

The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues

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Abstract

There are two broad exceptions to the general rule that South African courts do not have jurisdiction over offences committed outside South Africa. The first set of exceptions developed by South African courts deals with offences of treason and theft. The second set of exceptions was created by the legislature and includes national and international offences. The prosecution of international offences is based on the principle of universal jurisdiction. This article examines the relevant statutory provisions relating to the offences of torture, terrorism, grave breaches of the Geneva Conventions, war crimes, crimes against humanity and genocide. It will recommend that there is a need for the relevant legislation to be amended to eliminate the ambiguities that relate to the following issues: the place where the suspect has been arrested or found; courts with jurisdiction over the offence and the individual responsible for authorising the prosecution of the offence and designation of the court; the expiry of the right to prosecute; and the prosecution of acts or omissions which took place before the commencement of the Acts.

Keywords: criminal jurisdiction, Geneva Conventions, international crimes, offences committed abroad, Rome Statute, South African courts, universal jurisdiction

1. INTRODUCTION

The general rule is that South African courts do not have jurisdiction over offences committed outside South Africa.¹ There are several exceptions to this general rule, created by courts and the legislature.

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¹ JJ Joubert, *Criminal Procedure Handbook*, 10th Ed (2011) 41.

The exceptions created by courts are treason² and theft with an element of 'bringing in'.³ Other exceptions, which are the focus of this article, were created by the legislature. There are several statutes which empower South African courts to assume jurisdiction over offences committed outside South Africa.⁴ Some of these statutes deal with offences of international nature and others with offences of domestic nature. In the case of the former category of statutes, courts exercise universal jurisdiction and in the case of the latter category, courts invoke the principle extra-territorial application of South African law. It is beyond the scope of this article to deal with offences not covered by the principle of universal jurisdiction. The purpose of this article is to examine the relevant statutory provisions relating to the offences of torture, terrorism, grave breaches of the Geneva Conventions, war crimes, crimes against humanity and genocide and recommend that there is a need for the relevant legislative provisions to be amended in order to eliminate the shortcomings that relate to some issues. A more detailed discussion of these shortcomings and how they should be addressed is dealt with below when each issue is discussed in detail. This is done for two reasons: one, to avoid having an unnecessarily lengthy introduction; and two, to avoid repeating in the body what is discussed in the introduction. One, the place

² In *R v Holm; Pienaar* 1948(1) SA 925(A). In this case, some South African nationals had worked as broadcasters for the German government when South Africa was at war with Germany and their propaganda broadcasts were heard in South Africa. The Court held that although the offence of high treason was committed in Germany, they could be tried in South Africa. The court held that 'so far as high treason committed by a subject is concerned, there exists no international custom or comity which debars a state from trying and punishing the offender no matter where the offence has been committed. The reason for this is clear: it is because high treason, committed outside of the territory of the state concerned, is an offence only against such state. No other state is interested in punishing the offender and the punishment of the offender by the state concerned does not encroach upon the rights of other states.' See page 930.

³ In *S v Kruger* 1989(1) SA 785(A) the appellants had stolen animals in the so-called 'homeland' of Bophuthatswana (which was regarded by South Africa at the time as an independent state) and brought them to South Africa. The court held that in 'bringing-in' cases: 'a person who had in terms of South African law committed theft in a foreign country could be tried [in South Africa], not because of the theft in the foreign country but because of his continued act of appropriation, with the necessary intent, within South Africa. The reason for this was that, according to South African law, theft was a continuing offence and the thief had therefore also committed theft within the borders of South Africa'.

⁴ See for example, sections 150 and 151 of the Civil Aviation Act No 13 of 2009; section 327(1) of the Merchant Shipping Act No 57 of 1951; section 2 of the South African Citizens in Antarctica Act No 55 of 1962; section 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007; section 56A of the Nuclear Energy Act No 32 of 1998; section 12 of the Prevention and Combating of Trafficking in Persons Act No 7 of 2013; section 4 of the Anti-Personnel Mines Prohibition Act No 36 of 2003; and section 110A of the Criminal Procedure Act No 51 of 1977.

where the suspect has been arrested or found and the question to be dealt with here is whether South African courts have jurisdiction in a case where a person was arrested at a place where the law in question is silent on whether he may be arrested at such a place. Some pieces of legislation provide that a suspect may be arrested at, for example, an offshore installation outside South Africa and others are silent on that aspect.

The author relies on South African case law to argue that in cases where the law is silent on that issue and a person is arrested at such an installation, South African courts do not have jurisdiction. Two, the question of courts with jurisdiction over the offence and the person authorising the prosecution of the offence, and, designation of the court will also be discussed. The discussion here will focus on whether criminal proceedings may be instituted in a magistrates' court or in a High Court; who designates the court in question – is it the National Director of Public of Prosecutions or the minister responsible for justice and the likely implications relating to the designating authority; and the question of the person authorising the prosecution will also be dealt with. In some pieces of legislation it is the National Director of Publications and in one case it is the minister responsible for justice. It is argued that it order to avoid political interference in the prosecution process, the decision relating to designating the relevant court should be left in the hands of the prosecuting authority. Three, the question of the expiry of the right to prosecute will also be dealt with. Some pieces of legislation provide that the right to prosecute in respect of some offences does not expire whereas others are silent on that issue. It is argued those pieces of legislation which are silent on this issue should be amended accordingly. The fourth issue to be discussed is whether an offender may be prosecuted for the acts or omissions which took place before the commencement of the Acts. Some pieces of legislation address that issue and others are silent on that. Recommendations are made suggesting ways through which these issues could be addressed. The author also deals with the question of private prosecutions in cases of international crimes where the National Director of Prosecutions declines to prosecute. In the light of the fact that South African courts have jurisdiction in respect of these offences on the basis of the principle of universal jurisdiction, it is imperative to discuss this principle, albeit briefly, from a South African perspective.

