

# MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS AND THE RISK OF ABUSE OF PROCESS: A HUMAN RIGHTS PERSPECTIVE

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## I INTRODUCTION

Mutual legal assistance between states is a necessity in light of the increasing international dimension of criminal phenomena.<sup>1</sup> It is trite to say that one of the many features of the so-called global village in which we live is the growth in international and transnational crime.<sup>2</sup> Globalization means that people, money and information (and thus also criminal phenomena) can move around the globe with relative ease. South Africa, after the isolation of the apartheid era, is certainly no exception to this.

The pragmatic argument for mutual legal assistance seems to be that 'international boundaries [should] cause as few problems to the investigators as they do to criminals'.<sup>3</sup> This statement arguably has different meanings depending on where on the globe one finds oneself, or to what form of co-operation regime (multilateral or bilateral) one refers to. For instance, in the highly integrated supranational environment of Europe,<sup>4</sup> the normative and practical implications of the desire to co-operate effectively must be considered with reference to the 'labyrinth of conventions' that constitute European initiatives to co-operate in criminal matters, but then within the particular legal and normative context of Europe.<sup>5</sup> The focus of this article is,

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<sup>1</sup> This aspect of international criminal law is often referred to as 'horizontal international criminal law' and refers to 'the international co-operation between states in the enforcement of municipal [national] criminal law and is not concerned with the substance of criminal law'. See Adèle Erasmus 'Revisiting Schwarzenberger today: The problem of an international criminal law' (2003) 16 *SACJ* 413.

<sup>2</sup> See Gerhard Kemp 'The United Nations Convention Against Transnational Organized Crime: A milestone in international criminal law' (2001) 14 *SACJ* 152. For a discussion on the distinction between international and transnational criminal law, see Jonathan Burchell *Principles of Criminal Law* 3 ed (2005) 1–4.

<sup>3</sup> Christopher Murray & Lorna Harris *Mutual Assistance in Criminal Matters* (2000) 2.

<sup>4</sup> See for instance art 29 of the European Union Treaty, as quoted in Murray & Harris op cit note 3 at 3: '[T]he Union's objective shall be to provide a high level of safety within an area of freedom, security and justice, by developing common action among Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combatting (sic) racism and xenophobia.'

<sup>5</sup> See Christine van den Wyngaert & Guy Stessens 'Mutual legal assistance in criminal matters in the European Union' in John Dugard & Christine van den Wyngaert (eds) *International Criminal Law and Procedure* (1996) 283.

however, not on regional or supranational initiatives or structures to enhance co-operation in criminal matters, but rather on the role of human rights and the risk of abuse of process in the context of bilateral co-operation (in the form of mutual assistance) where South Africa is the requested state.

The International Co-operation in Criminal Matters Act<sup>6</sup> provides for various forms of co-operation in criminal matters between South Africa and foreign states. It is my submission that the legislative framework, and the emerging South African jurisprudence in the field of international co-operation, point to a worrying weakness in our domestic legislation: the possibility of abuse of process because of the risks posed by a human rights deficit between South Africa and many requesting states. It will be argued that this weakness is perhaps symptomatic of a structural defect in the South African approach to co-operation in criminal matters (which includes mutual legal assistance).

Criminal justice is par excellence a manifestation of state sovereignty.<sup>7</sup> In constitutional democracies like South Africa, the criminal justice system is often embedded in a system of constitutional safeguards for accused and detained persons. In short, constitutional democracies normally view criminal justice not as a system aimed at punishing criminals at all costs but rather as a rights-based approach to punish the guilty, after a fair trial.<sup>8</sup> Since the criminal justice system is indeed systemic in nature one should view the pre-trial process as part of the whole in order to evaluate in the end the fairness of the process.<sup>9</sup> But when it comes to international co-operation in criminal matters (extradition, mutual legal assistance, execution of foreign sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal activities, intelligence and law enforcement information-sharing),<sup>10</sup> the dynamics are quite different from purely domestic criminal justice. International co-operation in criminal matters, in whatever form, is normally regarded as a foreign relations issue, and not so much a criminal justice issue in the conventional sense of the term.<sup>11</sup> This is certainly still the case in terms of South African law and practice and lies at the heart of the issues discussed in this article.

<sup>6</sup> Act 75 of 1996.

<sup>7</sup> John Dugard *International Law — A South African Perspective* 3 ed (2005) 151.

<sup>8</sup> See in general the interaction between constitutionalism and criminal justice: Nico Steytler *Constitutional Criminal Procedure* (1998) 1–3; Andrew Ashworth *The Criminal Process — An evaluative study* 2 ed (1998) 25–8; Peet M Bekker et al *Criminal Procedure Handbook* 7 ed (2005) 12–18.

