IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case Number: 77150/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

DATE SIGNATURE

In the matter between:

SOUTHERN AFRICAN LITIGATION CENTRE	**1ST APPLICANT**
ZIMBABWE EXILES FORUM	**2ND APPLICANT**
VS	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
THE HEAD OF THE PRIORITY CRIMES LITIGATION UNIT	**2ND RESPONDENT**
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**3RD RESPONDENT**
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**4TH RESPONDENT**

JUDGMENT

FABRICIUS J,

1.

1. This is an application for judicial review of the decision of the First, Second and Fourth Respondents not to institute an investigation into crimes against humanity of torture committed in Zimbabwe ("impugned decision(s)"). The Second Respondent has filed a notice to abide by the decision of this court, but belatedly also filed an answering affidavit which I will deal with hereunder.

2. The application is brought in terms of ***s6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")*** and the **Implementation of the Rome Statute Act** of the ***International Criminal Court Act 27 of 2002 (ICC Act).***

3. According to the Applicants it concerns the First, Second and Fourth Respondents' failure to discharge their obligations to investigate and prosecute crimes under international law in accordance with South Africa's international law obligations, and domestic law contemplated in the **Rome Statute of the International Criminal Court** ("Rome Statute") and the ICC Act.

4. Independently of PAJA, it also allegedly concerns the prolonged refusal and/or failure by the Respondents to act in conformity with their obligations under the ICC Act, the principle of legality, and their obligations under s179 of the Constitution of 1996 read with the

requirements of the National Prosecution Authority Act 32 of 1998 as amended.

5. In addition, the delays by the Respondents in making their decision allegedly violates s237 of the Constitution, which requires all constitutional obligations to be performed diligently and without delay.

6. **Applicants have raised the following issues to be determined in this application** :

    a. South Africa's obligation under international law to investigate and prosecute international crimes in terms of the Rome Statute and its relevance to the impugned decision;
    b. South Africa's domestic obligation to investigate and prosecute international crimes contemplated in the ICC Act and the legal framework it creates;
    c. The nature, scope and extent of the obligation imposed on the First, Second and Fourth Respondents in terms of the ICC Act in relation to the investigation and prosecution of international crimes, in light of South Africa's international and domestic law obligations, including those under the Constitution;
    d. What is legally required of the First, Second and Fourth Respondents when contemplating the investigation and prosecution of crimes contemplated in the ICC Act, in light of South Africa's international and domestic obligations, and faced with a comprehensive dossier containing evidence indicating the

commission of torture on a widespread and systematic scale by perpetrators, who after the commission of the offence are or may be anticipated to be present in South Africa;

e. Whether the First, Second and Fourth Respondents' conduct and decision took into account, as required by law, relevant international law considerations;

f. Whether the manner in which the First, Second and Fourth Respondents handled the Applicants' request was consistent with - and gave effect to - the purpose and objectives of the ICC Act ie:

    i. Whether the First Respondent was entitled to refer the matter in its entirety to the Fourth Respondent, and thereby abrogate its responsibility;

    ii. Whether the First Respondent applied its mind to the decision of the Fourth Respondent not to initiate an investigation.

g. Whether the Applicants were justified in submitting their request for an investigation to the Second Respondent;

h. Whether the information provided by the Applicants was sufficient to justify the initiation of an investigation;

i. Whether the First, Second and Fourth Respondent relied on considerations that were irrelevant to the determination of the question before them ie:

(i) Whether the Applicants were required to conduct a court- directed investigation in bringing this matter to their attention;

(ii) Whether the Respondents were entitled to rely on reasons based on speculation (i.e. anticipated non-co-operation of Zimbabwe);

(iii) Whether the Respondents were justified in taking into account political considerations in deciding not to initiate an investigation;

(iv) Whether the Respondents could rely on justifications proffered after the impugned decision(s) was/were made;

j. Whether the delay occasioned by the Respondents was justified.

k. Whether the Applicants have *locus standi.*

I must add that the conduct of the Second Respondent, and his obligations/duties also deserve scrutiny.