2. UNIVERSAL JURISDICTION IN SOUTH AFRICA: LAW AND PRACTICE

Before discussing the jurisdiction of South African courts over international offences committed abroad, it is imperative to deal briefly

with the issue of universal jurisdiction in the South African context.⁵ This is because it is the principle of universal jurisdiction which countries, such as South Africa, invoke to prosecute international crimes committed outside their borders.⁶ This position is supported by the drafting history of some pieces of legislation in South Africa.⁷ The author is aware of two cases in which South African courts have dealt with the issue of universal jurisdiction in the context of international crimes committed outside South Africa.⁸ It is these cases that will be focused on in this section.

It is imperative that the question of the sources of universal jurisdiction in South Africa be dealt with first. This question was recently dealt with by the South African Constitutional Court in the case of *National Commissioner of the South African Police Service v Southern*

⁵ It is beyond the scope of this paper to refer to all books or articles on the concept of universal jurisdiction. See in general Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2006); Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecution of Serious Crimes under International Law* (2005); and Adeno Addis, 'Imagining the international community: The constitutive dimension of universal jurisdiction' (2009) 31 *Human Rights Quarterly* 129-162.

⁶ For a discussion of the differences between extra-territorial jurisdiction and universal jurisdiction in South African context, see Du Toit et al, *Commentary on the Criminal Procedure Act*, RS 52, (2014) 16 13-15.

⁷ For example, dealing with extra-territorial jurisdiction of South African courts in human trafficking cases, section 3.10 of the Memorandum on Objects of the Prevention and Combating of Trafficking in Persons Bill, 2010 stated as follows: 'The crime of trafficking in persons is regarded as an international crime. Clause 10 gives the courts in the Republic extra-territorial jurisdiction in respect of an act committed outside the Republic which would have constituted an offence if committed in the Republic. The High Court is provided with universal jurisdiction in respect of an offence in terms of the Bill if the person to be charged is, after the commission of the offence, present in the territory of the Republic or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic. This means that the High Court has jurisdiction irrespective of where the offence was committed, by whom it was committed, or against whom it was committed.'

⁸ In *S v Basson* (2005) (12) *BCLR* 1192 (CC); 2007 (3) SA 582 (CC) the accused was charged with 67 counts, including murder, fraud, certain drug offences and conspiracy to commit various crimes most of which were allegedly committed when he worked in a division of the South African Defence Force called the Civil Co-operation Bureau and headed South Africa's bacterial and chemical warfare programme. The Constitutional Court referred to the history of prosecuting international crimes but held that on the facts of the case before it was not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. See note 147. In *Rakoto v Head: Directorate for Priority Crimes Investigation* (2012) JDR 2226 (GNP) the court imposed restrictions on the third respondent's use of his passport because he was being investigated for crimes against humanity allegedly committed in Madagascar.

African Human Rights Litigation Centre and Another.⁹ The issue before the court was whether the South African Police Service has a duty, in terms of the Implementation of the Rome Statute Act, to investigate allegations of torture as a crime against humanity committed by and against Zimbabweans in Zimbabwe. The court makes it very clear that the principle of universal jurisdiction under South African law emanates from South Africa's national and international obligations. In other words, the relevant sources of universal jurisdiction in South Africa are international law and domestic law. The Constitutional Court states that:

Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order'. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm. Furthermore, along with genocide and war crimes there is an international treaty law obligation to prosecute torture. The Convention against Torture ... obliges state parties to 'ensure that all acts of torture are offences under its criminal law', together with an 'attempt to commit torture' and 'complicity and participation in torture'. South Africa has fulfilled this international law obligation through the recent enactment of the Torture Act. In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act. Regional and sub-regional law also permits South Africa to take necessary measures against crimes against humanity, including torture. 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. The exercise of universal jurisdiction is, however, subject to certain limitations¹⁰

In the above quotation, the court holds that the sources of universal jurisdiction in South Africa are international law, that is, treaty law and customary international law on the one hand and domestic law, that is, the constitution and the relevant legislation on the other hand. The court makes it very clear that even in the absence of a specific legislation criminalising an international crime in South African law, jurisdiction could be based on international customary law. The court had to resolve the question of whether South African Police had the power to investigate allegations of torture whether or not the suspect

⁹ *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (30 October 2014) (CCT 02/14) (2014) ZACC 30.

¹⁰ *Ibid.* Footnotes omitted.

was present in South Africa. It should be recalled that the Supreme Court of Appeal had held earlier that:

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]f 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, there appears to be 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* [in the light of the evidence adduced by the defendants] ... why an investigation should not be initiated.¹¹

The Supreme Court of Appeal held further that

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's [South African Police Service] 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.¹²

It is clear from the above decision of the Supreme Court of Appeal that the presence of an alleged perpetrator of a crime against humanity in South Africa is not a prerequisite for an investigation with a view to possible prosecution, an approach equally applicable to all international crimes. What was not clear from the Supreme Court of Appeal's decision, however, was whether such a person's trial could take place in his absence. Section 35(3) of the South African Constitution provides that the accused has a right to a fair trial which includes the right for

¹¹ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA); (2014) 1 All SA 435 (SCA) para 66. Emphasis in original. For a discussion of the issue of universal jurisdiction in the context of this case see Saidat Nakitto, 'South Africa's exercise of universal jurisdiction: An analysis of the Supreme Court Decision in the *National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and others* (2013)' (2014) 3 International Human Rights Law Review 146-158. For a discussion of the issue of the Rome Statute Act and the principle of universal jurisdiction, see *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089 (GNP); (2012) 3 All SA 198 (GNP).