<sup>9</sup> Gerhard Kemp 'Provisional release' in André Klip & Göran Sluiter (eds) *Annotated Leading Cases of International Criminal Tribunals* vol 8 (2005) 87.

<sup>10</sup> See M Cherif Bassiouni 'The "Indirect Enforcement System": Modalities of international cooperation in penal matters' (2004) 19 *Nouvelles Etudes Penales* 424–56.

<sup>11</sup> See Gerhard Kemp 'Foreign relations, international co-operation in criminal matters and the position of the individual' (2003) 16 *SACJ* 370. The criminal justice dimension of international co-operation only comes into play after the diplomatic process. See for instance *Beheermaatschappij Helling I NV v Magistrate, Cape Town* [2005] JOL 13758 (C).

## II HUMAN RIGHTS AND INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS IN THE FORM OF MUTUAL LEGAL ASSISTANCE

The primary aim of mutual legal assistance is for the requesting state to get evidence from abroad for purposes of domestic criminal proceedings. To bring human rights that would normally (or ideally)<sup>12</sup> apply during domestic criminal processes into the picture complicates matters. André Klip put it as follows:

'The fact that in criminal trials international assistance is increasingly needed makes the direct application of human rights norms more and more difficult. For states bound by these norms it might be unclear what their respective responsibility is. The accused might be confronted with a situation in which he cannot invoke human rights norms because of the international aspects, where he could have invoked the human rights norms in each of the states involved, had every aspect of the criminal proceedings taken place within one state.'<sup>13</sup>

It is necessary to point out that Klip's observations were made in the context of the human rights regime of the European Convention on Human Rights. Closer to home and more relevant for South Africa, the Harare Scheme on Mutual Assistance in Criminal Matters<sup>14</sup> (a Commonwealth scheme that provides that member states must provide mutual assistance via domestic legislation) was amended to provide for specific aspects of due process like the protection against self-incrimination and legal privilege.<sup>15</sup> The position of individuals (for example a suspect questioned by the requested state) is thus specifically provided for in the Scheme. Mutual assistance can for example be made subject to the requesting state's giving an undertaking that '(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or (b) a court in the requesting country will determine whether or not the material is subject to privilege'.<sup>16</sup>

The point is that we need to look at the interpretation and application of domestic legislation that provides for mutual legal assistance in order to get an idea whether Klip's observations and the references to protective measures for individuals in the context of mutual assistance have any impact on co-operation with states with less than satisfactory human rights standards and practices. Where mutual assistance does not form part of a multilateral scheme, the question is whether any domestic human rights would be applicable in the practice of bilateral assistance in criminal matters. At

<sup>12</sup> Throughout this contribution the vantage point adopted is that of the requested state, which is South Africa with its criminal justice system embedded in the Bill of Rights.

<sup>13</sup> André Klip 'The decrease of protection under human rights treaties in international criminal law' (2000) 68 *International Review of Penal Law* 292. For an analysis of this issue with a more focused look at the implications of the 'war on terrorism', the American-led occupation of Iraq and practices like 'rendition', see Michal Gondek 'Extraterritorial application of the European Convention on Human Rights: Territorial focus in the age of globalization?' (2005) 70 *Netherlands International LR* 349.

<sup>14</sup> Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (available at [www.thecommonwealth.org](http://www.thecommonwealth.org)).

<sup>15</sup> See discussion by Kimberley Proust 'International co-operation: A Commonwealth perspective' (2003) 16 *SACJ* 306.

<sup>16</sup> See clause 6 of the Harare Scheme and the discussion by Proust op cit note 15 at 308–9.

present, South African modalities of co-operation are still fundamentally bilateral in nature and requests for mutual assistance would normally be dealt with in terms of legislation that provides for various forms of judicial and other assistance.<sup>17</sup> It is against this background that the Cape High Court judgment in *Thatcher v Minister of Justice and Constitutional Development & others*<sup>18</sup> will be analysed below.