7. **The following relief is sought:**

a. Reviewing and setting aside the impugned decision(s);

b. A declaratory order that the impugned decision(s) are unlawful and inconsistent with the Constitution and invalid;

c. A declaratory order that the delays occasioned by the Respondents in reaching the impugned decision(s) violates s179 and s237 of the Constitution;

d. A mandamus directing the First, Second and Fourth Respondents to reconsider the Applicants' request to initiate an investigation. (This prayer was later expanded upon at my request)

e. The costs of this application;

8. What follows are the facts relied upon by the Applicants, and where necessary I will refer to the Respondents' version at the appropriate stage. The relevant events took place on 27 March 2007 in Harare, Zimbabwe. Applicants say that on that day the Zimbabwean police, under orders from the ruling party, the Zanu-PF, raided the headquarters of the opposition party, the Movement for Democratic Change ("MDC"). Over one hundred people were arrested and taken into custody, amongst them were MDC supporters and officials, as well as persons who worked in near by shops and offices. Individuals affiliated to the MDC were detained for several days, and were continuously and severely tortured. In response to this raid First Applicant compiled detailed and motivated representations consisting of testimony relating to events that took place during and subsequent to this raid, which had taken place at Harvest House. The representations consisted of twenty three signed affidavits, in which seventeen deponents attested to being tortured whilst in police custody. The remaining affidavits, attested to by Zimbabwean lawyers and medical practitioners, confirm that these individuals were in fact tortured. Applicants say that these affidavits also demonstrated that;

1.1 The individuals were tortured on the basis of their association with the MDC and their opposition to the ruling party, Zanu-PF;

1.2 The abuse that they were subjected to was inflicted by-and at the instigation of and/ or consent or acquiescence of public officials;

1.3 These acts of torture were part of a widespread and systematic attack on MDC supporters and officials and those opposed to the ruling party, the Zanu-PF.

9. Applicants then alleged that in the light of the collapse of the Rule of Law in Zimbabwe, concern for the safety of the victims, and the unlikely- hood of securing accountability in a Zimbabwean court, First Applicant believed that because South Africa was legally required to investigate war crimes, crimes against humanity and genocide, regardless of whether they were committed in South Africa or by South African nationals, those responsible could and should be held accountable under South African law designed for this very purpose.

10. SALC (First Applicant) accordingly incorporated the evidence into a detailed dossier (“the torture docket” or “the docket”) and on 14 March 2008 hand-delivered it to the Priority Claims Litigation Unit (“PCLU”, the Second Respondent), being the entity responsible for the investigation and prosecution of crimes contemplated in the ICC Act, as part of the National Prosecuting Authority (“the NPA”).

11. **The docket consisted of a detailed legal memorandum, and:**

1.1 identified the Zimbabwean officials responsible for the raid and relevant torture;

1.2 provided an overview of torture as a crime against humanity;

1.3 detailed South Africa's legal international obligations and jurisdiction to investigate and prosecute international crimes contemplated in the ICC Act;

1.4 outlined the obligation imposed on the authorities responsible for the administration and enforcement of the ICC Act;

1.5 requested the responsible authorities to institute an investigation with the view to prosecuting those responsible.

12. Applicants say that a summary of the evidence accompanied the legal memorandum, and included the affidavits of those tortured, corroborating testimony of lawyers, doctors and family members, as well as medical records. It also contained reports of reputable and independent organisations such as Human Rights Watch and Amnesty International, which documented both the events subsequent to 28 March 2007, and other separate clusters of the systematic use of torture on the part of Zimbabwean police.

13. **It is Applicants' case that the docket made the following abundantly clear:**

1.1 that SALC gathered evidence which showed that the harm inflicted by the Zimbabwean police falls within the internationally accepted definitions of torture and crimes against humanity;

1.2 that identified Zimbabwean officials were responsible for the crime against humanity, ie torture;

1.3 these officials from time to time visit South Africa and that, if and when they do so, South Africa was under a duty at International Law and under the ICC Act to apprehend and prosecute them if possible;

1.4 That it was the NPA's function under the ICC Act to discharge its duty on behalf of the State, by doing whatever was necessary in law to consider the docket and to take appropriate action.

