The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis*

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Abstract

This article examines whether the police have a constitutional duty to inform 'suspects' about their fundamental rights, despite the fact that section 35 of the Constitution of the Republic of South Africa, 1996, is silent on this issue. The decisions of the different divisions of the South African High Court diverge on this question, and the Constitutional Court has not yet had the opportunity to settle it. In an attempt to resolve this question, this article considers the underlying principles of binding and non-binding international law standards, as well as how this is approached in the Canadian and United States' jurisdictions. This analysis reveals that an emerging consensus of opinion is developing which suggests that the informational duties should arise from the moment the police embark on an adversarial relationship with suspects, by approaching them to establish or disprove the existence of evidence linking them to a crime. The author concludes that such an approach accords with a contextual and purposive interpretation, and should be embraced.

INTRODUCTION

During the initial phase of the criminal process tension arises between policing powers to investigate and prevent crime, on the one hand, and the

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fundamental rights of citizens, on the other. The South African Police Service serves to fulfill society's need to live in peace and safety. Yet, police action could also pose a serious risk to the individual's right to freedom from unwarranted official interference. Consequently, clear guidelines on the rules governing interactions between the police and private individuals is of fundamental importance if only to ensure that police officers are familiar with the limits of their powers, thus clarifying exactly when, during the initial phase of the investigation, they are duty-bound to impart the informational warnings contained in section 35 of the Constitution of the Republic of South Africa, 1996.[1]

Read superficially and literally, section 35 of the Constitution could be taken to protect only the rights of detained, arrested and accused persons.[2] This would exclude suspects from relying on the provisions of this section, especially entrenched to ensure that the trial of every accused complies with the due process values guaranteed in terms of the Bill of Rights.[3] Furthermore, a contextual reading of section 35 with section 35(5) would entail that, if suspects were not accorded the right to rely on the provisions of section 35, the remedy contained in section 35(5) of the Constitution may consequently not be available to them during their subsequent trial[4] (when their status would have changed to that of an accused).

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1 Hereafter 'the Constitution' or the 'South African Constitution'.

2 See for example the heading of the section which reads: 'Arrested, detained and accused persons' at: http://www.constitutionalcourt.org.za/site/constitution/english-web/ch2 html for the text of the Bill of Rights.

3 The Bill of Rights (located in Chapter 2 of the Constitution) contains a list of fundamental rights guaranteed by the Constitution.

4 According to I Currie & J de Waal (eds) in *The Bill of Rights handbook* (2005) at 156, the function of the 'contextual' interpretational tool is to construe a particular section of the Bill of Rights while having regard to other provisions in the Bill of Rights in order 'to provide a further context for the interpretation of individual provisions of the Bill of Rights'. However, the authors further explain at 156 n 44 that when two subsections contained in a section are harmonised in order to give proper meaning to a section, this form of interpretation should not be regarded as an example of the purposive method of interpretation. They are of the opinion that this interpretative tool is 'more accurately described as a manifestation of the systemic [or contextual] method of interpretation'. Therefore, whenever reference is made in this article to 'contextual interpretation', I refer to the latter form of 'contextual interpretation', preferred by Currie & De Waal. SE van der Merwe 'Unconstitutionally obtained evidence' in SE van der Merwe & PJ Schwikkard (eds) *Principles of evidence* (2008) at 216 remarks that if a suspect is not a beneficiary of s 35 when the infringement occurred, he or she would have to rely on the common law exclusionary rule.

This would be the case, despite the apparent underlying principle that section 35 seeks to advance, which is, that an accused should be treated fairly both at the 'gatehouses' of the criminal justice system (the pre-trial phase) by protecting them against unfair self-incrimination, as well as the 'mansions' (the court).[5] The means employed to ensure that an accused is treated fairly during the pre-trial stage is by upholding the right to remain silent and the right against self-incrimination. These rights, in turn, are effectively protected by the right to legal representation.

However, the uninitiated who are facing the power of the law in an adverserial justice system, may not be aware if these rights, unless they are informed of them by the police.

The South African case law on this point is by no means settled. One line of reasoning holds that a 'suspect' may not rely on the protection guaranteed by section 35; while other courts have opted for a purposive interpretation that extends the scope of protection to suspects.[6] To date, the Constitutional Court has not had an appropriate opportunity to provide guidance on this important question. Although a number of South African scholars have considered this question,[7] I will address the developments subsequent to these discussions and also consider comparative law sources which have not to date been explored.

Comparative law analyses reveal an emerging consensus suggesting that the informational duties of the police kick in from the moment they are

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5 See *S v Melani* 1996 2 BCLR 174 (EC) at 349; see also EJ Ratushny 'The role of the accused in the criminal process' in A Beaudoin & EJ Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (1989) at 462; see also AP Paizes 'Undue influence and involuntary confessions' (1981) *SACC* 122 at 131, where this metaphor is referred to with approval, citing J Kamisar 'Equal justice in the gatehouses and mansions of American criminal procedure' in A Hall & J Kamisar (eds) *Modern criminal procedure*.

6 See for example, *S v Langa* 1998 1 SACR 21 (T); *S v Ngwenya* 1998 2 SACR 503 (W); *S v Mthethwa* 2004 1 SACR 449 (E); *S v Ndhlovu* 1997 12 BCLR 1785 (N); compare *S v Sebejan* 1997 1 SACR 626 (W); *S v Orrie* 2005 1 SACR 63 (C); see also the *obiter* comments by Van der Merwe J in *S v Zuma* 2006 3 All SA 8 (W).