### III THE ROLE OF THE JUDICIARY IN MUTUAL LEGAL ASSISTANCE MATTERS

It is not the aim of this contribution to advocate creeping judicial interference in matters of high policy or foreign affairs.<sup>19</sup> Max du Plessis<sup>20</sup> demonstrates that the Constitutional Court has set conditions obliging the South African state to protect the human rights of persons in custody who are the subject of extradition requests by foreign states. Thus, according to Du Plessis, the principle flowing from *Mohamed v President of the Republic of South Africa*<sup>21</sup> is clear: 'the actions of South African authorities are to be carefully scrutinized in the extradition/expulsion context for signs of constitutional infringement'.<sup>22</sup> For the purpose of this contribution it is important also to note the following from the Constitutional Court's judgment in *Director of Public Prosecutions, Cape of Good Hope v Robinson*:<sup>23</sup>

'This judgment holds that an extradition magistrate conducting an enquiry in terms of s 10(1) of the [Extradition] Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of s 11 of the Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control.'<sup>24</sup>

It is clear then that South African jurisprudence puts the obligation to take human rights considerations into account in extradition matters first and foremost on the executive. Executive action is, of course, subject to judicial control and if, for instance, the Minister of Justice failed to take human rights considerations into account when deciding to extradite an individual, that decision can be reviewed by a court. For the purpose of this contribution we

<sup>17</sup> See in general Jan d'Oliveira 'International co-operation in criminal matters: The South African contribution' (2003) 16 *SACJ* 323.

<sup>18</sup> *Thatcher v Minister of Justice and Constitutional Development & others* 2005 (4) SA 543 (C).

<sup>19</sup> For a discussion of case law on international co-operation in criminal matters and international relations (such as *Kolbatschenko v King* NO 2001 (4) SA 336 (C)) see Kemp op cit note 11.

<sup>20</sup> Max du Plessis 'The extra-territorial application of the South African Constitution' (2003) 120 *SALJ* 797.

<sup>21</sup> *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC). The court held as follows (para 58): 'For the South African government to co-operate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he had no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be a party to the imposition of cruel, inhuman or degrading punishment.'

<sup>22</sup> Du Plessis op cit note 20 at 819. For a further discussion of extradition and human rights, see Dugard op cit note 7 at 223-7.

<sup>23</sup> *Director of Public Prosecutions Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC).

<sup>24</sup> *Robinson* case supra note 23 para 71.

need to ask whether the same approach is appropriate in the case of other forms of international co-operation in criminal matters.

The second point made by Du Plessis pertains to persons beyond South Africa's borders. He states that:

'Outside of the extradition context, it remains good principle to suggest that persons beyond South Africa's borders should be entitled to the benefit of Chapter 2's rights where the South African State asserts extra-territorial authority. This entitlement has particular importance where South African public officials exercise effective control abroad during times of occupation, but remains more generally applicable to situations where South African agents exercise police powers in the territory of another state.'<sup>25</sup>

Du Plessis's analysis clearly does not cover the type of situation which we shall see came before the court in the *Thatcher* case, namely a request for assistance in criminal matters (but not yet a request for extradition) where the person who is the subject of the investigation is within the borders of South Africa and where the requesting state has a bad or questionable human rights record.<sup>26</sup> But the implication of his analysis is that the Bill of Rights should be applicable to situations where South Africa is a party in a request for assistance in criminal matters.

#### IV MARK THATCHER, MERCENARIES, AND EQUATORIAL GUINEA'S HUMAN RIGHTS SITUATION

Sir Mark Thatcher, British national and son of Britain's former Prime Minister, Margaret Thatcher, was arrested in Cape Town on 25 August 2004 for allegedly being involved in an unsuccessful coup against the leader of Equatorial Guinea, Teodoro Obiang Nguema.<sup>27</sup> Thatcher was arrested for allegedly financing this botched coup in Africa's third largest oil-producing country.

Thatcher, who denied being part of the web of financiers accused of plotting the coup,<sup>28</sup> was charged with violating South Africa's Regulation of Foreign Military Assistance Act.<sup>29</sup> In a plea agreement Thatcher offered a guilty plea in exchange for paying a fine of about R3 million, after which he would be allowed to leave the country. This means that Thatcher admitted that his actions might have been reckless even if he only unwittingly contributed to aid in the plot. In exchange for his freedom, he offered to co-operate with the National Prosecuting Authority investigation.<sup>30</sup> He was handed a five-year suspended prison sentence and a fine of R3 million, and thereafter made arrangements to leave the country to be with his family.<sup>31</sup> National Prosecuting Authority spokesperson, Sipo Ngwema, stated that this

<sup>25</sup> Du Plessis op cit note 20 at 819.

<sup>26</sup> See e.g. Amnesty International press release AL Index Afr 46/016/2004, news service No 129 (available at [web.amnesty.org/report2005/2af-index-eng](http://web.amnesty.org/report2005/2af-index-eng)) regarding the human rights situation in Equatorial Guinea.

<sup>27</sup> See generally John Dlodlu 'Murky road to freedom' *Africa Today* February 2005 at 18–20.

<sup>28</sup> Karyn Maughan 'Thatcher for US after R3m coup plot fine' *Cape Argus* 13 January 2005 at 1.

