

The Zimbabwe torture docket decision and proactive complementarity

Max du Plessis

Key points

- 1** African countries should embrace universal jurisdiction and adopt laws that facilitate perpetrators of international crimes being brought to justice.
- 2** Countries should develop and implement a domestic legislative framework to address international crimes.
- 3** The independence of the judiciary must be safeguarded.
- 4** In deserving cases, civil society ought to intervene by bringing legal action to compel governments to comply with their statutory and treaty obligations.
- 5** Countries ought to consider creating specialised domestic police, prosecution and/or judicial units that can serve to close the impunity gap.

Summary

The decision of a landmark case heard in the South African Constitutional Court means there is an obligation for states to complement the work of the International Criminal Court – extending the court's influence in prosecuting serious crimes of international concern in states where it does not have jurisdiction under the Rome Statute. The court found that the South African security authorities, exercising South Africa's universal jurisdiction, are obliged by law to investigate international crimes committed in Zimbabwe, which is not a state party to the ICC. The decision establishes a progressive framework for prosecuting international crimes, provides a powerful tool against impunity, and confirms that states can and must play a complementary role in pursuing the aims of international criminal justice in respect of non-states parties.

COMPLEMENTARITY IS A driving feature of the system created by the Rome Statute of the International Criminal Court (ICC). The ICC is expected to act in what is described as a 'complementary' relationship with states that are party to the Rome Statute. This is reflected in the preamble to the Rome Statute, while article 17 of the statute articulates the complementarity principle by stating that a case is rendered 'inadmissible' if it 'is being investigated or prosecuted by a State which has jurisdiction over it'.¹ Importantly, the ICC can act only where a state is either unwilling or unable to proceed with an international crime investigation and prosecution.

The 2014 decision of the South African Constitutional Court in *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) – henceforth referred to as the 'SALC decision' – suggests a broader understanding of complementarity that is unfolding in practice and which is worth further exploration. This broader understanding in certain respects falls within the notion of positive complementarity, perhaps better phrased as 'proactive

complementarity’ – a term meaning that the ICC and states should actively encourage genuine national proceedings where possible, and that national and international networks should be relied upon as part of a system of international cooperation.²

The motivating force behind positive complementarity is the understanding that the ICC and domestic jurisdictions share a common responsibility.³ Because of this shared vision, there is an opening for domestic criminal-justice institutions and the ICC to act as a complement to one another. It is then possible to see ‘positive complementarity as the opposite of “passive” complementarity’. In other words, positive complementarity is a concept that ‘welcome[s] and encourage[s] efforts by States to investigate and prosecute international crimes and recognize[s] that such national proceedings may be an effective and efficient means of ending impunity’.⁴

The motivating force behind positive complementarity is the understanding that the ICC and domestic jurisdictions share a common responsibility

To date, this idea of positive complementarity has largely been confined to describing the partnering between the ICC and states parties in respect of situations or crimes over which the ICC or the state party both have potential jurisdiction under the Rome Statute. Thus, in the first place, the Rome Statute’s principle of complementarity is predicated on a mutual relationship between the ICC and states parties, but ultimately in the service of cases over which the ICC has jurisdiction or potential jurisdiction.⁵ Under complementarity, the exercise of that jurisdiction by the ICC would be prevented if a state party or a non-state party demonstrated a good-faith willingness and ability to prosecute the offender before a domestic court.⁶ But the ICC would have to have potential jurisdiction in the first place for the complementarity principle to be operative under the Rome Statute. This is for the simple reason that the ICC cannot operate, and the standard principle of complementarity will not apply, in respect of a case over which the ICC does not have jurisdiction.

However, it is possible to think about complementarity even more positively than that, in the sense that it can be extended to those cases where the ICC would not ordinarily have jurisdiction. In such cases, the practice of ‘universal jurisdiction’, or the exercise of criminal jurisdiction ‘based solely on the nature of the crime’,⁷ becomes important.⁸ The ICC does not exercise universal jurisdiction.⁹ However, states do, and it is here that the real potential lies for states to not just complement, but also augment the work of the ICC – acting where the ICC is unable to for lack of jurisdiction.¹⁰

To illustrate this, consider, for example, crimes that might be committed in Zimbabwe. Zimbabwe is not a state party to the ICC. Hence, failing a UN Security Council referral,¹¹ or an ad hoc referral by Zimbabwe itself,¹² the ICC does not have jurisdiction in relation to the crimes committed by Zimbabwean nationals on Zimbabwean territory. Accordingly, for the ICC, the question of complementarity vis-à-vis Zimbabwe does not arise under the Rome Statute.¹³

