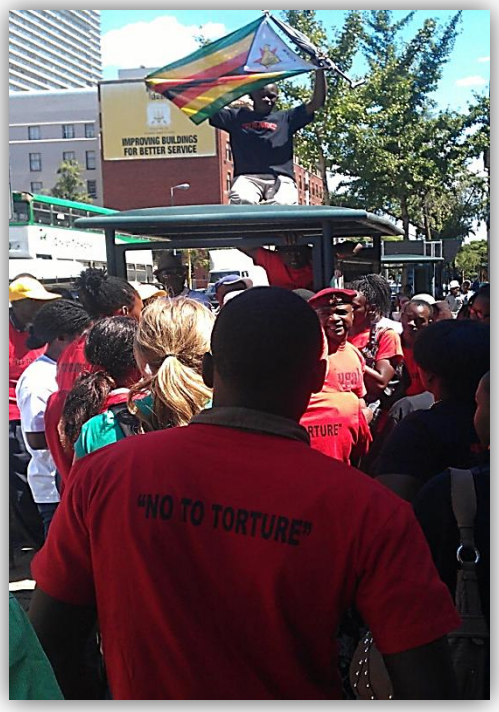
ZIMBABWE TORTURE CASE

SALC and Another v Director of Public Prosecutors and Others

Q and A

What is this case about?

- This case concerns obligations South Africa assumed when it ratified the Rome Statue of the International Criminal Court (Rome Statute). The Rome Statute is the product of the international community's commitment to prosecute perpetrators of war crimes, crimes against humanity (which includes torture) and genocide. It requires states to take the lead through the domestic investigation and prosecution of these crimes. In recognition of its obligations South Africa passed the Implementation of the Rome Statute Act of the International Criminal Court (ICC Act) incorporating the provisions of the Rome Statute into its domestic law.
- This case is five years in the making. It began with a detailed dossier submitted by SALC to the Priority Crimes Litigation Unit (PCLU), a specialist unit within the National Prosecuting Authority (NPA) responsible for the investigation and prosecution of international crimes. The primary events, which the dossier chronicles, relate to events occurring in March 2007 when Zimbabwean police raided the MDC's headquarters and detained and tortured scores of activists. The dossier made the case that torture was committed in a widespread and systematic way in Zimbabwe against political opponents of ruling party ZANU PF – that the torture amounted to crimes against humanity — and that South Africa's ICC Act gave SA authorities powers to investigate and prosecute crimes of persons who were present in South Africa after committing those crimes (even if they weren't SA nationals and the crimes had been committed outside SA). SALC maintained that the Zimbabwean officials named as perpetrators in the dossier travelled into SA on a regular basis and so could be subject to prosecution.



Zimbabweans show support outside the court

What outcomes are SALC and ZEF hoping for?

Relief relating to the NPA's/SAPS' decision

The High Court has been asked to make a finding that SALC's request was not properly considered and that the NPA and SAPS failed to give effect to South Africa's obligation to investigate and prosecute international crimes. SALC and ZEF ask that the Court set aside the decision and order the NPA and SAPS to reconsider SALC's request.

Interpreting South Africa's obligations to investigate and prosecute international crimes

If the Court upholds SALC and ZEF's arguments the Court would underline the importance of South Africa's international obligations vis-à-vis the International Criminal Court (ICC), the high principles at stake and the care and importance South Africa must accord charges of crimes against humanity, war crimes, genocide. It will be the first time a South African Court is asked to make a determination regarding South Africa's ICC Act and globally would serve to affirm the ongoing importance of universal jurisdiction laws. It will also point to the fact that international criminal justice is not only secured in the international realm but, perhaps more importantly, within domestic jurisdictions.

In a nutshell SALC and ZEF hope that the Court will provide practical content to South Africa's international and domestic obligations to prosecute serious international crimes not only committed in Zimbabwe but in any country in which these crimes occur.

Deterrent against Future Acts of State Sponsored Torture

A positive decision may not only be the first step in securing justice for the victims of the Harvest House Raid, it may also serve to deter future perpetrators from engaging in acts of torture. This decision will send out a clear message that perpetrators of international crimes will not be accommodated in South Africa, and the impunity that so many enjoy ends at the Zimbabwean, or other countries', borders.