7 See for example, PJ Schwikkard 'The exclusion of evidence in the absence of an appropriate warning' (1997) 3 *SAJHR* 446 (hereafter 'Schwikkard: 1997'); Schwikkard & Van der Merwe n 4 above. Van der Merwe undertakes a thorough comparative law analysis of the Canadian and the United States exclusionary remedies in chapter 12; PJ Schwikkard 'Arrested, detained and accused persons' in Currie & De Waal n 4 above at 741 and 791; F De Jager et al *Commentary on the Criminal Procedure Act* (2005) at 112D–11E; see also N Steytler *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 49. The work by Steytler represents an extensive comparative law analysis of the Bill of Rights with international and foreign law.

involved in an adversarial relationship, by approaching an individual to confirm, disprove, or reveal evidence that links him/her to a crime. In accordance with this view, in South Africa, a suspect should be informed of his/her constitutional rights. This approach has the important advantage of being significantly aligned to a contextual and purposive interpretation.

The international law position is discussed below.

INTERNATIONAL LAW

The interpretation clause of the Constitution, its meaning, as well as the legal effect of binding and non-binding international law standards are considered here, at both the regional and global level.

Section 39 of the Constitution serves as a general guide for the interpretation of the provisions of the Bill of Rights. This section, in relevant part, provides as follows:[8]

> When interpreting the Bill of Rights, a court, tribunal or forum –
> ...
> *must* consider international law; and
> *may* consider foreign law.

This provision directs that whenever a court interprets the provisions of the Bill of Rights – in our case section 35 – a consideration of international law is obligatory, while the consideration of foreign law remains optional.[9] What, some might ask, should be regarded as international law, within the meaning of section 39(1)(b)?

In the seminal case of *S v Makwanyane*,[10] Chaskalson CJ observed that within the context of the Bill of Rights both binding and non-binding international law qualify as tools for the interpretation of a number of provisions contained in the Bill of Rights.[11] Binding international law standards refer to human rights norms that have been recognised at international law level as having attained the status of customary international law, and international law conventions ratified and enacted

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8 Emphasis added.

9 Currie & De Waal n 4 above at 160–161.

10 1995 3 SA 391 (CC) at par 35. Although the provisions of the Interim Constitution were interpreted in *Makwanyane*, this *dictum* is applicable to the interpretation of Chapter 2 of the current Constitution.

11 *Ibid*. See also J Church, C Schulze & H Strydom *Human rights from a comparative and international law perspective* (2007) at 214.

into law by the South African government (the latter is also referred to as international conventional standards).[12] In the South African context, examples of non-binding international law (or non-conventional) standards are conventions not ratified by South Africa, as well as declarations, resolutions by the General Assembly and other UN bodies, guidelines, basic principles, general standards, and general comments published by treaty monitoring bodies.[13] Strydom, Pretorius & Klinck observe that these non-binding international law standards do not have a legally binding effect and are thus referred to as 'soft law'.[14] However, they hasten to add that 'there is a growing body of consensus that such documents embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of existing law.'[15] In this light, I will evaluate why one should consider both conventional and non-conventional standards.

Binding and non-binding international law standards

Binding and non-binding international law standards aimed at defining the scope of the powers of the police in their interaction with civilians during the initial phase of crime investigation, are considered here, first at regional and, then at global level.

Regional level

The Inter-American Convention,[16] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[17] the African Charter on Human and Peoples' Rights[18] and the Protocol to the African

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12 *Ibid*.

13 *Ibid*.

14 HA Strydom, JL Pretorius & ME Klinck *International human rights standards: administration of justice vol 1*(1997) at 3.

15 *Ibid*.

16 This convention was signed on 22 November 1969 and came into operation on 18 July 1978. See EM Patel & C Watters *Human rights: fundamental instruments and documents* (1994) at 94, for the text of the Inter-American Convention; see also www. up.ac.za/chr.

17 This convention was signed on 4 November 1950 and came into force on 3 September 1953, (hereafter 'the European Convention'). It is binding at regional level among European member states that signed, ratified, or acceded to it. See Patel & Watters n 16 above at 111 for the text of the European Convention; see also www.up.ac.za/chr.

18 Hereafter 'the African Charter' or 'the Banjul Charter'. The African Charter was adopted by the Assembly of the Heads of State and Government of the Organisation of African Unity (hereafter 'the OAU'), which has subsequently been replaced by the African Union (hereafter 'the AU'). The African Charter was adopted on 27 June 1981 in Kenya and came into force on 21 October 1986. See Patel & Watters n 16 above at 141, for the text of the African Charter; see also C Heyns *Human rights instruments in Africa vol I* (2004) at 134, for the text of the African Charter; C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2007) at 29–40; see further F Viljoen

Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,[19] do not guarantee the right to legal representation during the pre-trial phase of the criminal investigation.

However, both the Human Rights Committee[20] and the European Court of Human Rights[21] have interpreted the right to a fair trial to include the right to legal representation during the pre-trial phase. The principle underlying this approach was explained in *Imbrioscia v Switzerland*[22] by Pettiti, De Meyer and Lopez Rocha JJ who wrote separate dissenting, but convincing opinions.

Lopez Rocha J pointed out that the existence of a pre-trial right to legal representation is justified, 'especially in the initial stages of the proceedings' when the accused is confronted 'on rather unequal terms' by the might of the law and the state. He held further that the fact that an accused is accorded the right to legal representation during trial 'cannot effectively cure this defect'.[23] In a word, once an adversarial relationship exists, the accused individual or suspect needs protection in order to prevent unfair self-incrimination.

Ostensibly aimed at promoting the values advanced in the dissenting opinion of Rocha J in *Imbriosca*, the *Corpus Juris* of the European community[24] describes as the 'starting point' of the right to be treated as

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Realisation of human rights in Africa through inter-governmental institutions (unpublished LLD thesis 2004) for a discussion of the aims and functions of the African Commission on Human and Peoples' Rights (hereafter 'the African Commission'). Articles 6 and 7 of the African Charter guarantee the right to a fair trial. South Africa acceded to the African Charter on 9 July 1996.

19 Hereafter 'the African Court Protocol' or the 'Court Protocol'. This Protocol was adopted during June 1998, in Addis Ababa and entered into force in January 2004, after 15 instruments of ratification or accession were deposited with the Secretary-General of the AU. The seat of the court is in Arusha, Tanzania. See Heyns & Killander n 18 above; see also www.africa-union.org. South Africa signed the Court Protocol on 9 June 1999.