But what about a neighbour, like South Africa, which is a state party to the Rome Statute? Could South Africa, assuming universal jurisdiction under its ICC implementation legislation, or the like,¹⁴ not play a vital complementary role to the ICC

MAY

2012

THE HIGH COURT FOUND, IN WHAT BECAME KNOWN AS THE ZIMBABWE TORTURE DOCKET MATTER, THAT THE STATE’S FAILURE TO OPEN AN INVESTIGATION WAS UNLAWFUL AND UNCONSTITUTIONAL

by investigating and prosecuting Zimbabwean offenders, where the ICC does not have jurisdiction? South Africa's ICC implementation legislation, for instance, provides for this.¹⁵ Indeed, given its proximity to the offences that might be committed by its neighbour, and precisely because the ICC does not have any jurisdiction in relation to it, there is scope for contending that a state party (like South Africa), which does have jurisdiction, could and should proactively complement the work of the ICC in situations where the ICC is unable to do so because it lacks jurisdiction under the Rome Statute, or because the international community has proved unwilling, through the UN Security Council, to refer the situation to the ICC.

Notably, the South African Constitutional Court has endorsed this approach to complementarity in its SALC decision:¹⁶

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

Although an assertion of universal jurisdiction falls under the exercise of a state's criminal jurisdiction and is legally distinct from the Rome Statute, that assertion of universal jurisdiction may also be described as a means of achieving a positive and buttressing complementarity between a state party and the ICC. The Constitutional Court's endorsement of this proactive form of complementarity in the SALC decision warrants further discussion.

The court found that there was no evidence that Zimbabwean authorities were willing or able to pursue an investigation into torture committed in that country. It also found that it would be reasonable and practicable for the South African authorities to investigate the complaint given the proximity between South Africa and Zimbabwe, the likelihood that the accused would be present in South Africa at some point, and the reasonable possibility that the South African police services would be able to gather evidence that may satisfy the elements of the crime of torture.

The SALC decision and the Zimbabwe torture docket

On 30 October 2014, the Constitutional Court of South Africa handed down its judgment in a landmark case concerning the South African Police Service's (SAPS) responsibilities under domestic and international law to investigate international crimes. The case concerned allegations of widespread torture, amounting to crimes against humanity, committed in Zimbabwe. The decision by South Africa's highest court reaffirms the obligations set out in South Africa's implementation of the ICC Act 27 of 2002 (the ICC Act) regarding the duty to investigate and prosecute international crimes. The background to this matter is as follows.¹⁷

In March 2008, a South African-based public-interest litigation NGO, the Southern Africa Litigation Centre (SALC), submitted a dossier to the Priority Crimes Litigation Unit of South Africa's National Prosecuting Authority (NPA) detailing allegations of torture committed against members of the political opposition in Zimbabwe in 2007. After months of hand wringing, in the end the NPA took no action. Initially, the NPA indicated that it could do so only if the police investigated the allegations and laid charges. Then, in June 2009, the NPA – through the acting National Director of Public Prosecutions – informed the SALC that the police would not investigate the allegations. As a result, the SALC, together with another NGO, the Zimbabwe Exiles Forum, approached the North Gauteng High Court to order the police to investigate, as required under the ICC Act.

The High Court found that South Africa is obliged to investigate and prosecute international crimes 'as far as possible'

In May 2012 the High Court – in what has become known as the Zimbabwe torture docket matter – found that the state's failure to open an investigation was unlawful and unconstitutional. The court ordered the SAPS to do 'the necessary expeditious and comprehensive investigation', and then for the NPA to take its decision anew.¹⁸ The High Court made a number of significant findings along the way. Firstly, it found that South Africa is obliged under international and domestic law to investigate and prosecute international crimes 'as far as possible'. Secondly, a suspect need not be present in the republic in order for an investigation to begin.¹⁹ And, thirdly, 'when an investigation under the ICC Act is requested ... political considerations or diplomatic initiatives, are not relevant at that stage'.²⁰

In November 2013 the Supreme Court of Appeal (SCA) unanimously rejected an appeal by the police and the NPA against the judgment of the High Court.²¹ The SCA, like the High Court, found that the presence of the suspect is not required in order for an investigation to begin.²² In brief, the SCA found that South Africa exercises prescriptive jurisdiction (i.e. criminalises the conduct) 'at the time of its commission, regardless of where and by whom it was committed'.²³ As it was a crime at the time of its commission, the SCA found that it was 'clear that the [police] ... [had] the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially'.²⁴ Hence, it was found that not only did the police have the competency to investigate the alleged crimes, but, according to the court, they were also *required* to do so in this case.²⁵

The police, acting alone this time, decided to appeal the matter to the Constitutional Court, which heard the matter in May 2014. In the appeal, the Constitutional Court was assisted by the submissions of no fewer than seven *amici curiae*: four academics (led by Professor John Dugard), the Tides Center, the Peace and Justice Initiative, and the Centre for Applied Legal Studies.