¹² See note 11 op cit at para 68.

his trial to take place in his presence.¹³ There are exceptions to this rule under section 159 of the Criminal Procedure Act.¹⁴ It is submitted that those exceptions are applicable only when the accused is present in South Africa.¹⁵ The Constitutional Court was later to deal with the above two issues. On the issue of the presence of the suspect in South Africa before the investigation could begin, the Constitutional Court referred to international law on the question and to practice from different countries and to Section 4 of the South African Implementation of the Rome Statute Act¹⁶ and held 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.’¹⁷ The court explained the rationale behind this reasoning:

This approach is to be followed for several valid reasons. Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation. By way of example, it is only once a docket has been completed and handed to a prosecutor that there can be an assessment as to whether or not to prosecute.¹⁸

The court added that ‘South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an

¹³ Section 35(3)(c).

¹⁴ Act No 51 of 1977.

¹⁵ In *S v Khumalo* 1991 (1) SACR 666 (NMS), at 667, it was held that ‘The section envisages three grounds which would entitle the court to order that criminal proceedings may take place in the absence of an accused, contrary to the fundamental rule that criminal proceedings may only take place in the presence of the accused ... The three exceptions to the general rule are: where the court orders that an accused be removed if he conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable (s 159(1)), or, secondly, where an accused makes application to be excused from the proceedings, and where such application is granted (s 159(2)(a)), read with s 159(2)(aa), and, thirdly, where the accused is absent from the proceedings without leave of the court (s 159(2)(b)).’

¹⁶ *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) (2014) ZACC 30 (30 October 2014) para 41-47.

¹⁷ *Ibid* at para 47.

¹⁸ *Ibid* at para 48.

extradition request.¹⁹ The court was quick to add that ‘the universal jurisdiction to investigate international crimes is not absolute’ and that there are at least two limitations on such jurisdiction.²⁰ The limitations are:

The first limitation arises from the principle of subsidiarity. It requires that ordinarily there must be a substantial and true connection between the subject-matter and the source of the jurisdiction. And once jurisdiction is properly founded, the principle of non-intervention in the affairs of another country must be observed; investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state. Simply put, we may not investigate or prosecute international crimes in breach of considerations of complementarity and subsidiarity.²¹

The Constitutional Court held that the issue of whether the trial of a person suspected of committing an international crime outside South Africa may take place in absentia was ‘an aspect which needs not concern us in this case.’²² This is because the issue that court was required to deal with was whether the police had a duty to initiate an investigation in the absence of a suspect. However, the court wrote in a footnote that there is a substantial body of literature to the effect that the exercise of universal jurisdiction in the absence of the suspect is ‘repugnant to human rights norms and values’.²³

It is not far-fetched to argue that South African courts are unlikely to preside over a matter where the person who is alleged to have committed an international crime is not present in South Africa. This is because, as mentioned earlier, the accused’s right to a fair trial including the right to be present during his trial is guaranteed under the South African Constitution. As mentioned earlier, the exceptions to this rule are designed to deal with an accused that is already in South Africa.²⁴

¹⁹ Ibid at para 49.

²⁰ Ibid at para 61.

²¹ Ibid.

²² Ibid at para 46.

²³ Ibid at footnote 48.

²⁴ Section 159 of the Criminal Procedure Act provides that ‘(1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence. (2) If two or more accused appear jointly at criminal proceedings and – (a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative – (i) that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or (ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or (b) any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court, the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment

They are not designed to deal with a person who is not in South Africa. South African courts emphasise the accused's right to be present at his trial as a fundamental right to the extent that they will not authorise the extradition of a person to a country to serve a sentence which was imposed in his absence. This is the case even if the person fled the requesting country after conviction but before sentence.²⁵ It should also be recalled that South Africa is one of the countries which during the drafting of the Rome Statute opposed the proposal that the ICC should be empowered to conduct the accused's trial in his absence.²⁶ The above discussion shows the sources and limitations of universal jurisdiction in South Africa. This leads to the issues that arose in the second case on universal jurisdiction in South Africa. In *Rakoto v Head: Directorate for Priority Crimes Investigation*²⁷ where the third respondent, the former President of Madagascar, was being investigated for crimes

or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may – (aa) in the case of paragraph (a), authorise the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and (bb) direct that the proceedings be proceeded with in the absence of the accused concerned.(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.(4) If an accused who is in custody in terms of an order of court cannot, by reason of his physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for his further detention, the court before which the accused would have been brought for purposes of such an order if it were not for the indisposition or other condition, may, upon application made by the prosecution at any time prior to the expiry of the order for his detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he be detained at a place indicated by the court and for the period which the court deems necessary in order that he can recover and be brought before the court so that an order for his further detention for the purposes of his trial can be obtained.'

²⁵ *Robinson v S* (2004) 3 All SA 267(C). In this case, the appellant was convicted by a Canadian court of sexual arrest and before the imposition of the sentence he fled to South Africa. The court sentenced him to three years' imprisonment in his absence and Canada sought his extradition to serve his sentence. The High Court held that sentencing proceedings were part of the trial and that his right to a fair trial had been violated when the sentence was imposed in his absence and therefore should not be extradited.

²⁶ See United Nations Department of Public Information Press Release L/2798, 'Trial in absentia among issues discussed by preparatory committee establishment of criminal court, 16 August 1996', available at <<http://www.iccnw.org/documents/DPI/TrialinAbsentia16Aug96.pdf>> (accessed 25 November 2014).