<sup>29</sup> Act 15 of 1998.

<sup>30</sup> Dlodlu op cit note 27.

<sup>31</sup> *Ibid.*

agreement was concluded because Thatcher had chosen to co-operate with the South African authorities and would be providing further information on the coup plot.<sup>32</sup>

Apart from these criminal proceedings against Thatcher under South African law, a second process against Thatcher was also taking place. On 27 August 2004 Equatorial Guinea requested the South African authorities to question Thatcher on matters relating to criminal proceedings taking place in Equatorial Guinea. The Director-General of the Department of Justice was satisfied that the request met the requirements provided for in the International Co-operation in Criminal Matters Act.<sup>33</sup> The chronology of events leading to Thatcher's arrest for these purposes can be summarized as follows:

- An authorized representative of the South African Justice Department had satisfied himself that the request by the Equatorial Guinean government was in compliance with the jurisdictional requirements set in s 7(2)<sup>34</sup> of the International Co-operation in Criminal Matters Act.<sup>35</sup>
- The co-operation request was subsequently approved by the Minister of Justice in terms of s 7(4) and (5)<sup>36</sup> of the International Co-operation in Criminal Matters Act.<sup>37</sup>
- The Minister's approval of the request was conveyed to the Chief Magistrate of Wynberg, who in turn asked one of the magistrates attached to the Wynberg court to deal with the request. The magistrate in due course issued a subpoena in terms of s 8(2)<sup>38</sup> of the International

<sup>32</sup> *Ibid.*

<sup>33</sup> Act 75 of 1996.

<sup>34</sup> Section 7 provides as follows: '(1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General. (2) Upon receipt of such request the Director-General shall satisfy himself or herself — (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been committed and that an investigation in respect thereof is being conducted in the requesting State.'

<sup>35</sup> *Thatcher case supra note 18 para 4.*

<sup>36</sup> Section 7 provides as follows: '(4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval. (5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides.' For a discussion of the regime for international co-operation in criminal matters in terms of this act and other relevant instruments and statutes, see D'Oliveira *op cit* note 17.

<sup>37</sup> *Thatcher case supra note 18 para 4.*

<sup>38</sup> Section 8 provides as follows: '(1) The magistrate to whom a request has been forwarded in terms of section 7(5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause, is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth. (2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.'

Co-operation in Criminal Matters Act. Consequently, Thatcher was required to appear in the Wynberg court in order to respond to questions annexed to the subpoena.<sup>39</sup>

In reaction to this subpoena, Thatcher brought an urgent application in the Cape High Court to review and set aside the decisions of the Minister of Justice and the Director-General of the Department of Justice, and further to declare their conduct in this respect to be unconstitutional. He further sought an order reviewing, correcting and setting aside the decision of the Chief Magistrate and the assigned magistrate of the Wynberg magistrates' court for issuing the subpoena and declaring their conduct unconstitutional. In the alternative, Thatcher sought an order declaring s 8(1) of the International Co-operation in Criminal Matters Act to be unconstitutional.<sup>40</sup>

The fairness of the criminal process in Equatorial Guinea against the eight South Africans allegedly involved in the coup was at the heart of Thatcher's application. Thatcher contended that the accused could not be expected to get a fair trial in Equatorial Guinea. To support his contention Thatcher relied on reports and statements<sup>41</sup> and also on allegations made by the applicants in the *Kaunda* case.<sup>42</sup>

The following paragraph from the *Thatcher* case highlights the central problem at the heart of the concerns of this contribution:

"The applicant [Thatcher] suggested that the purpose of the interrogation provided for in the subpoena aforesaid was to elicit evidence which could be used to bolster the case against him by the South African prosecuting authorities. It could also be used to facilitate his extradition to Equatorial Guinea, which had publicly stated its intention to prosecute him. His trial there, as in the case of the trial against the eight South Africans, would not be in accordance with the requirements of customary international law."<sup>43</sup>

It is important to note that the application in the Cape High Court was not a request to the court to make any finding on the merits of the criminal case against him. His request was for the court to declare that the subpoena requiring him to co-operate and undergo interrogation for purposes of the investigation by Equatorial Guinea was unlawful and unconstitutional.<sup>44</sup> Thatcher also contended<sup>45</sup> that the decisions by the Minister of Justice and the Director-General of Justice (first and second respondents respectively) were unlawful because their conduct was not in accordance with the provisions of the Promotion of Administrative Justice Act.<sup>46</sup>

<sup>39</sup> *Thatcher* case supra note 18 para 5.

<sup>40</sup> *Ibid* para 6.