Not only did the police have the competency to investigate the alleged crimes, but, according to the court, they were also required to do so

In the SALC decision handed down in October 2014, the Constitutional Court found unanimously that the SAPS had flouted its legal obligations by refusing to open an investigation. Agreeing with the SCA, the Constitutional Court found that the SAPS were not only empowered to investigate the alleged crimes, but that they were under a *duty* to do so, arising from 'the Constitution read with the ICC Act' and international law.²⁶ The Constitutional Court held that the duty to investigate international crimes arose in instances where the country in which the crimes occurred is unwilling or unable to investigate and if, on the facts and circumstances of the particular case, an investigation would be reasonable and practicable.

The court's key findings were, firstly, that South Africa can exercise universal jurisdiction over such crimes under both international and domestic law; secondly, the presence of the suspect in South Africa was not required under international or domestic law in order to begin an investigation; and, thirdly, that South Africa was under an obligation to investigate such crimes under international law – and that, in terms of domestic law, such investigation is to be 'discharged through ... law-enforcement agencies' (i.e. the SAPS).²⁷

In arriving at its conclusion, the Court endorsed a robust form of universal jurisdiction, in terms of which international law does not require the presence of a suspect on a state's territory for an investigation to begin.²⁸ Neither does domestic law (and, in particular, the ICC Act) require such presence at the preliminary stages, according to the court.²⁹ The court concluded that 'the exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law'.³⁰

According to the court, there was an obligation on the South African authorities to pursue the investigation of international crimes committed in Zimbabwe. In this regard, the court noted:³¹



HAVING THE NECESSARY
DOMESTIC LAWS IN PLACE
IS CENTRAL TO ICC
COMPLEMENTARITY EFFORTS

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

Later, the court noted that this obligation 'is most pressing in instances where those crimes are committed ... within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity'.³² This is a clear judicial endorsement of the proactive complementarity discussed above. The court concluded that 'on the facts of this case the torture allegations must be investigated by the SAPS'³³ and that South Africa 'must take up [its] rightful place in the community of nations with its concomitant obligations', lest it becomes 'a safe haven for those who commit crimes against humanity'.³⁴

Concluding thoughts – proactive complementarity

The Constitutional Court's SALC decision establishes a progressive framework for the prosecution of international crimes by South African courts.

Perhaps most importantly the Constitutional Court confirms that the potential exists for proactive complementarity – in other words, for states to do domestically what the ICC is unwilling or unable to do internationally. Through this approach to complementarity domestic investigators and prosecutors act may act against international criminals, thereby ensuring that national courts uphold the international rule of law through a mutually reinforcing and complementary international system of justice.³⁵ As Professor Antonio Cassese pointed out in 2003, there was a practical basis at Rome where the ICC's statute was drafted for this principle:³⁶

It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused.

Having recognised this, countries should consider having universal jurisdiction over international crimes, as this is a powerful tool against impunity. If an investigation is not instituted by non-signatory countries in which the crimes have been committed, the perpetrators can be brought to justice only through the application of universal jurisdiction – namely,

the investigation and prosecution of these alleged crimes by states parties under the Rome Statute.³⁷

Furthermore, the Constitutional Court's decision highlights that in many cases the domestic implementation legislation in question would not have been invoked by the governments or the prosecution agencies without the intervention of civil society. In the torture-docket case, it took protracted legal action by civil society for South African government officials to comply with their statutory and treaty obligations.

Having the necessary domestic laws in place is central to ICC complementarity efforts, domestic prosecutions and fulfilling the broader aims of international criminal justice. Therefore, it is vital that the legislation include universal jurisdiction as a basis for domestic law-enforcement authorities to take action against individuals accused of committing international crimes abroad.

In addition, the Constitutional Court's decision in the SALC case confirms that domestic legislation may more easily and less controversially allow for universal jurisdiction as a complement to the work of international criminal tribunals and the ICC. That exercise of jurisdiction – through specialised domestic police and prosecution units – may be vitally important in closing the impunity gap, particularly in respect of states that are not party to the Rome Statute and where crimes are committed by their nationals or on their territories.