20 *Murray v UK* 28 Oct 1994 Series A no 300–A, (hereafter 'the *Murray* decision of the Commission').

21 *Murray v UK* decision of 8 February 1996 of the Eurpean Court of Human Rights.

22 17 EHRR 441.

23 *Id* at 461.

24 The *Corpus Juris* of the European community was drafted during 1997 and revised during the year 2000, with the aim of synchronising the laws of criminal procedure of the fifteen member states of the European community. Its aim is to establish a *jus commune* based on a combination of solutions as applied by the different member states in their criminal justice systems, while at the same time highlighting problems faced by member states in the field of fighting financial crime. The national *rapporteurs*, in conjunction with the EU-experts conducting the research into the compatibility of the

an accused and not as a witness, the moment when 'any step is taken establishing, denouncing or revealing the existence of clear and consistent evidence of guilt'. This, therefore, includes the period preceding the initial questioning by 'an authority aware of the existence of such evidence'.[25] Therefore, a person should be deemed a suspect once the police are in possession of evidence implicating him/her in the commission of an offence, which prompts the police to question him/her to confirm whether he/she was involved in the offence. Phrased differently, when an adversarial relationship is set in motion, the individual should be informed about those rights that serve to protect him/her from unfair self-incrimination. This approach further serves a similar purpose to that advanced by the *ad hoc* international criminal tribunals, discussed below[26] in that both emphasise the policing duty to inform a person suspected of having committed a crime that he/she is a suspect. The duty to disclose a person's status as a suspect was designed to prevent suspects from unwittingly incriminating themselves.

Mindful, perhaps, of the general state of poverty on the African continent, the African Commission has recommended that member states should allow paralegal services to provide legal assistance to indigent persons during the pre-trial stage.[27] In addition to this safeguard, and pursuant to its 1999 Resolution on the right to a fair trial and legal assistance, the African Commission adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[28] The relevant provisions of the Guidelines relating to a fair trial provide that an accused should be

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criminal justice systems of member states with that suggested by the *Corpus Juris* of the European community, concluded that the systems of most member states are compatible with art 29 of the *Corpus Juris*, except that of the Slovak Republic and Slovenia 'where the police are not duty bound to inform a suspect of his rights before interrogation' see 'Study on penal and administrative sanctions, settlement, whistle blowing and *Corpus Juris* in the candidate countries' *Era–Forum* (special issue no 3) (2001) at 26

25 See art 29 of the *Corpus Iuris* of the European community.

26 See the discussion at 249–250 below.

27 Recommended at its 26th session, held in Kigali, Rwanda, from 1–15 November 1999. See Heyns n 18 above at 587. For the text of this resolution, see Heyns n 18 above at 584–589; see further Heyns & Killander n 18 above at 288. Some might argue that this recommendation may have prompted the South African government to embrace paralegals in the proposed legislation aimed at regulating the legal profession. See for example, the Legal Services Sector Charter (2007), chapter 1 at 6, which identifies paralegals, as 'defined in the Legal Practice Act to be promulgated', as one of the stakeholders in this Charter. In terms of this Charter, 'non-profit community-based paralegals' should provide legal services to 'the poor and rural communities' (see http://www.justice.gov.za/LSC/LSSC_Dec%2007 (last accessed on 14 December 2009).

28 Adopted during 2003. (Hereinafter referred to as 'the Guidelines for a fair trial'). For the text of this document, see Heyns & Killander n 18 above at 301.

informed of the right to legal representation after he or she has been *arrested*.[29]

Global level

Neither the Universal Declaration of Human Rights,[30] nor the International Covenant on Civil and Political Rights[31] make provision for the enforcement of the right to legal representation during the pre-trial phase.

Seemingly adopted by the United Nations General Assembly to prevent the abuse of power by state officials during the pre-trial phase, the principles contained in the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment[32] require that nation states keep proper records of interrogation[33] and that these be made available for inspection by the courts, without the detained person suffering the risk of any form of prejudice.[34] The underlying reason for the creation of these safeguards would appear to lie in the recognition that suspects require protection when they are in an adversarial relationship with law enforcement officials. Moreover, the Body of Principles clearly provides that evidence obtained in a manner incompatible with its provisions, may be a relevant factor in assessing the admissibility of that

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29 Guideline N(2), under the heading 'Provisions applicable to proceedings relating to criminal charges'. Guideline M(2)(b) of the guidelines for a fair trial, under the heading 'Provisions applicable to arrest and detention', reads as follows: 'Anyone who is arrested or detained shall be informed, *upon arrest* … of the right to legal representation …'. (Emphasis added). See Heyns & Killander n 18 above at 298 for the text of par M(2)(b) of the Guidelines for a fair trial.

30 Adopted by the General Assembly of the United Nations on 10 December 1948 in terms of Resolution 217(III), ('the UDHR'). Article 11(1) of the UDHR reads as follows: 'Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'. See Patel & Watters n 16 above at 11; see also www.up.ac.za/chr. The UDHR has acquired the status of customary international law – see Church, Schulze & Strydom n 11 above at 166–167.

31 Passed by means of the General Assembly of the United Nations Resolution 220A(XI) of 16 December 1966, and came into force on 23 March 1976, after having been signed, ratified or accepted by means of accession by nation states, (hereafter 'the ICCPR'). See Patel & Watters n 16 above at 21, for the text of the ICCPR. South Africa ratified this covenant on 24 January 1990. See Heyns n 18 above at 49; see also www.up.ac.za/chr.

32 Hereafter 'the Body of Principles'. The Body of Principles was adopted in terms of the UN General Assembly Resolution 43/173 of 9 December 1988.

33 Principle 23(1) provides as follows: 'The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogation as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law'.

34 Principle 33, read with principle 37.

evidence in proceedings against the accused.[35] It is submitted that this standard serves to discourage unjustifiable police interference with the procedural safeguards designed to protect suspects from unfair treatment during the pre-trial process. However, it is submitted that the right to legal representation is a more effective means of achieving this goal.