The victims of the torture were members (or perceived to be members) of the opposition political party in Zimbabwe, the MDC, and the perpetrators were officials of the ZANU-PF government – is this case politically motivated?

The case involves incidents of state-sponsored violence, and crimes of this nature inevitably have a political component as they are generally committed against political opponents by organs of state in an attempt to suppress dissent.

However, the applicants' support for the victims of this state-sponsored torture is not political, and the political alignment of either the perpetrators or victims is unrelated to the applicants' decision to support the victims. The applicants' intention in bringing the evidence to the attention of the NPA was solely to ensure justice for victims of human rights violations.

Does this case have implications for the current state of affairs in Zimbabwe?

The outcome of this case will not directly impact the current state of affairs in Zimbabwe. However, if elections are to be held this year there is a real apprehension that they will be marked by violence and intimidation in the same way that previous elections have been. In the past there has been impunity for those responsible for state-sponsored acts of violence directed against political opponents. The applicants hope that a decision in their favour in this case will help to send a clear message to would-be perpetrators that their protection from prosecution will end at the Zimbabwe border and that South Africa will take seriously allegations of state-sponsored violence surrounding the build up to any planned elections.

Are the names of the perpetrators and victims known to the applicants and to the respondents?

The applicants submitted a full list of perpetrators and victims to the NPA in their dossier. However, for the purposes of these legal proceedings the names have been removed for security reasons. This is to ensure their protection and to prevent jeopardising any future investigations and prosecutions the names will be kept confidential.

The Second Respondent, Anton Ackermann, provided an affidavit to the Applicants. What is the significance of Anton Ackermann's affidavit?

Mr Ackermann is the Head of the Priority Crimes Litigation Unit – the unit in the NPA responsible for managing and directing investigations into international crimes. The applicants initially submitted the dossier to him, and he was of the view that the evidence in the dossier warranted the initiation of an investigation by SAPS. He has since indicated his unhappiness with the manner in which SAPS dealt with the matter as he felt that a docket should have been opened and the normal procedures for investigating a crime followed.

His affidavit is significant for a number of reasons:

- First, Mr Ackermann believed that SALC's evidence warranted further investigation, a stance SALC and ZEF have maintained throughout the proceedings.

- Second, it shows that his recommendations were ignored and the respondents actively tried to prevent his views being aired before the Court.

It demonstrates that the National Director for Public Prosecutions (NDPP) effectively usurped the role of Mr Ackermann and purported to act on his behalf indicating that the NDPP did not properly apply his mind to the issues before him and advice provided. The affidavit makes plain that Mr Ackermann was removed from the process and deliberately prevented from participating independently in the proceedings because he held an alternative view. In light of the fact that he disagreed with the NDPP and SAPS he had attempted to obtain separate legal representation as he felt that his position and views were not being placed before the court, a move that was thwarted by his superiors.

Who is representing SALC and the ZEF?

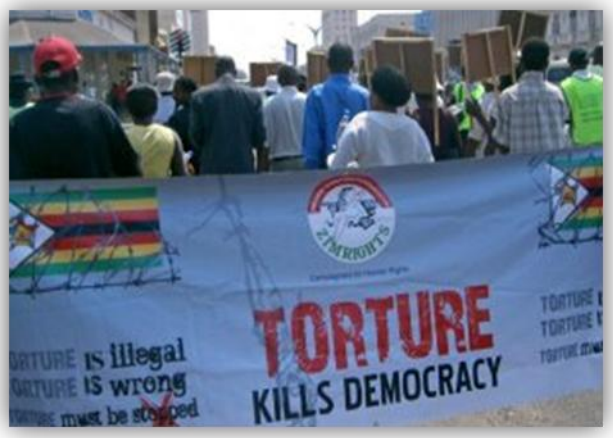
SALC and ZEF were represented by international and constitutional law experts Wim Trengove SC, Gilbert Marcus SC and Max du Plessis. Lawyers for Human Rights were the attorneys in this matter.