<sup>41</sup> *Ibid* para 9.

<sup>42</sup> *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

<sup>43</sup> *Thatcher* case supra note 18 para 10.

<sup>44</sup> *Ibid* para 13.

<sup>45</sup> *Ibid* para 14.

<sup>46</sup> Act 3 of 2000.

## V INTERNATIONAL CO-OPERATION AS A FOREIGN POLICY MATTER

An answering affidavit by Mr N J Makhubele (Director: International Affairs, Department of Justice), which formed part of the papers before the Cape High Court in the *Thatcher* case, stated the following:

'The [International Co-operation in Criminal Matters Act] arises from a commitment to achieve global peace and security and it is an important instrument for the purposes of implementing the international agreement between South Africa and EG [Equatorial Guinea]. In international affairs South Africa is committed to the promotion of human rights, the application of international law, interaction with African countries as equal partners and the pursuit of friendly relations with peoples and nations of the world. In addition, co-operation in Africa takes place in the spirit of the African *renaissance* aspired to by the heads of governments of the African Union.'<sup>47</sup>

Van Zyl J<sup>48</sup> described this affidavit as 'a foreign policy statement'. Significantly, Mr Makhubele was of the opinion that despite negative reports on the human rights situation in Equatorial Guinea, the South African government was not entitled to 'scrutinise the human rights record and criminal justice system of every country requesting it for information in a criminal trial or investigation'.<sup>49</sup> According to him, such conduct by the South African government would be contrary to the spirit of international co-operation prevailing between South Africa and the requesting state.<sup>50</sup> Mr Makhubele was of the opinion that there are times when it is appropriate to raise 'constitutionally founded objections' during the course of international co-operation in criminal matters. Such times would exist, according to Mr Makhubele, during the interrogation of the relevant individual or during such person's trial in South Africa.<sup>51</sup>

In fact, a South African delegation had visited Equatorial Guinea and assessed criminal process in that country. The delegation concluded that the trial of alleged mercenaries in Equatorial Guinea was conducted in a 'dignified' manner and 'appeared to be fair, open and transparent'.<sup>52</sup> Van Zyl J was very critical of these conclusions:

'Mr Thindisa's affidavit [Department of Justice] has been justifiably criticised as being based, for the most part, on what Mr Obono, the chief prosecutor [in Equatorial Guinea], told him, and for the rest on unidentified hearsay sources. His somewhat superficial report on the nature of the present trial raises a question mark about his own experience, if any, of trial proceedings. He was clearly not present for an important part of the trial and by his own account he did not speak to the accused. For only one Spanish-speaking counsel to represent all eight (if not all fourteen) accused could not have been regarded as acceptable. There is furthermore no indication that he requested the removal of the handcuffs and leg irons or shackles or that he arranged for them to acquire English transcripts of the evidence, bearing in mind that each of them was interrogated in the absence of the others.'<sup>53</sup>

Although the court in the *Thatcher* case dealt with a number of administrative law and constitutional matters, I would like to highlight one

<sup>47</sup> Excerpts from affidavit as quoted in the *Thatcher* case supra note 18 para 27.

<sup>48</sup> *Thatcher* case supra note 18 para 27.

<sup>49</sup> Ibid para 31.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid para 32.

<sup>52</sup> See quotations in *Thatcher* case supra note 18 para 44.

<sup>53</sup> Ibid para 45.

dimension of the broader constitutional analysis. The court articulated this dimension as follows:

'Does the first respondent [Minister of Justice] have the constitutional duty to reject a request for assistance from a country of which the criminal justice system is impugned in that trials ostensibly fall short of "the international minimum standard" and the death penalty may be imposed?'<sup>54</sup>

The question is, then, would there be any legal recourse for a person in Thatcher's position if the Minister does indeed have such a constitutional duty but nevertheless exercised her executive power to grant a request for mutual legal assistance from a country like Equatorial Guinea? Central to this analysis is the tension (the court in *Thatcher* called it an 'interaction'<sup>55</sup>) between the domestic law of South Africa (including the South African constitutional and human rights dispensation) and its international relations with Equatorial Guinea. This interplay between the law on international co-operation in criminal matters and foreign relations (as a manifestation of executive state action) has been the subject of academic analysis.<sup>56</sup> It is submitted that there is a need in our law to understand the ambit and content of the *legal exercise*<sup>57</sup> involved in matters of international co-operation. This is a developing area of South African jurisprudence. Judgments like the one in *Thatcher* contribute to the developing South African jurisprudence on international and transnational criminal justice. I agree that co-operation in criminal matters 'is not a purely legal exercise'.<sup>58</sup> But the critical question is how the system of co-operation should be constructed in order to fulfil the expectations of the South African legal order as one embedded in respect for human rights, and also to take due cognizance of the norms, values and characteristics of the growing system of international criminal law.