Furthermore, the United Nations Special Rapporteur on the independence of judges[36] has asserted that it is 'desirable' that an accused have an attorney assigned to him/her during police interrogation. The rationale for such an approach being that the presence of a legal representative would serve as a safeguard against the abuse of power.[37] The provisions contained in the Guidelines on the right to a fair trial[38] and the Basic Principles on the Role of Lawyers,[39] both suggest, however, that the right to legal representation should be accessed soon after *arrest*.

Further to its role as global standard-setter in international criminal law,[40] the United Nations has established *ad hoc* international criminal tribunals for the prosecution of human rights atrocities committed in for example

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35 Principle 27 reads as follows: 'Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person'.

36 Report on the Mission of the Special Rapporteur to the UK, UN Doc E/N 4 1998/39add 4 par 47, 5 March 1998.

37 A similar recommendation was made by the Inter-American Commission in its report on the situation in Nicaragua. See, in this regard, the Report on the situation of Human Rights of a segment of the Nicaraguan Population of Moskito Origin, OAE Ser L/V11. 62, Doc 10, rev 3, 1983.

38 See n 28 above. For the contents of the relevant guideline, see n 29 above.

39 Herenafter 'the Basic Principles'. More particularly, Principle numbers 5, 6 and 7 of the Basic Principles. The Basic Principles was adopted during 1985 in Milan, at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders. Principle number 7 reads as follows: 'Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.' See Strydom, Pretorius & Klinck n 14 above at 56 for the text of the Basic Principles.

40 See, for example, the First Congress of the UN, held in 1955, when the Standard Minimum Rules for the Treatment of Prisoners was adopted (Economic and Social Council Resolution 663 C I(XXIV)); also at its Fourth Congress, held at Caracas, where the Code of Conduct for Law Enforcement Officials were adopted (General Assembly Resolution 34/169); see further at its Seventh Congress, held in Milan, during November 1985, when the General Assembly adopted, *inter alia*, the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New Economic Order; and the Basic Principles on the Independence of the Judiciary (General Assembly Resolution 40/32); during its Eighth Congress, held during December 1990, the General Assembly adopted, among other resolutions, the Basic Principles on the Role of Lawyers, including the Guidelines on the Role of Prosecutors. (See UN Publication, sales no E 92 IV.1 at vii–viii).

Yugoslavia[41] and Rwanda.[42] The Rules of Procedure of the Rwandan and Yugoslavian International Criminal Tribunals provide that a *suspect* may not be questioned during the pre-trial investigation phase without the presence of a legal representative, unless this right had been expressly waived.[43] In the absence of any such waiver, questioning may not proceed.[44]

It is noteworthy that Rule 1 of the Rules of Procedure of the ICTY[45] defines a 'suspect' as[46]

> [a] person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime…

This definition focuses on the subjective belief of the prosecutor, informed by an objective assessment as to whether on all the facts at his/her disposal, the person is regarded as a suspect. As with the provisions of the *Corpus Juris* of the European community and the relevant provision of the International Criminal Court,[47] this provision clearly aims to protect suspects from unfair pre-trial self-incrimination. In other words, the drafters of this provision accepted that an adversarial relationship is set in motion by the prosecution once they approach suspects to question them about their possible involvement in a crime.

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41 Hereinafter referred to as 'the ICTY'.

42 Hereinafter referred to as 'the ICTR'. The ICTR was established as a result of the genocide committed in Rwanda after the death of President Habyarimana in a plane crash. The UN Security Council established a Commission of Experts to determine whether genocide had been committed. The Commission held that genocide was indeed committed and recommended that the Statute of the International Tribunal for Yugoslavia be extended to include crimes committed during the Rwandan massacre. For this reason, the Security Council adopted Resolution 955 on 8 November 1994, establishing the ICTR. See GW Mugwanya 'Introduction to the ICTR' in Heyns (ed) n 18 above at 60–81, for a brief history, the function and jurisdiction of the ICTR. In addition, a tribunal was established to deal with the human rights atrocities committed in Sierra Leone.

43 Rule 42(B) of the Rules of Procedure of both tribunals are identical in content and read as follows: 'Questioning of a suspect shall not proceed without the presence of counsel, unless the suspect has waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall only resume when the suspect has obtained or has been assigned counsel.'

44 Article 42(B) of the Rules of Procedure of the ICTY and the ICTR.

45 These Rules were adopted pursuant to art 15 of the Statute of the Tribunal.

46 Rule 2 of the Rules of Procedure of the International Criminal Court (hereafter referred to as 'the ICC'), contains an identical provision.

47 *Ibid*.

FOREIGN LAW

As in South Africa, the law of evidence in Canada and the United States is based on English common law. The experiences in these jurisdictions could therefore shed light on this issue.

Canada

In Canada, the right to legal representation and the ancillary Charter rights are triggered when a person is 'detained' by the police.[48] In the Canadian Supreme Court decision in *Therens*,[49] Le Dain J held that a person is deemed to be 'detained', when she is deprived of her freedom; when, by means of a demand or direction, a police officer assumes control over the movements of a person, having significant legal consequences, which as a result prevents access to legal representation; and when a person, as a result of psychological compulsion, reasonably perceives that his/her freedom of choice has been curtailed by a police officer, without the application or threat of the application of force.[50]

L'Heureux-Dube J, dissenting in *Elshaw*,[51] found that the interpretation by Le Dain J, in *Therens*, placed an 'undue restraint on law enforcement agencies'. He referred to various decisions handed down by the Canadian Courts of Appeals[52] where the dictum of Le Dain J had been applied in a way that limited, rather than broadened the scope of the concept of 'detention'.