Who presided over this matter?

This case was argued before Judge Hans Fabiricius at the North Gauteng High Court, Pretoria.

When will a judgment be handed down?

A judgment is expected in May 2012.



The Court Diary is available on the SALC blog

http://salcbloggers.wordpress.com/

CASE ANALYSIS

LANDMARK CASE FOR INTERNATIONAL CRIMINAL JUSTICE IN SOUTH AFRICA

*By Christopher Carl Gevers**

3 April 2012

This past week a South African Court heard a landmark case on the domestic prosecution of international crimes under the principle of universal jurisdiction. The case was brought to court by the Southern Africa Litigation Centre (SALC) following unsuccessful attempts to persuade the National Prosecuting Authority (NPA) to investigate and prosecute in South Africa 17 Zimbabwean suspects for torture as a crime against humanity committed in connection with a raid on opposition headquarters in Zimbabwe in March 2007. The case was followed closely by local and international media; and the importance of the case to SALC was indicated by the fact that it briefed as its counsel three of South Africa's leading international and constitutional law lawyers, Wim Trengove SC, Gilbert Marcus SC and my colleague at the University of KwaZulu-Natal, Max du Plessis. I was fortunate to act as an adviser to the applicants on the international legal aspects of the case; and resultantly had an opportunity to witness the matter first hand as it was argued over the course of 26 to 29 March in Court 2D of the Pretoria High Court, before Judge Fabricius.

Background

On 14 March 2008 SALC hand delivered a memorandum and docket of information and evidence to the Priority Crimes Litigation Unit (PCLU) of the NPA. On 19 June 2009, after much hand-wringing by the NPA, SALC received a response from the head of the NPA advising them that the docket had been referred to the South African Police Service (SAPS), and that the SAPS had responded saying they did not intend to investigate the matter – for reasons that the NPA endorsed. These reasons included issues regarding the sufficiency of the evidence contained in the docket, ostensible problems in obtaining further evidence from Zimbabwe, concerns over whether South Africa's authorities had jurisdiction in respect of the investigation, and the fear of undermining Zimbabwe's sovereignty.

Unhappy with the decision by the NPA and the SAPS, in December 2009 SALC (together with the Zimbabwe Exiles Forum) launched a legal challenge to the decision not to pursue the matter on the basis that it was irregular and unlawful under South Africa's administrative justice principles and contrary to the rule of law. In its application SALC asked the Court to set aside the decision not to open an investigation and to order that the matter be remitted to the authorities for them to reconsider the decision. The respondents cited in the matter were the head of the NPA (First Respondent), the Director of the PCLU (Second Respondent), the Director-General of Justice and Constitutional Development (Third Respondent) and the National Commissioner of Police (Fourth Respondent).

After a year of pleadings being exchanged, the matter was set down for hearing in the Pretoria High Court last week. On the eve of proceedings the case took an interesting turn when one of the senior Prosecutors (the Second Respondent) – who had previously indicated his intention to abide by the decision of the Court – deposed to an affidavit that alleged he had been sidelined within the NPA because of his view that the SAPS's reasons for refusing to initiate an investigation were flawed.

Arguments before the Court

A large portion of the arguments were directed at the domestic legal aspects of the application, in particular (i) the standing of the applicants; (ii) the competence of the Court to review the decision of the NPA not to prosecute (based on the acceptance of the police decision not to investigate); and (iii) the correct division of responsibilities between the NPA and the police in respect of the investigation of international crimes. Those arguments, while interesting, are not the focus of this post. Suffice it to say that, in my opinion, none presented an obstacle to the success of the applicants' case.

Rather, I'd like to focus on what I consider the three most interesting aspects of the case: the sufficiency of evidence, the question of jurisdiction and the comity-related concerns.

The sufficiency of evidence for the purposes of investigation

In his written submissions to the Court, the First Respondent (head of the NPA) placed considerable emphasis on the apparent insufficiency of the evidence contained in the docket handed over by SALC as a basis for an investigation and possible prosecution. This line of argument was somewhat contradicted by the police's response to the docket, which castigated SALC for going too far in its investigations by taking witness statements. This inconsistency led counsel for the applicants, Trengove SC, to remark that the respondents were collectively asking for a 'Goldilocks docket' in order to investigate: not too much, not too little.