Investigations into international crimes are often politically contentious, and there may be a domestic unwillingness to pursue such cases

Lastly, and importantly, investigations into international crimes, under universal jurisdiction, are often politically contentious, and there may be a domestic unwillingness to pursue such cases. The Constitutional Court's decision teaches that a failure on the part of government to open investigations is not itself beyond scrutiny. As the Zimbabwean torture docket case illustrates, domestic courts have been approached to challenge government inaction. This is a new level of complementarity where civil society has requested, and one branch of government (the judiciary) has ordered, that domestic action be taken to prosecute international crimes.³⁸

The Constitutional Court's decision in the torture docket matter confirms that there is an essential supporting role for states to play in pursuing justice in respect of non-states parties. That role is particularly relevant where the ICC is unable to exercise jurisdiction. It is at those moments that national justice systems

become the courts of last resort – the means by which to close the gaps left by the UN Security Council or the ICC to deliver international criminal justice in pursuit of a common goal.

Notes

This policy brief is based in part on ISS Paper 241, published in November 2012 and authored by Max du Plessis, Antoinette Louw and Ottilia Maunganidze, titled *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*.

- 1 Article 17(1)(a), Rome Statute of the International Criminal Court (1998). See preamble and article 17 generally.
- 2 Office of the Prosecutor, Report on prosecutorial strategy, para. 2. See also Office of the Prosecutor, Report on the activities performed during the first three years (June 2003–June 2006), para. 58; Carsten Stahn, Complementarity: A tale of two notions, *Criminal Law Forum*, 19, 2008, 87–113. See further Max du Plessis, Antoinette Louw and Ottilia Maunganidze, *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, ISS Paper, 241, November 2012.
- 3 Carsten Stahn, Complementarity: A tale of two notions, *Criminal Law Forum*, 19, 2008, 101.
- 4 William Burke-White, Proactive complementarity: The International Criminal Court and national courts in the Rome system of justice, University of Pennsylvania Law School, Public Law and Legal Theory Research Paper No. 07–08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964201#PaperDownload, 19; see also William Burke-White, Implementing a policy of positive complementarity in the Rome system of justice, *Criminal Law Forum*, 18, 2007.
- 5 See further Max du Plessis, Antoinette Louw and Ottilia Maunganidze, *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, ISS Paper 241, November 2012.
- 6 According to the Rome Statute, ‘unwillingness’ exists when ‘proceedings were or are being undertaken ... for the purpose of shielding the person concerned from criminal responsibility’, there has been ‘an unjustified delay in the proceedings’ and ‘proceedings were not or are not being conducted independently or impartially’ (article 17(2)). ‘Inability’ obtains when ‘the State is unable to obtain the accused or the necessary evidence and testimony or [is] otherwise unable to carry out its proceedings’ (article 17(3)).
- 7 See principle 1(1), *The Princeton Principles on Universal Jurisdiction* (2001).
- 8 See, generally, R O’Keefe, Universal jurisdiction: Clarifying the basic concept, *Journal of International Criminal Justice*, 2:3, 2004, 735–760.
- 9 Under the Rome Statute, the ICC ordinarily exercises jurisdiction over the territory of states parties and over the nationals of states parties. Exceptionally, the ICC can exercise jurisdiction over states that accept its jurisdiction on an ad hoc basis, or when the Security Council refers a situation in any state to the court.
- 10 For further detail on this argument, see Max du Plessis, Antoinette Louw and Ottilia Maunganidze, *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, ISS paper 241, November 2012.
- 11 See article 13(b) of the Rome Statute.
- 12 See article 12(3) of the Rome Statute. Although Zimbabwe cannot technically refer a case to the court itself, as it is a non-state party, it can (as did Côte d’Ivoire) accept the ICC’s jurisdiction under article 12(3) and seek the court’s intervention.
- 13 See further Max du Plessis, Antoinette Louw and Ottilia Maunganidze, *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, ISS Paper 241, November 2012.
- 14 Although it is common for states parties to criminalise international offences under domestic law at the same time that they implement their cooperation obligations to the Rome Statute (as South Africa has done), these two acts are notionally distinct. As a function of sovereignty, states – whether party to the Rome Statute or not – are free to exercise jurisdiction over international crimes however they see fit.
- 15 See sections 4(1) and 4(3)(c) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. See also Max du Plessis, South Africa’s implementation of the ICC statute: An African example, *Journal of International Criminal Justice*, 5:2, 2007, 460–479.
- 16 *Southern African Human Rights Litigation Centre* (CC), paras 30–32 (emphasis added).
- 17 For a factual background, see *Southern African Human Rights Litigation Centre* (CC), paras 9–15; and Christopher Gevers, ‘*Southern Africa Litigation Centre and Another v NDPP and Others: Note*’, *South African Law Journal*, 139, 2013, 293.