In *R v Mann*[53] Iacobucci J mentioned *obiter* in a majority judgment that the police cannot be said to 'detain' every suspect they stop for purposes of identification or interview. Therefore, delays that do not involve significant physical or psychological confinement do not qualify for the

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48 *R v Therens* [1985] 1 SCR 613; 18 CCC (3d) 481 (SCC); see also *R v Hufsky* (1980) 40 CCC (3d) 398 (SCC), where a brief stoppage at a roadblock was deemed a detention.

49 See n 48 above at par 57.

50 See also *R v Elshaw* (1991) 67 CCC (3d) 97; [1991] 3 SCR 24 (SCC). L'Heureux-Dube J wrote a dissenting opinion in this decision.

51 *Id* at 27–29 of the printed page (publication pages or paragraph numbers not available), http://csc.lexum.umontreal.ca/en/1991/1991ecs3-24/1991rcs3-24 html (last accessed on 14 December 2009).

52 See, for instance, *R v Moran* (1987) 36 CCC (3d) 225 (Ont. CA). Martin JA laid down a list of criteria to determine whether the accused had been 'detained'. The court applied that criteria to the facts of the case and held that the accused had not been 'detained' in terms of s 10(b) of the Charter when interviewed. See also *R v Espito* (1985) 24 CCC (3d) 88 (Ont CA); *R v Voss* (1989) 50 CCC (3d) 58 (Ont CA); however, compare the recently decided matter of *R v Janeiro* (2003) CarswellOnt 5081 (Ont CA).

53 [2004] 3 SCR 59; see also *R v Orbanski* (2005) 196 CCC (3d) 481 (SCC).

protection guaranteed by sections 9 or 10 of the Charter.[54] This type of detention has come to be referred to as a '*Mann*-type investigatory detention' and implies that asking a person for identification, or even a short inverview, will not qualify as a 'detention'. The police are required to meet the standard of a 'reasonable suspicion' as a condition precedent to a *Mann*-type investigatory detention. The qualification introduced by *Mann*, blurred the clear line between police questioning that amounts to a detention, and questioning that does not.[55] This uncertainty led to the infringement of the rights of the accused in the case of *R v Grant*[56].

In this case, the accused walked past police officers in a manner that they perceived as a 'suspicious' manner. They decided that he should be questioned; stood in his way and ordered him to keep his hands in front of him – which he did. During questioning, Grant made incriminatory statements, and he was arrested. At issue was whether Grant had been detained when these statements were made. The Supreme Court of Canada revisited the concept of 'detained', in an attempt to establish legal certainty.

Stuart,[57] in heads of argument filed in the Supreme Court of Canada in the sequel to the case of *Grant*,[58] underlined the shortcomings in the concept of 'detained' by arguing that the focus on physical and psychological detention could encourage the police to avoid activating sections 9 and 10 of the Charter by delaying an arrest.[59] To avoid this, he proposed that the concept 'detention' be broadened to include the stopping of both vehicles and pedestrians where the police 'have a *suspicion* which has reached the point that they are attempting to obtain incriminating evidence' against the suspect.[60] In other words, he favoured an approach that would include the perceptions of the police officers, for example, whether they had already decided that a crime had been committed; whether, in their view, the suspect was the perpetrator; and whether the questioning would be conducted with the aim of securing incriminating evidence against the

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54 *Id* at par 19.

55 This was the opinion of Laskin JA in *R v Grant* (2006) 38 CR (6th) 58 (Ont CA) at par 62.

56 Now reported as *R v Grant* 2009 SCC 32

57 Of the Faculty of Law, Queen's University, Canada. The author has the heads of argument (also referred to as 'the factum') on file.

58 See n 56 above.

59 Stuart n 57 above in his Heads of Argument at 9.

60 *Id* at 9–10. Emphasis added.

suspect.[61] Approaching a suspect with such foreknowledge and purpose, brings the police into an adversarial relationship with the suspect, which renders him/her in need of legal representation at this crucial point of police-citizen interaction.

However, the majority judgment delivered by the Supreme Court of Canada confirmed in *Grant* that a 'detention' under sections 9 and 10 of the Charter refers to a suspension of the individual's liberty interests by a significant physical or psychological restraint.[62] The majority judgment of the Supreme Court explained that

> the necessary element of compulsion or coercion may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.[63]

The test is therefore that of a 'reasonable man': Would a reasonable person have believed that he/she had no alternative but to cooperate with the police? A number of factors may be considered to determine this.[64]

The fundamental difference between the approach suggested by Stuart and that adopted by the Supreme Court is that the court did not attach significant importance to the subjective intention of the police in determining whether a detention had occurred. Predictably, this approach has not gone unchallenged.

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61 See also Binnie J (dissenting) in *Grant* n 56 above at par 168. Such an approach is notably similar to the approach adopted in the *Corpus Juris* of the European community.

62 *Grant* n 56 above at par 44; also see par 150. It must be pointed out that the majority judgment of the Supreme Court did take into account some factors relating to the intention of the police, for example, whether the individual was singled out for 'focused investigation' – see par 44.

63 *Id* at par 28.

64 *Id* at par 44. The following factors may, *inter alia*, be considered: '(a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or singling out the individual for focused investigation. (b) The nature of the police conduct including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter. (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.' Compare the factors considered by the court in the South African decision of *Magobodi v Minister of Safety and Security* 2009 1 SACR 355 (Tk) at par 14. In this decision, the court had to determine whether 'consent' to conduct a search of a vehicle in terms of section 22 of the Criminal Procedure Act, 51/1977, had been voluntarily obtained.

Binnie J, entering a dissenting opinion in *Grant*,[65] endorsed Stuart's view and relied on the point of view held by Butterfoss, who argued that the test adopted by the majority judgment 'permits officers substantial leeway in approaching and questioning citizens without being required to show objective justification for such conduct'.[66] The judge argued that such generous leeway of non-Charter protection was achieved both by executing a 'highly artificial reasonable person', who is much more assertive in encounters with the police than the average person, and by ignoring the 'subjective intentions of the officer'.