In any event, the First Respondent argued that, in the absence of domestic law in respect of the appropriate standard of evidence required to initiate an investigation, the Rome Statute provisions on sufficiency of evidence had been followed by the NPA in its consideration of the docket. On this basis the First Respondent went on to cite a number of cases from the ICC and the ICTY relating to the sufficiency of evidence. However, in doing so counsel for the First Respondent failed to distinguish between the different evidentiary burdens that apply at different stages of proceedings. For example, he cited case-law from the confirmation of charges phase (*The Prosecutor v. Bahar Idriss Abu Garda* and *The Prosecutor v. Callixte Mbarushimana*), and from the trial phase (*Prosecutor v Lubanga*).

In doing so, the First Respondent placed considerable reliance on the Abu Garda and Mbarushimana confirmation of charges decisions, but did not cite the Kenya Authorisation Decision, where the Pre-Trial Chamber considered in some detail the evidentiary basis necessary for the initiation of an investigation.

Nor did he cite articles 15(2) and 53(1)(a) of the Rome Statute. By doing so the First Respondent pushed into service the higher evidentiary burden for the confirmation of charges ('substantial grounds to believe'), rather than the appropriate standard for the commencement of an investigation ('reasonable basis to believe'). In so doing, the applicants argued that the NPA had committed one amongst many material errors of law in deciding to accept the police's decision not to initiate an investigation. Nor, incidentally, would it have been wise for the NPA to rely on the appropriate evidentiary standard, as it was conceded by the respondents in the papers that the docket provided by SALC established a reasonable suspicion that crimes against humanity had been committed.

The 'Gordian knot' of jurisdiction

The parties' submission on jurisdiction were aimed at answering three separate questions: First, whether and on what basis South African courts would be able to exercise 'universal jurisdiction' over the crimes in question. Second, whether it was necessary for South African courts to have jurisdiction in order for the police to investigate the crime. Third, whether the investigation of crimes that took place in Zimbabwe would violate that country's sovereignty.

The first question turned on the correct interpretation of the jurisdictional clauses of South Africa's Implementation of the Rome Statute Act 27 of 2002 (the ICC Act). Section 4(1) of the ICC Act states:

> *'Despite anything to the contrary in any other law in the Republic, any person who commits [an international] crime, is guilty of an offence.'*

Then, section 4(3) states:

> *'In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if –*
>
> *(a) …*
> *(b) …*
> *(c) that person, after the commission of the crime, is present in the territory of the Republic …'*

In their submissions on jurisdiction, the applicants relied on the distinction between prescriptive and enforcement jurisdiction. Accordingly, section 4(1) of the Act prescribes international offences as crimes under South African law and does so without any reference to the locale of the crime or the presence of the accused. By contrast, section 4(3)(c) sets out the conditions under which South African courts can exercise enforcement jurisdiction over the crimes. While accepting that courts cannot exercise enforcement jurisdiction over the crimes until the person is present in the Republic, the applicants rejected the construction that South Africa's prescriptive jurisdiction over such crimes was similarly conditioned on the presence of the accused. This must be the case, according to the applicants, because: (i) if it were not it would create an absurd situation where a crime was inserted into South Africa's criminal law when the accused appeared, and then deleted therefrom should he leave the Republic, and (ii) were the crime only prescribed at the time of the accused entry into the Republic it would violate the principle of legality in that it would amount to a retroactive application of criminal law. This would not only offend South Africa's international human rights obligations, but also violate the South African Constitution, which contains a prohibition on retroactive application of criminal law.

Therefore, according to the applicants, it is incorrect to say that South African courts do not have jurisdiction over these crimes until the accused is present in the Republic, rather under section 4(3)(c) the enforcement of such jurisdiction was merely subject to the same territorial limitations as other 'traditional' bases of jurisdiction. On this reasoning it was preferable, said the applicants, to understand section 4(3)(c) as motivated by the South African legislature's concern to avoid trials *in absentia*.

