ICC Act, which we must interpret in relation to international law.<sup>40</sup>

The Constitutional Court did, however, indicate that the duty to investigate is not absolute,<sup>41</sup> and pointed to two possible limitations.<sup>42</sup> First, the investigation of crimes outside of South African territory is only permissible if the country with jurisdiction over such crime is unwilling or unable to prosecute, and only if the investigation is confined to the territory of the investigative state.<sup>43</sup> In essence, South Africa may neither investigate nor prosecute international crimes in breach of considerations of complementarity and subsidiarity. Second, before a country embarks on an investigation it must consider whether it is practical and reasonable under the circumstances to do so.<sup>44</sup> A determination on practicality must be made on a case-by-case basis.<sup>45</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> Id paras 46–47.

<sup>36</sup> Ibid.

<sup>37</sup> The South African Police Services Act 68 of 1995.

<sup>38</sup> *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

<sup>39</sup> (n1 above) para 55.

<sup>40</sup> Ibid.

<sup>41</sup> Id paras 61–64.

<sup>42</sup> Id para 61.

<sup>43</sup> Ibid.

<sup>44</sup> Id para 63.

<sup>45</sup> Ibid.

These practical guidelines for deciding when to investigate crimes not committed on the territory of South Africa, by non-South Africans and against non-South Africans, illustrate that the domestic rules applicable to the investigations (and prosecution) cannot simply be transposed onto such crimes. Yet the court, in its conclusion that there is a duty to investigate, did just this. The court took the constitutional duty incumbent on the SAPS – for example under section 205 – and extended it to crimes committed abroad. This plausible reading of the constitutional obligations on South African authorities reflects the trend of expansive interpretation to give effect to the fight against impunity.

## **Conclusion**

The Constitutional Court's conclusion that South Africa may exercise universal jurisdiction over criminal conduct based both on international and domestic law, appears unassailable. The finding that in connection with investigations, the South African authorities may exercise jurisdiction even in the absence of the accused, while not similarly unassailable, is probably a reasonable conclusion.<sup>46</sup> While plausible, the conclusion that there is a duty to conduct investigations, particularly in the absence of the alleged perpetrator appears not as well founded. Perhaps it is a reflection of the court's intent to unshackle itself from the strictures of statutory constraint in an effort to contribute to the fight against impunity.

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<sup>46</sup> Id para 48.