²⁷ *Rakoto v Head: Directorate for Priority Crimes Investigation* 2012 JDR 2226 (GNP).

against humanity he allegedly committed in Madagascar, the Court held that '[s]ection 38(d) [of the Constitution dealing with public interest litigation] introduced a fundamental and revolutionary principle of universal jurisdiction created *sui generis* by the Rome Statute as incorporated in the [Implementation of the Rome Statute of the International Criminal Court Act] ICC Act. The ICC Act empowers South Africa as a party to the Rome Statute to exercise jurisdiction over international crimes committed by any person outside of South Africa if that person after the conviction of the crime is present in the territory of South Africa'.²⁸ It is submitted that the same principle is applicable to other international crimes prosecuted on the basis of universal jurisdiction. In *S v Okah*,²⁹ which is discussed in detail below, the South African High Court held that it had jurisdiction over the accused for the offences of terrorism committed in Nigeria because he was present in South Africa.

3. JURISDICTION: THE PLACE WHERE THE OFFENCE WAS COMMITTED AND THE PLACE WHERE THE ACCUSED WAS ARRESTED OR FOUND

South African courts have jurisdiction over offences of terrorism; war crimes, crimes against humanity and genocide; torture; and grave breaches of the Geneva Conventions committed outside South Africa. Section 15(1) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act³⁰ provides that South African courts will exercise jurisdiction over a person who is alleged to have committed the offence of terrorism if:

(a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic; or (b) the offence was committed – (i) in the territory of the Republic; (ii) on board a vessel, a ship, an off-shore installation, or a fixed platform, or an aircraft registered or required to be registered in the Republic at the time the offence was committed; (iii) by a citizen of the Republic or a person ordinarily resident in the Republic; (iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic; (v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act ... or the International Air Services Act ...; (vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic; (vii) when during its commission, a national of the Republic is seized, threatened, injured or killed; (viii) in an attempt to compel the Republic to do or to abstain or to refrain from doing any act; or (c) the evidence reveals any other basis recognised by law.

²⁸ Ibidat para 11.

²⁹ *S v Okah* (SS94/2011) (2013) ZAGPJHC 6 (21 January 2013).

³⁰ Protection of Constitutional Democracy against Terrorist and Related Activities Act No 33 of 2004.

Under section 15(1)(a) what matters is that, irrespective of where the offence of terrorism was committed, the accused has been arrested in one of the following places: (i) the territory of the Republic; (ii) the territorial waters of the republic; (iii) on board a ship registered in South Africa; (iv) on board an aircraft registered in South Africa; (v) on board an aircraft required to be registered in South Africa; and (vi) on board a ship required to be registered in South Africa.

The author is aware of only one case in which an offender was prosecuted in South Africa for the offence of terrorism committed outside South Africa under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, namely in *S v Okah*.³¹ There, a South African permanent resident, holding Nigerian citizenship, was arrested in South Africa and prosecuted for the offences of terrorism committed in Nigeria. The High Court held that, being a member of the United Nations and a signatory to the relevant UN conventions, South Africa had an obligation to deal with charges of terrorism.³² The Court held that it had jurisdiction under section 15(1)(a) because the accused was arrested in South Africa.³³ The Court added that it also had jurisdiction on the basis of section 15(2) because the accused was not extradited to Nigeria.³⁴ It would have been unconstitutional to extradite him to Nigeria where there was a real risk that he would have been sentenced to death because South Africa had abolished death penalty.³⁵

Section 6(1) of the Prevention and Combating of Torture of Persons Act³⁶ provides that ‘a court of the Republic has jurisdiction in respect of

³¹ *S v Okah* (21 January 2013) SS94/2011 ZAGPJHC 6.

³² *S v Okah* (21 January 2013) SS94/2011 ZAGPJHC 6 para 5.

³³ *Ibid* at para 7(n).

³⁴ *Ibid* at para 7(o).

³⁵ The reason why the accused was not extradited to Nigeria was given in a later decision by the same court on an application that the accused made after his conviction. In *S v Okah* (Application in terms of Section 317 of the Criminal Procedure Act No 51 of 1977), Judgment of 20 March 2013. It should be recalled that South Africa may extradite a person to a country where he could be sentenced to death provided that the requesting country assures South African authorities that the death penalty will not be imposed or if imposed will not be implemented. See *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

³⁶ Act No 13 of 2013. Section 4 of this Act defines torture as follows: ‘For the purposes of this Act, “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person – (a) for such purposes as to – i) obtain information or a confession from him or her or any other person; (ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or (b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or

an act committed outside the Republic which would have constituted an offence under section 4(1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission.’ Section 6(1) of the Prevention and Combating of Torture of Persons Act stated further that South African courts have jurisdiction over the offence of torture committed outside South Africa if the accused ‘(a) is a citizen of the Republic; (b) is ordinarily resident in the Republic; (c) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited...; or (d) has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.’

Sections 15(1)(a) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act and section 6(1) of the Prevention and Combating of Torture of Persons Act deal with, *inter alia*, the place at which the accused has been arrested or found after the commission of an offence. A person may be prosecuted for terrorism in South Africa if that person was arrested at one of the following places: (i) in the territory of the Republic; or, (ii) in its territorial waters; or, (iii) on board a ship or aircraft registered or required to be registered in the Republic. On the other hand, for a person to be prosecuted for torture in South Africa, he should have been found, after the commission of the offence, at or in one of the following places: (i) territory of the Republic; or (ii) in its territorial waters; or, (iii) on board a ship registered or required to be registered in the Republic; or, (iv) on board a vessel registered or required to be registered in the Republic; or, (v) on board an off-shore installation registered or required to be registered in the Republic;³⁷ or (vi) on a fixed platform registered or required to be registered in the Republic; or (vii) on board an aircraft registered or required to be registered in the Republic.