It should be recognized that international co-operation in criminal matters occurs within the context of an international system based on state sovereignty. At the same time it is appropriate to draw attention to an emerging narrative of human rights in international relations.<sup>59</sup> The statements by government officials quoted in the *Thatcher* judgment indicate that the internal human rights situation and respect for due process did not weigh as much as other foreign policy concerns or issues pertaining to friendly relations and co-operation with Equatorial Guinea. The following observations by Cherif Bassiouni are relevant in this regard:

'The systemic problems of international cooperation derive in part from the insistence by many governments on bilateralism over multilateralism. The reason such states favor this approach is because they view international cooperation in penal matters as an extension of their political relations. Thus, governments reduce procedural barriers to international cooperation with friendly nations and increase them with less friendly ones. As a result, international cooperation in penal matters has become a part of states' political accommodation processes, instead of being a legal system, based on an international *civitas maxima*.'<sup>60</sup>

<sup>54</sup> Ibid para 47.

<sup>55</sup> Ibid para 52.

<sup>56</sup> See in general Kemp op cit note 11.

<sup>57</sup> See *Thatcher* case supra note 18 para 52 for the court's articulation of this relationship.

<sup>58</sup> Ibid para 52.

<sup>59</sup> James Goodby 'Democratic lessons from Helsinki and central Asia' *Financial Times* 1 August 2005.

<sup>60</sup> Bassiouni op cit note 10 at 457.

One of the applicant's contentions was that s 8(1) of the International Co-operation in Criminal Matters Act is unconstitutional because it infringes upon the constitutional separation of powers. The gist of his argument was that the magistrate was a mere rubber stamp, acting upon the instructions of the executive. The court rejected this line of argument. Indeed, the court accepted that the magistrate 'did exercise a discretion in considering the request [for co-operation] and other documentation forwarded to her'.<sup>61</sup> Importantly, the court also held that in exercising this discretion, the magistrate 'was not adding her voice in the conduct of foreign affairs'.<sup>62</sup> In other words, the magistrate was acting in terms of the scheme of the Act, which assigns certain functions to the judiciary. The court constructed the relevant provisions of the Act to be a concretization of the principle of separation of powers, in that both the executive and the judiciary have certain clearly stipulated roles.<sup>63</sup> The critical question, however, is not whether there is some sort of formal separation of powers in the scheme of the Act, but to what extent the judiciary can function as a guardian of human rights considerations within the context of international co-operation and to avoid abuse of process. The court took the following approach in the *Thatcher* case:

'In accordance with the provisions of section 8(1) the fourth respondent [magistrate] was not called upon, when issuing the subpoena, to consider the applicant's constitutional rights, be it his right to silence or his right not to incriminate himself. When the applicant appears before her to answer the questions directed at him, the fourth respondent will, if called upon to do so, be fully empowered to consider such rights and rule accordingly.'<sup>64</sup>

The court held that s 8(1) of the Act is not inconsistent with the Constitution.<sup>65</sup>

## VI THE RISK OF ABUSE OF PROCESS

It is clear that the applicant's case in *Thatcher* was primarily aimed at the conduct (or lack thereof) of the first respondent — the Minister of Justice and Constitutional Development. The applicant's case was that the Minister of Justice had not applied her mind to the relevant documentation and, importantly, that she 'ignored the applicant's constitutional rights, more particularly his right to silence, his right not to incriminate himself and his right to a fair trial'.<sup>66</sup> The applicant further contended that the Minister did not have due regard to the possible imposition of the death penalty on accused persons (associated with the applicant) — at the time on trial in Equatorial Guinea. The court noted that 'section 7(4) of the [Co-operation Act] lays down no requirement with which the first respondent [the Minister

<sup>61</sup> *Thatcher* case supra note 18 para 67.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* para 70.

<sup>65</sup> *Ibid* para 71.

<sup>66</sup> *Ibid* para 72.

of Justice] has to comply prior to approving a request for assistance',<sup>67</sup> qualifying this as follows:

'If, of course, she [the Minister of Justice] had suspected that the trial in Equatorial Guinea was unfair and would in all probability result in grave injustice for the accused, she would have been required to take account of this in making her decision. In the present case, however, she was doubtless aware of the great strides that had been taken in improving relations with Equatorial Guinea, including the development of its legal system and judicial training. She had also been apprised of the trial proceedings and condition of the South African accused in Equatorial Guinea, however unsatisfactory the reports in this regard might have been. Without any indication to the contrary, she was entitled to accept the reports as accurate and reliable.'<sup>68</sup>

The court noted that the Minister of Justice had regard to 'political and foreign policy considerations on the basis of a joint commitment to combat cross-border crimes and South Africa's commitment to promote the rule of law in Africa'.<sup>69</sup> Significantly, the court further noted that, on a political level, '[the Minister of Justice] was of the view that the South African government should assist Equatorial Guinea'<sup>70</sup> in its request for assistance.