The respondents' arguments on jurisdiction were difficult to follow. While the First Respondent appeared to abandon his jurisdiction points in oral argument, in the NPA's written submissions the distinction between prescriptive and enforcement jurisdiction was accepted in principle.

Both the applicants and the respondents relied on the Canadian Supreme Court decision in *R. v. Hape* [2007] 2 S.C.R. 292, 2007 SCC 26 in support of their contentions on this point, with the applicants also citing the subsequent decision in *Canada (Justice) v. Khadr* [2008] SCC 28. I have my doubts about the usefulness of *Hape* and *Khadr* in this regard, aside from setting out the general rules relating to the exercise of extraterritorial jurisdiction and the broad principle (relied on by the applicants) that deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (Hape, at paras. 51, 52 and 101, per LeBel J.).

Comity-related concerns

Equally interesting, though less laudable to some, were the arguments raised by the state regarding the political considerations of the proposed investigation and any resultant prosecutions. Arguments of this species appeared throughout the papers, implicitly and explicitly. They concerned not only the effect of such action on inter-state relations, and in this regard South Africa's role as the SADC mediator in Zimbabwe was specifically raised, but also the effect on relations between functionaries of the police forces of South Africa and Zimbabwe. While these arguments overlap with the sovereignty-based arguments, they are distinct in that they maintain that South Africa *ought* not investigate the crimes in Zimbabwe for policy reasons, not that they are legally prohibited from doing so under the principle of sovereign equality.

The consideration of these arguments split into two distinct enquiries: (i) whether such considerations are relevant; and (ii) at which stage (and by whom) these should be considered.

The applicants argued that it was not the task of the police, at the *investigatory phase*, to raise these foreign policy considerations as an excuse not to investigate. If indeed these foreign policy considerations are relevant at all, then they are to be considered by the head of the NPA, with advice from the Ministry responsible for international relations, at a later stage in the proceedings.

In any event, as the applicants argued, arguments of this nature are precursors to an immunity claim which some (though not all) of the suspects might be entitled to raise at a latter stage should prosecutions be undertaken. However, as I've discussed elsewhere, the consensus appears to be that the ICC Act has pre-empted such arguments through the inclusion of section 4(2)(a), which provides that notwithstanding "any other law to the contrary, including customary and conventional international law, the fact that a person … is or was a head of State or government, a member of a government or parliament, an elected representative or a government official … 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".

Most commentators have interpreted this provision as removing personal immunity of foreign officials before South African courts. Based on this understanding, the applicants argued it would appear nonsensical for a court to allow considerations of comity to derail an investigation into the commission of international crimes, when the legislature has expressly negated the relevance of comity at the prosecution stage through the removal of personal immunity. (That argument would lose its force significantly if (as I've argued elsewhere) section 4(2)(a) of the ICC Act removes the *functional* immunity of persons tried under the Act, and does not address *personal* immunity *per se*.) Additionally, the applicants contended that various other provisions of the ICC Act – not least of all the Preamble – suggest that the consideration of comity as a basis for non-investigation is inimical to South Africa's commitment to combat impunity for international crimes.

Following three days of argument the Court reserved judgment. It remains to be seen which peg the Court will decide to hang its decision on. The nature of a review application is such that the Court might choose not decide every issue raised by the applicants in respect of the impugned decision. In fact, it need only find fault with one as a basis for concluding that the decision must be set aside. The upshot of this is that should the Court find in favour of the applicants, it might base its decision on an isolated misdirection of law, or a misconstruction of authority by one or more of the respondents, and leave the more interesting (and admittedly more vexed) questions of jurisdiction and comity unanswered.

Having witnessed the judge's handling of the case, I would certainly not characterize him as a shrinking violet, quite the contrary. Equally so, it was clear that he had a complete and considerable grasp of all of the complex issues raised by the parties, as well as the significance of the case both from the perspective of the victims, and its broader context. All this augurs well for those of us looking for a wide-ranging, precedent-setting judgment fitting of the inaugural judicial pronouncement on South Africa's ICC Act.

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