Another issue that is worthy of examination is the jurisdiction of South African courts with respect to the offences of war crime,

incidental to lawful sanctions.’

³⁷ Section 1 of the Marine Zones Act, Act No 15 of 1994 defines ‘installation’ to mean “any of the following situated within internal waters, territorial waters or the exclusive economic zone or on or above the continental shelf: (a) Any installation, including a pipeline, which is used for the transfer of any substance to or from – (i) a ship; (ii) a research, exploration or production platform; or (iii) the coast of the Republic. (b) Any exploration or production platform used in prospecting for or the mining of any substance. (c) Any exploration or production vessel used in prospecting for or the mining of any substance. (d) A telecommunications line as defined in section 1 of the Post Office Act No 44 of 1958. (e) Any vessel or appliance used for the exploration or exploitation of the seabed. (f) Any area situated within a distance of 500 metres measured from any point on the exterior side of an installation referred to in paragraph (a) or (b) other than a pipeline. (g) Any area situated under or above an installation referred to in paragraph (a) or (b).’

crime against humanity and genocide committed outside South Africa. In November 2000 South Africa ratified the Rome Statute of the International Criminal Court. In order to give effect to the Rome Statute, South Africa enacted the Implementation of the Rome Statute of the International Criminal Court Act,³⁸ commonly referred to as the Rome Statute Act. The Rome Statute Act empowers South African courts to try those who commit the offences of war crimes, crimes against humanity or genocide outside South Africa. This, as the discussion below shows, was recently confirmed by the Constitutional Court when it held, *inter alia*, that the South African Police and the prosecuting authority had a duty to investigate and prosecute, respectively, crimes against humanity committed in Zimbabwe.

Section 4(3) of the Rome Statute Act provides that '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.'

If such person is not a South African citizen or is not ordinarily resident in South Africa and has not committed such offence against a South African citizen or against a person ordinarily resident in South Africa, section 4(3) is silent as to whether such a person may be arrested if after the commission of the said offence he is 'on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic.' It is submitted that if a person is, for example, suspected to have committed terrorism or torture in a given country and is arrested at an off-shore installation and argued that his arrest was unlawful because the law does not permit his arrest when he is found at an off-shore installation, the state could argue that his arrest was lawful because under section 9(1) of the Marine Zones Act '[a]ny law in force in the Republic, including the common law, shall also apply on and in respect of an installation.' This means that the law relating to arrest, for example, the relevant provisions of the Criminal Procedure Act,³⁹ govern the arrest of those suspected of the offences under the Rome Statute Act. However, the position is less clear with regard to a person who, after the commission of the offence, is found on board a ship or vessel or aircraft registered or required to be registered

³⁸ Implementation of the Rome Statute of the International Criminal Court Act No 27 of 2002.

³⁹ See for example section 40 of the Criminal Procedure Act which empowers a police officer to arrest a person without a warrant.

in South Africa. Section 327 of the Merchant Shipping Act⁴⁰ provides that a person may be arrested if he has 'committed an offence on board a ship.' The Civil Aviation Act⁴¹ also deals with offences committed 'on board an aircraft.'⁴² This means that it would be unlawful to arrest a person who after the commission of the said offence is on board a ship, vessel or aircraft registered or required to be registered in the Republic. For that person to be arrested lawfully, the ship or the aircraft must dock or land in South Africa when that person is on board and he is arrested in South Africa on the basis that if after the commission of the crime, is present in the territory of the Republic.

In the author's opinion, if a person who committed an offence under the Implementation of the Rome Statute Act outside South Africa is arrested on board a ship or aircraft outside the territory of South Africa and brought to South Africa to stand trial, that person would have been brought before South African courts illegally and therefore South African courts would find it difficult to hear the case. The same argument applies to a person who has been arrested on an off-shore installation for allegedly committing the offence of terrorism outside South Africa unless the same offence was committed against a South African off-shore installation. This argument finds support in the Appellate Division's (now Supreme Court of Appeal) decision in *S v Ebrahim*,⁴³ though made in a different factual context. In that case, a South African citizen who had committed acts of treason in South Africa and fled to Swaziland, had been abducted and brought back to South Africa. The court refusing to condone what it termed as international delinquency held that '[t]here is an inherent objection to such a cause, both on the grounds of public policy pertaining to international ethical norms and on the grounds that it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. In such circumstances the judiciary finds different routes to avoid the sanctification of a delinquent act.'⁴⁴ The best approach would be for the South African government to seek the extradition of the accused from the country of his nationality or where he resides ordinarily or where he has been found.

The Implementation of the Geneva Conventions Act⁴⁵ also provides that South African courts have jurisdiction over offences such as grave breaches of the Geneva Conventions committed outside South Africa.⁴⁶

⁴⁰ Merchant Shipping Act No 57 of 1951.

⁴¹ Civil Aviation Act No 13 of 2009.

⁴² Section 150.

⁴³ *S v Ebrahim* (1991) 2 SA 553(A).

⁴⁴ *Ibid* at 556. However, it has to be shown that the government was involved in the abduction or unlawful arrest of the person from abroad. See *Nduli and another v Minister of Justice and others* (1978) 2 All SA 159(A); *S v Mahala and another* (1994) 4 All SA 198 (A).

⁴⁵ Implementation of the Geneva Conventions Act No 8 of 2012.