To summarise, these cases address the important concern of establishing exactly when the policing informational duties should be set in motion. The Supreme Court accepted that the need to distinguish clearly between police questioning that does not trigger Charter protection, and questioning that does. It appears that the court opted for a test that considers all the circumstances of the encounter – without undue emphasis on the subjective views of the officer – in order to determine whether an adversarial relationship has developed. Once a reasonable person would have perceived such a relationship exists,[67] the informational warnings should be given.

The United States

In the United States, warnings in terms *Miranda v Arizona*[68] have to be given when a person is 'taken into custody or otherwise deprived of his freedom by the authorities in any significant way'. This broad 'custody' requirement made it difficult for police officers to perform their law enforcement duties effectively. As a result, in *Berkemer v McCarthy*,[69] the United States Supreme Court[70] divised a sliding scale approach to obviate the activation of *Miranda* warnings, by holding that a policeman who 'lacks probable cause', but whose observations lead him 'reasonably [to]

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65 *Id* at par 169.

66 EJ Butterfoss 'Brightline seizures: the need for clarity when Fourth Amendment activity begins" (1988–89) 79 *J Crim I & Criminology* 437 at 439.

67 For example, when he/she reasonably perceives the encounter as one which singles him/her out for focused police investigation.

68 Called '*Miranda* warnings' because it was held in this case that the accused should be warned of her constitutional rights in *Miranda v Arizona* (1966) 384 US 436. For a discussion of the content of the Miranda warnings, see HR LaFave *Search & seizure: a treatise on the Fourth Amendment* (1978) at 47; SE van der Merwe 'Unconstitutionally obtained evidence: towards a compromise between the common law and the exclusionary rule' (1998) 2 *Stell LR* 173 at 196.

69 *Berkemer v McCarty* (1984) 468 US 420.

70 *Per* Marshall J.

suspect' that a person is committing a crime, may detain the suspect briefly to 'investigate the circumstances' that gave rise to his/her being under suspicion.[71] In other words, a 'reasonable suspicion' entitles the police officer to question a suspect to establish his/her identity and to get information from the suspect to confirm or disprove his/her original suspicion.[72] This policing power is referred to as an 'investigatory' stop.

In *Serna-Barreto*,[73] the Seventh Circuit Court of Appeals stated that one of the mechanisms that could be used to ease the obvious tension between the two compelling, though, competing public interests could be found in striking a balance:[74]

> ... between the interest of the individual in being left alone by the police and the interest of the community in being free from the menace of crime, the less the interest of the individual is impaired the less the interest of the community need be impaired to justify the restraint. But beyond that, it is hard to see how criminal investigations could proceed if the police could never restrict a suspect's freedom of action, however briefly, without having probable cause to make an arrest.

From this point of view, on the one hand, the police and in the interest of public safety, should not be unreasonably restrained from exercising their duties. On the other hand, in the interest of protecting the public interest in the promotion of individual freedoms, the citizen should not, without reasonable justification be subjected to significant interference with his/her fundamental rights.

It is important to note, however, that suspects must be informed that they are not obliged to answer any questions.[75]

In 1980 the Supreme Court of the United States held that a person is 'detained' within the context of the Fourth Amendment, when having regard to all the circumstances, a reasonable person would have believed

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71 *Berkemer* n 69 above at 439–440.

72 *US v Serna-Barreto* (1988) 842 F 2d 965 at 966.

73 *Ibid*.

74 *Ibid*.

75 *Per* Binnie J (dissenting) in *Grant* n 56 above at par 177, citing the US Model Code of Pre-Arraignment Procedure (ALI 1975, s 110. (2). A similar procedural protection, establised in terms of Judges' Rules existed in the South African context during the pre-constitutional era. See See Appendix 'C' in Schwikkard & Van der Merwe n 4 above for the contents of these rules.

that he/she was not free to leave after an investigatory stop[76] thereby setting a benchmark for recent developments in Canada [77] Contrary to the approach advocated by Stuart,[78] it was held in *Mendenhall*,[79] that 'except insofar as that may have been conveyed to the respondent [suspect]', the subjective perceptions of the police are immaterial in determining whether a detention occurred.

To summarise, the United States' courts have eased the clear tension between rights protection and effective policing by striking a balance between these two competing interests. The Canadian interpretation of the concept 'detained' is closely aligned to that of the United States. However, it should be noted that the consequences arising from a detention differ in the two jurisdictions. In Canada, a detention prompts the informational warnings, whereas these warnings are not activated under the same circumstances in the United States. Further, in the United States the right to legal representation is only activated after an arrest. Meeting the terms of the provisions contained in the Inter-American Convention,[80] the United States only guarantees the right to legal representation after an *arrest* has taken place.[81]

THE POSITION IN SOUTH AFRICA DURING THE CONSTITUTIONAL ERA

There are conflicting decisions of the the South African High Courts relating to the activation of the informational warnings.

In *Sebejan*,[82] Satchwell J considered whether a statement made by one of the accused at a stage when she was a suspect, should be admissible for purposes of cross-examination. The judge characterised deceiving a suspect into believing that he/she was a state witness when inactual fact, information was being sought to strengthen the prosecution's case against him/her, as 'inimical to a fair pre-trial procedure'.[83] The following *dictum* of the judge underscores the underlying principle that extends

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76 *US v Mendenhall* 446 US (1980).
77 See the revised approach to the concept of detention in *Grant* n 56 above.
78 See n 57 above.
79 See n 76 above at 554; see also *Stansbury v California* 511 US (1994) at 323.
80 See n 16 above above.
81 *Oregan v Mathiason* (1977) 429 US 495; *Thompson v Keohane* (1995) 99 US 112.
82 See n 6 above.
83 *Id* at par 46.

constitutional protection under section 35 of the Constitution to 'suspects':[84]

> Surely policy must require that investigating authorities are not encouraged or tempted to retain potential accused persons in the category of 'suspect' while collecting and taking statements from the unwary, unsilent, unrepresented, unwarned and unenlightened suspect and only thereafter, once the damage has been done as it were, to inform them that they are now to be arrested.