14. **In the light of those considerations, the torture docket requested the following from the NPA**:

1.1 that it, through the PCLU, consider the memorandum together with evidence contained in the docket, in order that it may with all reasonable speed decide to take appropriate action under the ICC Act, against acts of torture as a crime against humanity committed by the named perpetrators in Zimbabwe:

1.2 if the need arose, that the NPA consult further with SALC and its lawyers in respect of the further gathering of evidence and or provision of advice, regarding international criminal law in relation to the acts alleged against the named perpetrators;

1.3 that the NPA communicate its decisions in respect of a prospective decision to the Director of SALC.

It is now convenient to refer to the relevant statutory provisions and other policy documents and directives:

15. **The Constitution of the Republic of South Africa;**

1.1 Chapter 1 section 2 deals with the supremacy of the Constitution and provides that it is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Chapter 2 contains the Bill of Rights, which is the corner-stone of democracy in South Africa. It enshrines the rights of all people in the country, and affirms the democratic values of human dignity, equality and freedom. The State must respect, protect, promote and fulfil the rights contained therein. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of State. Chapter 3 deals with co-operative government, and provides that all spheres of government must observe and adhere to the principles contained in the chapter, and must conduct their activities within those parameters. Chapter 8 deals with courts and the administration of justice. Section 179 in particular deals with the prosecuting authority. This consists of a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President. He is

also the head of Directors of Public Prosecutions, and prosecutors as determined by an Act of Parliament. The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions to instituting criminal proceedings. The section also provides that the National Director must issue policy directives which must be observed in the prosecution process, and may review a decision to prosecute or not to prosecute under certain specified circumstances. Section 205 deals with the police service. The objects of the Police Service are to prevent, combat and investigate crime, amongst others. A National Commissioner of the Police Service controls and manages it, subject to certain constraints.

1.2 **National Prosecuting Authority Act 32 of 1998 as amended;**

Section 7 provides for the establishment of certain Investigating Directorates in the office of the National Director, which may be so established by the President by proclamation in the Gazette. Chapter 4 deals with the powers, duties and functions of members of the Prosecuting Authority. Section 20 provides for the power to institute and conduct criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting and conducting such criminal proceedings, amongst others. Section 21, as contemplated by the Constitution, provides for a prosecution policy and issuing of

policy directives. Section 22 provides for the application of the United-Nations guidelines on the role of prosecutors within the framework of national legislation. Chapter 5 applies to the powers, duties and functions relating to Investigating Directorates. Nothing in that chapter derogates from any power or duty which relates to the prevention, combating or investigation of any offences, and which is bestowed upon the South African Police Service in terms of any law.

1.3 **South African Police Service Act 68 of 1995 as amended;**

The National Commissioner of the service is appointed according to the mentioned terms of the constitution. Chapter 6A deals with a Directorate for Priority Crime Investigation. Section 17F, in the context of a multi-disciplinary approach, requires government departments or institutions when required to do so, to take reasonable steps to assist the Directorate in the achievement of its objectives. The said chapter 6 was inserted into the Act by s 5.3 of Act 57 of 2008 which came into operation on 06/07/2009, after the impugned decision of 29/05/2009.

1.4 **The NPA's Prosecution Policy;**

This document amongst others describes the role of the prosecutor in criminal proceedings, the discretion given to him or her in the context of the criminal process, and more particularly deals with the decision whether or not to institute criminal

proceedings against an accused, but before that part of the process occurs, also provides for a docket to be handed to the prosecutor by the police, which needs to be properly studied so as to ensure that the relevant facts had been properly investigated. Thereafter the prosecutor should consider whether to request the police to investigate the case further, to institute the prosecution, or to decline to prosecute, amongst other powers.