⁴⁶ *Ibid* at sections 5 and 6.

Section 7(1) of the Implementation of the Geneva Conventions Act provides that 'any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic'.

Unlike the other statutes discussed above, the Implementation of the Geneva Conventions Act does not stipulate the place or places where the person in question has been arrested. It is argued that on the basis of this provision, a person may lawfully be arrested if he is found in South Africa or at an off-shore installation. However, it would be unlawful to arrest that person if he is found on board a ship or aircraft registered in South Africa or required to be registered in South Africa. The arguments advanced above in respect of crimes under the Implementation of the Rome Statute Act and the Protection of Constitutional Democracy against Terrorist and Related Activities Act apply with equal force here.

4. COURTS WITH JURISDICTION AND AUTHORISING JURISDICTION

Section 16(1) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act provides that '[n]o prosecution under Chapter 2 may be instituted without the written authority of the National Director.'⁴⁷ Section 6(2) of the Prevention and Combating of Torture of Persons Act provides that 'if an accused person is alleged to have committed an offence [of torture] outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution, who must also designate the court in which the prosecution must be conducted.'

In case of both torture and terrorism the National Director of Public Prosecutions has to authorise prosecution in writing. While authorisation of the National Director of Public Prosecutions is necessary for a prosecution for terrorism and torture, in the case of torture the Director must also designate a court in which the prosecution must be conducted. In neither case does the prosecution have to be instituted by the National Director of Public Prosecutions. It could be instituted by any public prosecutor provided the National Director has authorised prosecution. Section 5(1) of the Rome Statute Act provides that '[n]o prosecution may be instituted against a person accused of having

⁴⁷ In *S v Okah* (21 January 2013) SS94/2011 ZAGPJHC 6 at para 6(q), the Court held that the object of the section is to ensure that a charge under the terrorism Act is taken by the highest official after proper consideration of all relevant facts.

committed a crime without the consent of the National Director.’ The difference between section 5(1) of the Rome Statute Act and section 6(2) of the Prevention and Combating of Torture of Persons Act on the one hand and section 16(1) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act on the other is that in terms of section 5(1) of the Rome Statute Act, the National Director of Public Prosecutions does not have to authorise prosecution; he is required only to consent to prosecution. This should be distinguished from section 110A(2) of the Criminal Procedure Act which provides that where a South African who has committed an offence abroad is immune from prosecution in that country he cannot be prosecuted in South Africa unless the National Director ‘instructs’ that he should be prosecuted in South Africa.⁴⁸ Section 5(4) of the Rome Statute Act provides as follows: ‘The Cabinet member responsible for the administration of justice must, in consultation with the Chief Justice of South Africa and after consultation with the National Director and in writing designate an appropriate High Court in which to conduct a prosecution against any person accused of having committed a crime.’⁴⁹

Unlike under the Prevention and Combating of Torture of Persons Act with regard to torture committed outside South Africa where the National Director of Public Prosecutions is empowered to designate a court in which the accused should be prosecuted, the Rome Statute Act gives that power to the minister responsible for justice who has to do so ‘in consultation with the Chief Justice of South Africa and after consulting with the National Director of Public Prosecutions.’ There is a fundamental difference between the two procedures which the

⁴⁸ Section 110A of the Criminal Procedure Act provides as follows:

(1) Notwithstanding any other law, any South African citizen who commits an offence outside the area of jurisdiction of the courts of the Republic and who cannot be prosecuted by the courts of the country in which the offence was committed, due to the fact that the person is immune from prosecution as a result of the operation of the provisions of (a) the Convention on the Privileges and Immunities of the United Nations, 1946; (b) the Convention on the Privileges and Immunities of the Specialised Agencies, 1947; (c) the Vienna Convention on Diplomatic Relations, 1961; (d) the Vienna Convention on Consular Relations, 1963; or (e) any other international convention, treaty or any agreement between the Republic and any other country or international organisation, and that person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within its area of jurisdiction, that court shall, subject to subsection (2), have jurisdiction to try that offence.

(2) No prosecution may be instituted against a person under subsection (1), unless (a) the offence is an offence under the laws of the Republic; and (b) the National Director of Public Prosecutions instructs that a prosecution be instituted against the person.

⁴⁹ See also section 7(2) of the Implementation of the Geneva Conventions Act which provides that ‘The Cabinet member responsible for the administration of justice must, in consultation with the Chief Justice of South Africa and after consultation with the National Director of Public Prosecutions, in writing designate an appropriate Court to try a person contemplated in subsection (1).’

minister responsible for justice has to follow: 'in consultation with' and 'after consultation with'. Recently, in the case of *National Director of Public Prosecutions v Freedom Under Law*⁵⁰ the Supreme Court of Appeal observed that

It has by now become well established that when a statutory provision requires a decision-maker to act 'in consultation with' another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of 'after consultation with' which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.⁵¹

The effect of the above ruling is that while the minister responsible for justice has to obtain the consent of the Chief Justice as to the court in which the suspect should be prosecuted, he is not bound by any advice given by the National Director of Public Prosecutions who he is required to consult. The question whether this could encroach on the independence of the prosecuting authority is dealt with later in this article.

This raises the issue of whether a person, for example, a victim of torture, an act of terrorism, a war crime, a crime against humanity, genocide or grave breaches of the Geneva Conventions, could institute a private prosecution against the person who has committed the offence outside South Africa, if the National Director of Public Prosecutions refuses to authorise prosecution.