As far as administrative justice is concerned, the court accepted that the Minister of Justice did apply her mind to the request for assistance, as well as the accompanying documents and other information. The court was critical of some aspects of the documentation presented to the Minister. However, this was apparently not enough for the court to find against the Minister on administrative-justice grounds:

'There was no question of her simply rubber stamping the advice or recommendation given her. . . . She was, indeed, carrying out a policy decision relating to foreign affairs, as she was empowered and required to do.'<sup>71</sup>

Regarding the request by Equatorial Guinea for mutual legal assistance in the form of judicial co-operation, it is submitted that the Minister of Justice and the Department of Justice were wrong not to have made their objection to the human rights situation in Equatorial Guinea quite clear. Perhaps concerns about mercenary activities in the region and South Africa's strong stance against that<sup>72</sup> trumped human rights concerns. The authorities in Equatorial Guinea were, as a result of the South African government's decisions and the structure of decision-making under the co-operation regime set up by the International Co-operation in Criminal Matters Act, in a position to abuse South African legal processes to bolster a criminal trial in Equatorial Guinea marred by poor due process and human rights standards.<sup>73</sup>

<sup>67</sup> Ibid para 74.

<sup>68</sup> Ibid para 75.

<sup>69</sup> Ibid para 76.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid para 81.

<sup>72</sup> See in general Dlodlu op cit note 27.

<sup>73</sup> See Amnesty International's Country Report (Equatorial Guinea) (available at [web.amnesty.org/web/web.nsf/print/OC901AF368DD535B80256FDA00374378](http://web.amnesty.org/web/web.nsf/print/OC901AF368DD535B80256FDA00374378)) on the human rights situation in that country. The Report covers the period January to December 2004. It specifically mentions the trial of the accused in the alleged coup. It states: 'The trial was grossly unfair. No evidence was presented in court to substantiate the charges, other than the defendants' own statements which were in Spanish, a language they do not understand, and which the defendants stated were extracted under torture. The court ignored their claims and did not allow defence lawyers to raise the issue of torture. The defendants had no access to their lawyers until two days before the trial, which started on 23 August [2004], and their lawyers were not given

## VII CONCLUSION

The status quo is that international co-operation in criminal matters (including mutual legal assistance) is by and large an executive, and not primarily a judicial function. Co-operation in criminal matters between states is after all a manifestation of international relations between sovereign states. This is not the exclusive domain of the judiciary, nor should it be. It is submitted that the court in the *Thatcher* case, for instance, should have given more weight and attention to the dire human rights situation in Equatorial Guinea. In fact, the court seriously doubted the fairness of the criminal proceedings in Equatorial Guinea, but in the end decided that there were more appropriate forums and opportunities for the applicant to raise human rights concerns.

South African courts should not serve as conduits for foreign criminal processes where the integrity of such processes is affected by a manifest disrespect for human rights and due process considerations. International co-operation in criminal matters is a necessary tool in the fight against international and transnational crime, and also a fundamental part of good foreign relations. But South African courts must, as a matter of principle and as a consequence of our human rights dispensation, speak out against situations where there is clear abuse of process by foreign states. Balancing crime fighting and respect for human rights and due process is appropriate, also in the context of international co-operation in criminal matters, including mutual legal assistance.

Ultimately, the value of the judgment in the *Thatcher* case lies in the court's interpretation of s 8(1) of the International Co-operation in Criminal Matters Act, namely that there is scope in mutual legal assistance requests for human rights considerations to play a role before the relevant magistrate's court. But then our courts must not act as rubber stamps and will have to scrutinize the human rights situation of the requesting state. This is something the executive might find politically unpalatable. For this reason what Thring J in the *Beheermaatskappij Helling* case<sup>74</sup> refers to as the 'filter' of s 7 of the International Co-operation in Criminal Matters Act, in terms of which co-operation is subject to ministerial approval, is not entirely

sufficient time to prepare their defence. The defendants complained that their statements had not been taken by an investigating judge, as required by national law, but by the Attorney General, who acted for the prosecution in court. Defence lawyers lodged an appeal which was pending at the end of the year. Since their arrest, the foreign nationals had been held incommunicado and handcuffed and shackled 24 hours a day. They were deprived of adequate food and medical care and had only sporadic and limited access to their families.' See further Bruce Zagaris 'S. Africa Constitutional Court affirms dismissals of appeal by 69 in E. Guinea extradition, arrests Margaret Thatcher's son, and trial of mercenaries in Zimbabwe concludes' 20:10 (Oct 2004) *International Enforcement Law Reporter* 412–15. Van Zyl J also referred to some of these aspects of the criminal process in Equatorial Guinea: see *Thatcher* case supra note 18 para 45.