1.5 **The NPA's directive on foreign investigations;**

This directive indicates what is required when foreign investigations are contemplated. Investigations abroad could be conducted formally, by way of a formal letter of request, or alternatively in terms of the procedure provided for by the ***International Co-operation in Criminal Matters Act 75 of 1996***. Informal investigations could be done generally through Interpol channels, or whatever other informal methods were approved by the particular country. It is also stated that an investigation team should never travel to a foreign country without the prior knowledge and approval of the appropriate authorities in that country. Provision is then also made for the contingency of obtaining statements abroad.

1.6 **The South African Development Community Protocol on Mutual Legal Assistance in Criminal Matters;**

This protocol provides for the widest possible measure of mutual legal assistance in criminal matters which includes investigations, prosecutions or proceedings relating to offences concerning transnational organised crime, corruption, taxation, custom duties and foreign exchange control. Zimbabwe did not ratify this protocol.

1.7 **The Zimbabwe Criminal Matters (Mutual Assistance) Act 13 of 1990;**

The granting of assistance is under the control of the Attorney General, who may refuse a request by a foreign country for assistance under that Act if the request relates to the prosecution or punishment of a person for an offence that is, by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character or if there are reasonable grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character.

1.8 **The Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002:**

1.8.1 It is convenient to quote part of the preamble to this Act in the present context; “The Republic of South Africa is committed to. bringing persons who commit such atrocities to justice, either in a Court of Law in the

> Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the National Prosecuting Authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the statute, in the International Criminal Court, created by and functioning in terms of the said statute; and, carrying out its other obligations in terms of the said statute;"

I will refer to this statute as the "domestic Rome Statute".

> "The Statute" means the **Rome Statute of the International Criminal Court,** adopted by the United Nations Diplomatic Conference of Pleni-potentiaries on the establishment of the International Criminal Court on 17 July 1998, and ratified by the Republic on 10 November 2000. In addition to the Constitution and the law, any competent court in the Republic hearing any matter arising from the application of this Act must also consider and, were appropriate, may apply –
>
> a. conventional international law, and in particular the Statute;
> b. customary international law;

c. comparative foreign law.

1.8.3 **The Objects of the Act** are the following;

a. to create a framework to ensure that the Statute is effectively implemented in the Republic;

b. to ensure that anything done in terms of this Act conforms with the obligation of the Republic in terms of the Statute;

c. to provide for the crime of genocide, crimes against humanity and war crimes;

d. to enable, as far as possible and in accordance with the principle of complementarity as referred to in Article 1 of the Statute, the National Prosecuting Authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic, and beyond the borders of the Republic in certain circumstances; and

e. in the event of the National Prosecuting Authority declining or being unable to prosecute a person as contemplated in par (*d*), to enable the Republic to co-operate with the Court in the investigation and prosecution of persons accused of having committed crimes or offences referred to in the Statute, and in particular to –

(i) enable the Court to make requests for assistance;

(ii) provide mechanisms for the surrender to the Court of persons accused of having committed a crime referred to in the Statute;

(iii) enable the Court to sit in the Republic; and

(iv) enforce any sentence imposed or order made by the Court.

“A crime against humanity” means any conduct referred to in part 2 of Schedule 1 of this Act. In the present context it referrers to torture when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. “Torture” means the intentional infliction of severe pain or suffering whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain arising only from, inherent in or incidental to, lawful sanctions. Chapter 2 provides for the jurisdiction of South African courts and institution of prosecutions in South African courts in respect of a crime and, in s 4 (1) states that any person who commits a crime is guilty of an offence and is liable to certain punishment. S 4 (3) provides the following;

“In order to secure the jurisdiction of a South African court for purposes of this chapter, any person who commits a crime contemplated in ss (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if –

a. that person is a South African citizen; or

b. that person is not a South African citizen but is ordinarily resident in the Republic; or

c. that person, after the omission of the crime, is present in the territory of the Republic; or

d. That person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."

S5 (1***)*** provides that no prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director.