Highlighting the values that section 35 seeks to protect, the judge reasoned that the likelihood should not exist that accused persons who must *a fortiori* have once been suspects, are not advised of their rights to silence and to legal representation', and consequently do not receive 'meaningful warnings prior to making statements' which are subsequently used against them during their trials, 'because it is easier to obtain such statements against them while they are still suspects who do not enjoy constitutional protections'.[85] This assertion suggests that an interpretation that precludes suspects, in these circumstances, from relying on section 35 would be synonymous with judicial condonation of unjustifiable governmental conduct.[86]

Satchwell J's reasoning accords with a purposive interpretation. She clearly sought the values or interests that the fundamental rights embodied in section 35 were designed to protect in a democratic society based on human dignity, equality and freedom, and subsequently preferred an interpretation that best serves to protect those values.[87]

MacArthur J[88] distinguished *Sebejan* from *Langa*.[89] In *Langa* several accused were charged with theft, alternatively a contravention of section

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84 *Id* at par 56.

85 *Ibid*.

86 See, in this regard, JJ Joubert (ed) *Criminal procedure handbook* (2007) at 5, quoting with approval from Aranella 'Rethinking the functions of criminal procedure: the Warren and Burger Courts' competing ideologies' (1983) 72 *The Georgetown Law Journal* 185 at 188, who confirms the importance of this point of view in the following terms: '… Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes.'

87 See *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, at 395; see also Currie & De Waal n 4 above at 148–150, for a discussion of the purposive form of interpretation.

88 Sitting in the same Provincial Division of the High Court as Satchwell J.

89 See n 6 above at 27.

36 of the General Law Amendment Act.[90] One of the accused, a suspect at that stage, was confronted by the police. She pointed out the alleged stolen goods and confessed to her part in the crime. MacArthur J[91] applied a literal approach and held that the accused could not rely on the constitutional guarantee of the right to legal representation or the right to remain silent at the relevant time, as she had been neither 'arrested', nor 'detained' when she pointed-out the items and made the incriminating statement.[92] The judge refused to follow the Canadian interpretation of 'detained'.[93] He held that the confession by the accused was made voluntarily, and was admitted on that basis. It is worth noting that MacArthur J did not consider nor refer to, the interpretation of the Bill of Rights as explained by Froneman J in *Melani*.[94] In my view Froneman argues that it should be irrelevant whether the accused was a suspect, a detainee or an accused person when her rights were violated: What really matters is whether the trial would be fair, since this is the purpose sought to be protected by the right to legal representation during the pre-trial phase.[95]

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90 Act 62 of 1955. The constitutionality of this provision was challenged in *Osman v Attorney-General, Transvaal* 1994 4 SA 1224, 4 SACR 493 (CC). However, the *Osman* judgment does not dictate that the police do not have to impart the informational warnings to a 'suspect'.

91 Mynhardt J concurring.

92 *Langa* n 6 above at 26–27; see also *Ngwenya* n 6 above, where the same approach was followed. In *Ngwenya*, Leveson J held that s 25 of the Interim Constitution is divided into 3 parts – detention, arrest and trial. Section 25(1) deals with the rights of a *detained* person, while s 25(3) covers the rights of *accused* persons.

93 *Ibid*. However, see Schwikkard:1997 n 7 above at 455, who differs. She argues, referring to the facts of *Sebejan* n 6 above, that the broad interpretation of the concept of 'detention' as applied in Canada, should not be regarded as irrelevant in the South African context, because the facts of *Sebejan* demonstrates that 'a person who is not technically a suspect feels compelled to answer questions put to them and consequently incriminates themselves'.

94 See n 5 above.

95 See J Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (1993) at 174, who, in an opinion written during the pre-constitutional era – arrived at the same conclusion, arguing that what really matters is whether the subsequent trial would be fair: 'Teen daardie agtergrond skryf subartikel (1) [of section 73 of the Criminal Procedure Act] dan voor dat 'n beskuldigde, ongeag die feit dat hy in hegtenis is, geregtig is op regsbystand van sy regsadviseur. Dit kom nie daarop aan of hy 'n "aangehoudene", "verdagte", "beskuldigde" of iets anders genoem word nie – hy is geregtig op die bystand van sy regsadviseur'. Loosely translated, this passage has the following meaning: In the light hereof, sub-section (1) [of section 73 of the Criminal Procedure Act] provides that irrespective of the fact whether the accused has been arrested, he is entitled to legal assistance. It is immaterial whether he was 'detained', a 'suspect', an 'accused' or something else – he is entitled to be assisted by his legal adviser. Kriegler suggests that, bearing in mind the number of uneducated persons in South Africa, an accused, be he or she a suspect or however one prefers to refer to him or her, ought to be informed about the right to legal representation.

It is furthermore submitted that a contextual reading[96] of section 35 with section 35(5)[97] of the Constitution reaffirms the appropriateness of the approach followed in *Sebejan*, which was subsequently approved in *S v Orrie*.[98] It was held that the underlying principles that section 35(5) seeks to enhance is the prevention of unfair trials, and avoiding 'detriment' to the criminal justice system.[99] This raises the question: if a suspect were, in the circumstances mentioned in *Sebejan*, prohibited from relying on section 35 – and by necessary implication also section 35(5), when his or her status would have changed to that of an accused – would such an interpretation not be 'detrimental' to the integrity of the criminal justice system? It is consequently suggested that the focus of attention should rather be on the purpose that section 35, in general, and section 35(5) in particular, aim to achieve – namely whether the evidence was '*obtained in a manner that violated the rights contained in the Bill of Rights*', (regardless of whether those rights accrued to a 'suspect,' 'detained' or 'accused' person);[100] and whether the *admission* of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

CONCLUSION

In any modern criminal justice system there should be a balance between the powers of the police to interact with civilians in fulfilling their policing duties, and the right of citizens to be free from unwarranted state

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96 See n 4 above.