<sup>74</sup> *Beheermaatskappij Helling* case supra note 11. Thring J (at 22–3) described the role of the Minister in terms of the scheme of the International Co-operation in Criminal Matters thus: 'There may well be and probably are countries (I am not suggesting that the Netherlands [the requesting state in casu] is one of them) with which co-operation in these matters may be considered (at ministerial level) to be unwarranted or undesirable for a variety of reasons, for example because the system of criminal justice in those countries is disturbingly inadequate, or because of their refusal or failure to reciprocate in the past with assistance to South Africa.'

satisfactory. Our courts have a duty not only to protect the integrity of domestic legal processes and our constitutional dispensation, but also to guard against (transnational) abuse of process by refusing to act as conduits for foreign states with bad human rights standards and practices.

South African jurisprudence on international co-operation in criminal matters is still in its infancy. So far our courts (under the guidance of the Constitutional Court) seem to be quite cautious in their approach and are not willing to decide on matters of high policy or foreign relations. However, it is equally clear that there is scope for human rights considerations in matters of international criminal justice.

The time is ripe to challenge the traditional contrast between ‘policy matters’ and ‘legal questions’. This is all the more necessary because of the lack of effective supranational or international structures where individuals could challenge decisions or seek relief in the context of mutual assistance between states. In this regard it is clear that the creation of, for instance, the African Court on Human and Peoples’ Rights is of little use for individuals who become the subjects of international co-operation in criminal matters and mutual legal assistance.<sup>75</sup> André Klip’s observations regarding the problematic role of human rights in international criminal justice in the supranational environment of Europe<sup>76</sup> are perhaps even more valid when it comes to co-operation in criminal matters in Africa. Indeed, it is up to South African courts to decide on the proper protection of human rights while enforcing our obligations under international and national law to co-operate in criminal matters.

South African jurisprudence on international co-operation in criminal matters (including mutual legal assistance) shows that this area of law is in need of reform. International and regional dynamics and developments in international criminal law demand further analysis of the status quo. There is room to reconsider our approach to international co-operation, which is still mainly bilateral in nature, in light of the following idealistic observations by Cherif Bassiouni:

‘Multilateralism should serve to buttress bilateralism and vice versa. Moreover, harmonization of national legislation should be sought to produce new synergies that enhance complementarity. Thus, extradition, legal assistance, transfer of execution of penal sentences, recognition of foreign penal judgments, transfer of execution of penal sentences, recognition of foreign penal judgments, transfer of

<sup>75</sup> The African Court on Human and Peoples’ Rights is, in theory at least, a step in the right direction to bring human rights closer to individuals. This institution should really develop into a true supranational forum for the protection of human rights and should thus serve as the necessary corrective to any human rights violations that might occur as a result of or as part of international co-operation in criminal matters between states, which is no doubt important in the fight against international and transnational crime on the African continent. The court is established in terms of the Protocol on the African Court on Human and Peoples’ Rights. South Africa ratified the Protocol (which came into operation in December 2003) on 3 July 2002. The court may only in exceptional circumstances allow individuals to bring cases before it. Apart from the rather complicated relationship between the court and the African Commission on Human and Peoples’ Rights, as well as the stringent rules and procedures on individual locus standi, there also seems to be a lack of political will in many states in Africa to make this international human rights body to work effectively. See in general Dugard *op cit* note 7 at 565–8 for a critical discussion of the African Court on Human and Peoples’ Rights.

<sup>76</sup> Klip *op cit* note 13.

criminal proceeds, freezing and seizing of assets derived from criminal proceeds, intelligence and law enforcement information-sharing, and regional and sub-regional “judicial spaces” can reinforce each other without sacrificing proper legal procedures and without violating individual human rights.<sup>77</sup>

The risk of abuse of process in the case of mutual legal assistance, and the implications of this for the integrity of our legal system which is based on the respect for human rights, can ultimately best be dealt with by making this issue part of a broader critical investigation into the South African law on international co-operation in criminal matters.

<sup>77</sup> Bassiouni *op cit* note 10 at 458.