1.9 **The Presidential Proclamation appointing Second Respondent;**

This proclamation was made under s13 (1) (c) of the National Prosecuting Authority Act on 24 March 2003, and appoints the Second Respondent, a special Director of Public Prosecutions to head the Priority Crimes Litigation unit, and to manage and direct the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and serious national and international crimes amongst others.

2.

The Persons;

Mr T.C Williams drafted Fourth Respondents answering affidavit herein. During the times relevant to these proceedings he had been the acting National Commissioner of the South African Police Service. The acting National Director of Public Prosecutions had been Advocate Mpshe SC. Advocate Ackerman SC had been head of Second Respondent. Advocate M Simulane SC had been Director General; Department of Justice and Constitutional Development up to 14 October 2009.

3.

The decision;

Mr Williams described the factual background as follows;

On 5 January 2009 he received a letter signed 17 December 2008 from the Acting National Director of Public Prosecutions Advocate Mpshe SC, in which it was recorded that the allegations made in what was referred to as “the docket” required further investigation before the Acting National Director could make a decision whether to prosecute or not. He forwarded the letter to General Lalla, who at the time was the Divisional Commissioner: Detective Service. He in turn referred the letter to the head: Legal Support: Crime Operations, General Jacobs. General Jacobs had elicited the services of Colonel Bester from die SAPS legal services to advise whether the docket, from an

investigative point of view, was adequate or not. Colonel Bester apparently perused the entire docket and was of the view that it was not only inadequately investigated, but that further investigations into the relevant allegations would be impractical and virtually impossible. Mr Williams on 29 May 2009 wrote to the Acting National Director, Advocate Mpshe SC, advising him that the South African Police Service should not initiate an investigation as suggested by First Applicant. He gave reasons. Advocate Mpshe SC made an affidavit in which he stated, amongst others obviously, that the decision not to institute an investigation was taken by Fourth Respondent on 29 May 2009, which decision had been communicated to him on 12 June 2009. The decision therefore had not been made either by him or the Second Respondent. He had however agreed with the decision. I must add that Advocate Ackerman SC, the Second Respondent in effect, had recommended at one stage that an investigation be instituted as requested by First Applicant.

3.1 It however also appears from the answering affidavit, in answer to his affidavit filed a few days before the hearing, that he had been of a different view at another stage, which view substantially accorded with that of Mr. Williams. Before me, he did not explain this at all. In December 2008 the Second Respondent was of the view that the docket should be investigated by the Fourth Respondent, who on 29 May 2009 decided not to do so, for a number of reasons which were then

accepted by the First Respondent. In the context of the mentioned time-period First Applicant's heads of argument said the following: five months had passed before Fourth Respondent declined to initiate an investigation. He did so, on the basis of five unsubstantiated reasons, and provided no evidence of any efforts undertaken to even attempt an investigation, or to engage with the Second Respondent. In this five month period between the referral by the First Respondent to the Fourth Respondent, no guidance and direction was sought from or given by the National Prosecuting Authority. Also, during this period, the South African Police Service did not take any preliminary steps to investigate the allegations. No docket was registered nor an investigating officer appointed. No witnesses were interviewed, and no attempt was made to monitor the movements of the relevant perpetrators in and out of South Africa, and no attempts were made to engage with the Applicant. Advocate Ackerman SC, the head of Second Respondent, was at one stage unhappy with the manner in which the South African Police Service handled the matter, and was of the view that it should as a minimum have registered such a docket, appointed an investigating officer, held discussion with the First Applicant and witnesses, and then should have submitted the docket back to the National Prosecuting Authority. Advocate Mpshe SC did not share these concerns, and supported Fourth Respondents' decision and

reasoning. In the context of these facts, First Applicant was of the view that the lengthy and detailed answering affidavits filed by the First and Fourth Respondents evidenced a "rearguard attempt to explain, *ex post facto*," the various difficulties that the Respondents now called into service, and seeking to explain a decision not to institute an investigation. In the context of the reasons offered in this application by the Respondents, First Applicant's say that:

1.1 the reasons had not been forthcoming until the application was launched;

1.2 the reasons changed between the filling of the Rule 53 record and the filling of the answering affidavit;

1.3 The reasons are on the main an after – the – fact collection of speculative "justifications" for why it would not have been possible to conduct an investigation.