- 18 See *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (3) All SA 198 (GNP), paras 33.1 and 33.5. For a discussion of the judgment, see Christopher Gevers, 'Southern Africa Litigation Centre and Another v NDPP and Others: Note', *South African Law Journal*, 130, 2013, 293.
- 19 *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (3) All SA 198 (GNP), paras 21 and 32.
- 20 The court added, however: 'Such considerations may become relevant at a stage when the First Respondent [the National Director of Public Prosecutions] would have to decide whether or not to order a prosecution, but even at that stage the purpose of the Rome Statute Act, and South Africa's commitment thereto, remain relevant considerations that have to be taken into account.'
- 21 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA).
- 22 *Southern African Human Rights Litigation Centre* (SCA), para. 51. For a discussion of the High Court judgment on this point, see Christopher Gevers, International criminal law, *South African Journal of Criminal Justice* (2014).
- 23 *Southern African Human Rights Litigation Centre* (SCA), para. 51, citing section 4(1) read with the definitions of 'crimes against humanity' and part 2 of schedule 1 of the ICC Act.
- 24 *Southern African Human Rights Litigation Centre* (SCA), para. 55. The court referred to section 205(3) of the Constitution, the South African Police Services Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998, and the silence of the ICC Act on the question of extraterritorial investigations.
- 25 *Southern African Human Rights Litigation Centre* (SCA), para. 3.2.2. In para 67 of its judgment, the SCA stated that the facts that led them to this conclusion included the reality that, on the evidence, the state's officials themselves 'appear to recognise that the case they were presented with was not entirely without foundation and was deserving of further and better investigation'; that there were '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'; and that the investigations by the SAPS 'concerning visits to the country by the alleged perpetrators do not discount entirely the possibility of future visits'.
- 26 *Southern African Human Rights Litigation Centre* (CC), para 55.
- 27 *Ibid.*, para 50.
- 28 The court noted: 'Investigations and the exercise of adjudicative jurisdiction confined to the territory of the investigating state are not at odds with the principle of universal jurisdiction.' See *Southern African Human Rights Litigation Centre* (CC), para. 55.
- 29 Taking a similar, but not identical approach to the SCA, the court distinguished between three forms of jurisdiction – prescriptive, adjudicative and enforcement jurisdiction – and found, in essence, that while enforcement jurisdiction is 'confined to the territory of the state seeking to invoke it', prescriptive and (in some circumstances) adjudicative jurisdiction can be applied 'universally' (that is, outside the territory of the state). *Southern African Human Rights Litigation Centre* (CC), para. 29.
- 30 *Ibid.*, para. 47.
- 31 *Ibid.*, para. 40.
- 32 *Ibid.*, para. 32.
- 33 *Ibid.*, 80.
- 34 *Ibid.*
- 35 See also William Burke-White, Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice, *Harvard International Law Journal*, 49:1, winter 2008, 53.
- 36 Antonio Cassese, *International Criminal Law*. Oxford University Press, 2003, 351, emphasis added.
- 37 See further Max du Plessis, Antoinette Louw and Otilia Maunganidze, *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, ISS Paper 241, November 2012.
- 38 *Ibid.*

About the author

Max du Plessis (B.Luris SA, LLB Natal, LLM Cambridge, PhD University of KwaZulu-Natal) is an associate professor at the University of KwaZulu-Natal and a practising advocate in South Africa. He is also an associate tenant at Doughty Street Chambers, London, and a senior research associate at the Institute for Security Studies.

About the ISS

The Institute for Security Studies is an African organisation that aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy analysis and advice, and delivers practical training and technical assistance.

Acknowledgements

The ISS is grateful for support from the following members of the ISS Partnership Forum: the governments of Australia, Canada, Denmark, Finland, Japan, the Netherlands, Norway, Sweden and the USA.

ISS Pretoria

Block C, Brooklyn Court
361 Veale Street
New Muckleneuk
Pretoria, South Africa
Tel: +27 12 346 9500
Fax: +27 12 460 0998

ISS Addis Ababa

5th Floor, Get House
Building, Africa Avenue
Addis Ababa, Ethiopia
Tel: +251 11 515 6320
Fax: +251 11 515 6449

ISS Dakar

4th Floor, Immeuble Atryum
Route de Ouakam
Dakar, Senegal
Tel: +221 33 860 3304/42
Fax: +221 33 860 3343

ISS Nairobi

Braeside Gardens
off Muthangari Road
Lavington, Nairobi, Kenya
Cell: +254 72 860 7642
Cell: +254 73 565 0300

www.issafrica.org