The Prevention and Combating of Torture of Persons Act, the Protection of Constitutional Democracy against Terrorist and Related Activities Act, the Rome Statute Act and the Implementation of the Geneva Conventions Act are all silent on whether or not a private prosecution is possible. Of course, in the case of offences under the Implementation of the Rome Statute of the International Criminal Court Act, the International Criminal Court could also exercise jurisdiction if the National Director of Public Prosecutions declines to prosecute. Section 7(1) of the Criminal Procedure Act⁵² provides that

in any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence – (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; (b) a husband, if the said offence was committed in respect of his wife; (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may ... either in person or by a legal representative, institute and conduct

⁵⁰ *National Director of Public Prosecutions v Freedom under Law* 2014 (4) SA 298 (SCA).

⁵¹ *Ibid* at para 38.

⁵² Criminal Procedure Act No 51 of 1977.

a prosecution in respect of such offence in any court competent to try that offence.

Section 7(1) refers to 'any case' in which the Director declines to prosecute 'an alleged offence'. The offence in question could be one committed in South Africa or outside South Africa as long as there is a court in South Africa competent to try the offence. It should also be recalled that section 7(2)(b) of the Criminal Procedure Act provides that the Director of Public Prosecutions 'shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate' signed by him stating that 'he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State'.⁵³ The National Director does not have any discretion; he must issue such a certificate.⁵⁴

On the basis of such a certificate, a private prosecution may be instituted in an appropriate court. In the case of torture, the victim could approach any appropriate court in South Africa. This could be a magistrate's court or a high court.⁵⁵ This is the same with the offence of terrorism. It could be prosecuted in any court irrespective of where it was committed.⁵⁶ Any offence under the Rome Statute Act has to be prosecuted before the High Court.⁵⁷ An offence under the Implementation of the Geneva Conventions Act has to be prosecuted before the High Court or a court of similar status when the accused is not a member of the South African National Defence Force. If the accused is a member of the South African National Defence Force, he could be prosecuted before a military court.⁵⁸ It should be noted that the person intending to institute a private prosecution does not

⁵³ Section 7(2)(a).

⁵⁴ See *Bothma v Els and Others* 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC) para 5 (note 2), where the Constitutional Court stated that the Director of Public Prosecution 'must' issue the relevant certificate if he declines to prosecute.

⁵⁵ Section 1 of the Prevention and Combating of Torture of Persons Act defines a court to mean 'a court contemplated in section 166 of the Constitution.' Section 166 of the Constitution provides for the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa, any court of a status similar to the High Court of South Africa, any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrate's Courts.

⁵⁶ See section 16 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act which refers to the High Court, Regional Court and Magistrate's Court.

⁵⁷ See sections 3(d) and 5(4) of the Rome Statute Act.

⁵⁸ Implementation of the Geneva Conventions Act section 1.

have to have a prima facie case against the suspect.⁵⁹ A victim who does not wish to institute a private prosecution could challenge the National Director of Public Prosecution's decision not to prosecute the suspect. If the court finds the National Director's decision irrational, unreasonable or illegal, it may set it aside and order the National Director to institute criminal proceedings against the suspect.⁶⁰

5. THE EXPIRY OF THE RIGHT TO PROSECUTE

Section 18 of the Criminal Procedure Act provides, inter alia, that the right to institute a prosecution for the crime of genocide, crimes against humanity or war crimes shall not lapse after the general prescription period of 20 years.⁶¹ The Constitutional Court observed that there are 'few crimes that the legislature has sought to exclude from the 20-year prescription period.'⁶² However, the law is silent on whether the right to institute a prosecution for the offences of torture,⁶³ terrorism⁶⁴ and the grave breaches of the Geneva Conventions⁶⁵ lapses after 20 years. In the light of the fact that these laws are silent on the issue of the lapse of the right to prosecute, it is argued that section 18 of the Criminal Procedure

⁵⁹ In *Solomon v Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T) it was held that 'one of the objects, and perhaps the main object of the Legislature in granting the right of private prosecution is to reduce the temptation offered to an aggrieved person to take the law into his own hands; if he considers himself injured by a criminal act and the [state] will not take up his case, he may prosecute himself with a view to the punishment of the wrongdoer' and that 'the Legislature ... must have contemplated that private prosecutors might in many cases have weak grounds for prosecution – a decision by the [DPP] not to prosecute would indicate this – but the policy of Parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a prima facie case. The penalty for vexatious and unfounded prosecution is liability for costs.' See pages 609 and 613.

⁶⁰ See *National Director of Public Prosecutions v Freedom under Law* (2014) 4 SA 298 (SCA).

⁶¹ For a discussion of the relationship between the accused's right to a fair trial and in particular the right to be tried without delay and section 18 of the Criminal Procedure Act, see *Zanner v Director of Public Prosecutions, Johannesburg* (2006) 2 All SA 588 (SCA). A person cannot be extradited to stand trial for offences that would not have been prosecuted in South Africa because of the lapse of the right to prosecute under section 18 of the Criminal Procedure Act – see *Bell v S* (1997) 2 All SA 692 (E).

⁶² See *PB v Els and others* (2012) JOL 24352 (CC) para 45.

⁶³ The Schedule to the Prevention and Combating of Torture of Persons Act, which amends, inter alia, the Criminal Procedure Act, does not amend section 18 of the Criminal Procedure Act.

⁶⁴ The Schedule to the Protection of Constitutional Democracy against Terrorist and Related Activities Act No 33 of 2004, which amends, inter alia, the Criminal Procedure Act, does not amend section 18 of the Criminal Procedure Act.

⁶⁵ The Implementation of the Geneva Conventions Act refers to different sections of the Criminal Procedure Act but it does not refer to section 18.