I may say at this stage that Respondents admitted that an undue delay had occurred but stated that the Applicants had not been prejudiced thereby.

4.

Fourth Respondent's reasons;

As said, Fourth Respondent wrote to First Respondent on 29 May 2009 declining to initiate an investigation as suggested by First Applicant. In

the context of the argument before me, it is necessary to quote this letter.

"Dear Advocate Mpshe SC

ALLEDGED CONTRAVENTION OF THE IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONATIONAL CRIMINAL COURT ACT, 2002 (ACT NO 27 OF 2002): ZIMBABWE

With reference to your letter dated 15 December 2008 in respect of the abovementioned matter and the letter of Southern African Litigation Centre (SALC) dated 20 April 2009, I may inform that an initial evaluation of the so – called "docket" provided by the SALC has been conducted.

As you are most probably aware, the so-called "docket" contains a number of "statements" which are unsigned and which contain allegations of torture being committed by Zimbabwean officials. The information therein is, in addition to the above, of such a nature that it is insufficient to constitute evidence in an investigation into contraventions of the above Act.

Although the SAPS does not believe that it is legally entitled to initiate an investigation into the allegations merely on the "anticipated presence" of the persons in South Africa, as suggested by the SALC,

the ability of the SAPS to conduct investigations relating to event which occurred in another country will be hampered by the following factors:

- In order to conduct a thorough, court-directed investigation, the identity of the deponents and the contents of the statements need to be verified. For obvious reasons, this cannot be done through the utilization of existing legitimate channels, thus hampering the collection of the required evidence.

- While we have noted an undertaking by the SALC to make witnesses available and assist in obtaining evidence, the manner in which they are to be made available and the manner in which evidence is to be collected, especially in respect of the Zimbabwe Government or *de facto* authority, is not clear. The value of the undertaking is also uncertain and neither the SAPS nor our courts for that matter have, without the assistance of the Zimbabwean Authorities, the ability to ensure such co- operation.

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Given the identity of the perpetrators and the relevant circumstances prevailing in the country it stands to reason that the required evidence will to a greater or lesser extent have to be obtained in a covert manner, by unknown persons and entities (over whom we have no control) at the behest of the SAPS.

- This you will appreciate would imply that these persons are in fact “agents of the service and a very real risk exists that the SAPS can be accused of conduct which is tantamount to espionage, or at the very least impinging on that countries sovereignty.

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- At this stage, the docket contains nothing more than mere allegations and I do not see my way clear or involving the SAPS in an investigation, the legality of which is questionable and which can have for reaching – implications for the Service and the country in general. It may also be pointed out that following the submission of the “docket” to your office the SALC wrote an article which was published in the Mail and Guardian in which this fact was made public. It can therefore be expected that should the SAPS undertake to investigate the matter the SALC may make public this fact thus compromising any investigation which may have been possible. Furthermore the undertaking of an investigation will generally be construed as being sanctioned by Government and as reflecting South Africa’s policy in respect of that country; a decision which can, for obvious reasons, not be taken in isolation. In conclusion it may be mentioned that the undertaking of any investigation will in addition to negatively impacting on South Africa’s diplomatic initiatives in Zimbabwe, compromise the position of the SAPS when is

> assumes the chair of the Southern African Regional Police Chiefs Co- operation Organization (SARPCCO), the official SADC law enforcement structure, in September this year (2009). Similarly, the undertaking of an investigation against the top structures of the Zimbabwean Police will be met with resistance and will effectively bring to end not only ongoing and future criminal investigations, (which are in the direct interest of the Republic). Given the uncertainties which exist in respect of the legalities pertaining to the conduct of such an investigation, and its consequences for SAPS and the country, I do not intend to initiate an investigation as suggested by the SALC."

5.