97 This section reads as follows: 'Evidence obtained in a manner that violates any right contained in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

98 2005 1 SACR 63 (C). In *Orrie*, the accused was questioned at the police station and a sworn *witness* statement was taken from him, which the prosecution subsequently intended to use in evidence against him. An objective test was applied to determine whether the accused was a suspect when interviewed by the police. Nonetheless, it could be argued that the *Orrie* court also relied heavily on the subjective view of the police officers to determine this issue. For example, the police officers were in possession of information which tended to show that the suspect could possibly be connected to a crime. Armed with such information, the interview was held in order to prove or disprove evidence of his guilt. Referring with approval to the reasoning of Satchwell J in *Sebejan*, Bozalek J concluded that, 'no less than accused, a suspect is entitled to fair trial procedures' (at 69). See also the *obiter* remarks by Van der Merwe J in *S v Zuma* n 6 above at 81f–g, which is closely aligned to the judgments in *Sebejan* and *Orrie.*

99 See *Melani* n 5 above at 348–349; *Sebejan* n 6 above at par 52; *S v Mathebula* 1997 1 SACR 19 (W) at 131; *S v Naidoo* 1998 1 SACR 479 (N) at 527; *Pillay v S* 2004 2 BCLR 158 (SCA); *Mthembu v S* (64/ 2007) [2008] ZASCA 51; *S v Tandwa* [2007] SCA 34 (RSA).

100 See the decision in *Mthembu* n 99 above, where the protection of section 35(5) was interpreted so as to extend to the protection of the fundamental rights of a *prosecution witness*.

interference. *Sebejan* and *Orrie* have demonstrated the importance of the meaning given to the concept 'suspect' in the context of the Bill of Rights, while simultaneously striking a balance between the public interest in crime control and rights' protection. The concept 'suspect' is important from a criminal procedural point of view, first to prevent the police from continuing to classify potential accused persons as'suspects'[101] or 'state witnesses',[102] while in fact obtaining incriminating evidence against them without having to comply with the dictates of section 35 of the Constitution.[103] Secondly, it serves as an unequivocal guide to law enforcement agencies as to when the informational duties, created by the Constitution, should be activated. It follows that the *Sebejan* and *Orrie* classification of the concept 'suspect' serves to determine the scope and ambit of the rights guaranteed by section 35,[104] while also signifying whether the 'gatehouse' of the criminal justice system has been reached.[105]

It is submitted that both objective and subjective factors should be considered in determining whether the individual was regarded as a suspect.[106] In other words, in contrast to the Canadian approach, the subjective belief of a police officer, based on information at his/her disposal, should be taken into account as a factor when determining whether the accused was indeed regarded as a suspect.[107] A similar approach is suggested by the *Corpus Juris* of the Europe community,[108] and has been applied by the ICTY and the ICTR.[109] It is further submitted that reading the *Sebejan* and *Orrie* judgments together suggest that both a subjective and an objective analysis should be engaged in order to

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101 *Sebejan* n 6 above at par 56; see also Article 29 of the *Corpus Juris* of the European community, referred to in n 24 above.

102 *Orrie* n 6 above; see also *Mthembu* n 99 above.

103 *Sebejan* n 6 above at par 56.

104 Schwikkard in Currie & De Waal n 4 above at 740.

105 See *Melani* n 5 above at 349, where Froneman J wrote as follows: 'It has everything to do with the need to ensure that an accused is fairly treated in the entire criminal process: in the "gatehouses" of the criminal justice system (that is the interrogation process) as well as in the "mansions" (the court)'.

106 See Steytler n 7 above at 49, where he argues that the *Therens* test is 'similar to the South African common law. The test is objective: has a person subjected himself or herself to the control of the police because of the imminent threat of lawfully sanctioned force?' Elements of this test were applied in *Orrie*; see also the *obiter* remark in *Zuma* n 6 above at 81f–g, where subjective factors were considered.

107 See Stuart n 57 above; see also the *dictum* by Binnie J (dissenting) in *Grant* n 56 above at par 176, where this commonsensical point is made as follows: 'The police know, but the suspect does not know, the point which a person of interest begins to emerge as a suspect and ceases to be ...'.

108 See n 24 above.

109 See n 42 above.

determine whether a person is a suspect.[110] Moreover, although without specific reference, these judgments have heeded the remark made by L'Heureux-Dube J in *Elshaw*[111] in that in both the *Sebejan* and *Orrie* judgements, the courts declined to adopt an approach that would unjustifiably reign in the powers of the police properly to execute their duties.

A *suspect*, arraigned before the ICTY, the ICTR and the ICC, is entitled to be informed of the right to legal representation.[112] It is submitted that the approach adopted in *Sebejan* and *Orrie* accords with the approach applied in these international criminal tribunals.[113]

The approaches adopted in the jurisdictions considered in this contribution have the following universal characteristic: The informational warnings that the police are constitutionally compelled to impart, commence from the moment that an adversarial relationship arises between the police and the citizen.[114] In the South African context, such an adversarial relationship will, more often than not, emerge when an individual becomes a suspect. Such an approach accords with a purposive and contextual interpretation of the provisions of section 35 of the Constitution, and should be embraced. The likelihood of the police strengthening their case against a suspect by means of his/her compelled cooperation will, in this way, be meaningfully reduced. The sensible approach would therefore be to adopt the approach in *Sebejan* and *Orrie* in preference to that espoused in *Langa* and *Ngwenya*.

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110 See also the *obiter* comments by Van der Merwe J in *Zuma* n 6 above at 81f–g.

111 See n 50 above at 21 of the printed page.

112 See Rule 1 of the Rules of Procedure of the ICTY and the ICTR; see also Rule 2 of the Rules of Procedure of the ICC.

113 Compare Schwikkard: 1997 n 7 above who favours the Canadian approach applied in *Therens*; see also Steytler n 7 above at 49.

114 However, in the United States, these informational warnings are triggered somewhat later, when compared to the procedure followed by the ICTY, ICTR, ICC, the *Corpus Juris* of the European community, as well as that applied in Canada and South Africa.