Act is applicable and the effect is that a person who has committed the offence of torture, the offence of terrorism and a grave breach of the Geneva Conventions has to be prosecuted within twenty years from the time the offence was committed, otherwise the prosecutor's right to prosecute will lapse. It could be argued that this interpretation is only applicable to those who have committed those offences in South Africa. In the light of the fact that there is no legislative guidance on the question of whether section 18 of the Criminal Procedure Act is also applicable to offences committed outside South Africa, it is recommended that one of the two approaches could be adopted: either the period of limitation for the offences committed outside South Africa should be 20 years but should start to run from the time the accused enters South Africa or, these being serious offences, there should not be a limitation period within which the charges against the person in question may be initiated. The latter recommendation would be in line with the recommendations made by various international human rights bodies such as the Committee against Torture,⁶⁶ Committee on the Rights of the Child,⁶⁷ and the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions,⁶⁸ which have called upon states to ensure, inter alia, that serious offences are excluded from the statutes of limitation.

6. PROSECUTION OF ACTS OR OMISSIONS WHICH TOOK PLACE BEFORE THE COMMENCEMENT OF THE ACTS

Section 35(3)(l) of the Constitution provides that every accused person has the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. It is interesting to see how the position in

⁶⁶ See for example, Committee against Torture Conclusions and recommendations of the Committee against Torture on the initial report of Japan CAT/C/JPN/CO/1 (3 August 2007) para 12 (offences of torture and ill-treatment); Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of Bulgaria CAT/C/BGR/CO/4-5 (14 December 2011) para 8 (torture); Concluding observations of the Committee against Torture on the initial report of Turkmenistan CAT/C/TKM/CO/1 (15 June 2011) para 8; and Concluding observations of the Committee against Torture on the 2nd periodic report of the plurinational state of Bolivia CAT/C/BOL/CO/2 (14 June 2013) para 11.

⁶⁷ Committee on the Rights of the Child Concluding observations on Japan's Initial Report, CRC/C/OPSC/JPN/CO/1 (22 June 2010) para 36 (with regard to the offences of sale of children, child pornography and child prostitution).

⁶⁸ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Mission to Brazil (Addendum) A/HRC/11/2/Add.2 (23 March 2009) para 96 where the Special Rapporteur recommends that '[t]he period of prescription (statutory period of limitation) for intentional crimes against life should be abolished.'

relation to the *ex facto* application of following three sets of statutes is to be tested against this constitutional provision:

- i. The Implementation of the Geneva Conventions Act⁶⁹ and the Protection of Constitutional Democracy against Terrorist and Related Activities Act⁷⁰ provide that offences that were committed before they commenced could be prosecuted.
- ii. The Rome Statute Act provides that '[n]o prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Rome Statute.'⁷¹
- iii. The Prevention and Combating of Torture of Persons Act is silent on the issue of whether it is applicable to acts amounting to torture that were committed before it came into force.

A person prosecuted for acts of torture committed in South Africa or outside South Africa which took place before the Prevention and Combating of Torture of Persons Act took effect could invoke section 35(3)(l) of the Constitution. There is a need for the legislature to clarify that issue especially in the light of the fact that the offence of torture has been known in international law at least since 1987 when the Convention against Torture came into force.

7. CONCLUSION

This article dealt with the issue of the prosecution in South African courts of international crimes committed outside South Africa and made the following recommendations.

- a. It is recommended that the best approach is not to link the jurisdiction of the courts to the place where the suspect was arrested or found. What is critical is whether the accused was lawfully brought before South African courts in compliance with national and international law.
- b. It is submitted that a provision which stipulates that it is the minister responsible for justice who, in consultation with the Chief Justice and after consulting with the National Director of Public Prosecutions, designates a court in which the prosecution should take place could compromise the independence of the prosecuting authority. It is noted that section 179(1) of the Constitution and section 32(1) of the National Prosecuting Authority Act provide that the prosecuting authority has to prosecute without fear,

⁶⁹ Section 7(4) provides that 'Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.'

⁷⁰ Section 27.

⁷¹ Section 5(2).

favour or prejudice. An ill-intentioned Minister could deliberately refuse to designate a court in which the suspect should be prosecuted, which means that a prosecution may not take place at all, notwithstanding the fact that the National Director of Public Prosecutions has a prima facie case against the suspect. It is recommended that the law should be amended to entrust the responsibility of designating the court with the National Director of Public Prosecutions and the designation should be in writing.⁷² It is noted that 6(2) of the Prevention and Combating of Torture of Persons Act, unlike section 5(4) of the Rome Statute Act, does not state that the court in question should be designated in writing.

- c. The statutes discussed above (those dealing with the offences of torture, terrorism, war crime, genocide, crimes against humanity, and the grave breaches of the Geneva Conventions) are silent on whether or not a private prosecution may be instituted should the National Director of Public Prosecutions decline to prosecute the suspect. It is argued that a private prosecution should be possible if the National Director of Public Prosecution declines to prosecute.
- d. It is recommended that section 18 of the Criminal Procedure Act should be amended to state whether or not the 20-year prescription period is applicable to the offences of torture, terrorism and the grave breaches of the Geneva Conventions which are committed in South Africa and outside South Africa. There is a need for the Prevention and Combating of Torture of Persons Act to be amended to clarify whether or not it is applicable to acts of torture that were committed before it took effect.

⁷² This also the same approach taken in section 12(4)(a) of the Prevention and Combating of Trafficking in Persons Act No 7 of 2013, which provides that 'the National Director of Public Prosecutions must, in writing, designate an appropriate court in which to conduct a prosecution against any person accused of having committed an offence under this Chapter in a country outside the Republic as provided for in subsection (1).'