In his answering affidavit the Fourth Respondent also made reference more specifically to a regional organisation known as the "Southern African Regional Police Chiefs Co-operation Organisation". This organisation is also presently an institution of the South African Development Community. On a national level the Directors General of the departments of State Security, Correctional Services, Justice and Constitutional Development, the South African Police Service as well as the department of International Relations and Co-operation, serve on a committee known as the International Co-operation Trade and Security committee. He was represented on this committee by General Jacobs. In this context he confirmed that it would have had a definite

detrimental and prejudicial effect on the relationship between the various police forces of the SADC countries if it were to be disclosed that South Africa was contemplating an investigation of high - ranking police officials of Zimbabwe, in respect of a crime committed in Zimbabwe by Zimbabweans. In this context he stated in his answering affidavit that; “it stands to reason that if the SAPS were to have initiated an investigation aimed at prosecuting six Ministers and Directors – General, together with a Commissioner and eleven members of a special task force, the Zimbabwe Police Service may, to put it euphemistically, have taken an adverse view on the conduct of the SAPS and it may have led to that Police Service declining to co-operate with the SAPS on other matters. He was also of the view that neither the South African Police Service nor the South African courts have the ability to ensure co-operation from the Zimbabwean authorities to investigate the matter.

6.

It is convenient at this stage to refer to the appointment of Brigadier Marion who was tasked to establish whether the statements and other material contained in the docket constituted a court – investigation into the allegations which the First Applicant sought to be investigated. This was done after the application had been served. Brigadier Marion filled a comprehensive supporting affidavit setting out all the deficiencies in the docket which still had to be investigated in order to properly submit a dossier to the First Respondent to consider whether he would be able

to institute a *prosecution* which had a reasonable prospect of success. Brigadier Marion's assessment of the torture docket only occurred on 3 February 2010. First Applicant argued that this evidence is a belated exercise in irrelevancy. They object to the retrospective justification of the imputed decision and in any event, the mandate given to Brigadier Marion was to advise on the prospects of a successful prosecution rather than investigating whether the torture docket was sufficient to initiate an investigation with a view to prosecution. The wrong question was therefore asked and answered. Brigadier Marion did in fact explain in his affidavit what a "court – directed" investigation was. Such an investigation has at its primary object the gathering of evidence relevant to the commission of a crime in a matter so as to enable a prosecutor to make a properly informed decision whether or not to prosecute, and in the event of a prosecution being instituted, to ensure the conviction of the accused. I do not agree that the whole affidavit of Brigadier Marion is either inadmissible or irrelevant. He analysed thirteen of the witness statements and gave detailed explanations of their deficiencies. (In the context of the question put to him) Having regard to the context in which First Applicant's have put this case before this court, I am of the view that any Judge would have had to read the docket himself and at the very least form an opinion whether the allegations contained therein established the elements of the crime against humanity (this is after all what the First Applicant's alleged has occurred and in which context it has presented this case), and whether or not further investigations ought to have taken place, and what the

nature of these investigations ought most likely to have been, and what further information was necessary. By way of example I will refer to his analysis of one of the witnesses only and this was in respect of witness number one.

Statement;

"He was arrested on 26 March 2007 by two police officials and he admits that he is a member of the MDC. He alleges that he was continuously assaulted and tortured over a period of time. The following requires further investigation:

1.1 In paragraph two of his affidavit he does not mention the names of the policemen who arrested him. This must be established.

1.2 In paragraph 3 of his affidavit he does not mention the member in charge of the police station where he was detained. This person would have to be approached to confirm or dispute his version.

1.3 A search will have to be conducted at the other police station for his files and children's luggage to corroborate his version and to establish whether his clotting was in fact connected to any bombings.

1.4 The railway line mentioned in paragraph 4 will have to be visited and the witness will have to point out the spot where he was allegedly tortured. This will have to be photographed. It must be established whether in fact a train had been petrol bombed at that spot.

1.5 All the police stations and other scenes will have to be visited and photographed, especially the rooms which featured prominently in the allegations of torture. Forensic Crime scene testing is also required to ascertain whether blood or other fluid can be found which can be linked to the victims DNA.

1.6 In paragraph 7 he mentions that he was assaulted by a gang of police officers. He does not mention who they are and what each of them did, and which of the instruments were used by each of them to assault him.

1.7 He does not mention in his affidavit the names of the people whom he falsely implicated as having committed offences. It should be established what information was given to him by the alleged torturers and what he made up of his own accord.

1.8 We will require the so-called many confessions and statements which he was forced to make. This will be required to test his version and the contents of these statements will be the subject of a number of further investigations.

1.9 In paragraph 11 he mentions that he was taken by car to Harare Police Station. It is not explained or mentioned in his affidavit what the colour, make or other description of the car was, which would assist to trace the vehicle and ultimately the driver and other assailants.

1.10 In paragraph 13 he names specific police officers as persons who actively or passively participated in the assaults on

him. This is not sufficient as he needs to state what each police official did and what weapons were used to assault him. He also needs to mention who stood by and did nothing.

1.11 He does not mention in his affidavit whether he received medical treatment for any injuries which he sustained.

1.12 The statement was recorded nearly a year after the incident.

1.13 He does not elaborate in his affidavit whether he was released, whether he was charged or not and whether he was or is being prosecuted.

1.14 No medical report has been filed relating to him.

7.

In the said context Brigadier Marion analysed thirteen witness statements on a similar basis. I am of the view that a court would have had to do the same exercise, albeit not that detailed if the proper question is asked and answered. He concluded that the statements provided by the First Applicant were inadequate for a “court – directed” investigation. The allegations of torture would have had to be re-investigated from scratch. He highlighted certain issues which would have to be addressed in any new investigation. I set out a number of them;

1.1 A number of the statements had not been signed or commissioned;

1.2 None of the statements indicate that the witnesses did not require an investigation by the South African authorities nor do they confirm that they were prepared to testify in a South African court;

1.3 In several instances the names of the alleged torturers were spelt differently and appropriate investigations would have to be undertaken to properly establish the identities of all the implicated police officials;

1.4 It would be necessary to see all the relevant records maintained by the Zimbabwean police relevant to the arrest, detentions and court proceedings;

1.5 Prison records relating to the detention of the witnesses would also have to be obtained;

1.6 Court records would have to be obtained in particular the ones where the matters state and or prosecute the noted injuries on the persons of certain of the witnesses;

1.7 No medical reports were provided for at least seven of the witnesses and medical reports in respect of at least eleven persons who had not provided witness statements were filled. In many cases the observations reflected on the medical reports were in illegible hand wrighting, and in some cases even the names of the patients and or doctors could not be established;

1.8 In respect of seven witnesses, the reports were compiled months after the medical examinations;

1.9 In the case of certain witnesses, more than one report had been compiled, and a second report was either unsigned or the author thereof was not identified;

1.10 Proper affidavits would have to be obtained from all examining medical practitioners;

1.11 In as much as these were mainly State employees, the consent of the Zimbabwean government would have to be obtained;

1.12 The Zimbabwean Prosecuting Authority would have to explain why no criminal proceedings were instituted against any of the persons arrested;

1.13 The implicated parties would have to be approached, informed of the allegations against them and provided with an opportunity to raise a defence.

8.

It was stated that a South-African prosecutor would not have been prepared to make a decision to prosecute on the facts placed before him such as they were, *but would have directed that further investigations be conducted* (I underline). All of those investigations would have to be conducted in Zimbabwe. No South African police officer would have the right to travel to Zimbabwe and to proceed to carry out the mentioned investigations without special authorisation. In the case of at least seventeen of the witness's statements, "copying and pasting" had occurred. The South African Authorities had no legal

basis upon which to investigate a charge of torture and consequently, it had to be established whether there was any basis on which a crime against humanity could be investigated. It had to be so that the implicated parties conducted the actual torture, that they knew that their conduct was contributing to a wide spread or systematic attack on a civilian population, and in this context, a strategy of the Zanu – PF to intimidate the MDC, and to weaken its power base as the political opposition. A complete analysis of all the witness statements supported Brigadier Marion's conclusion that the special unit was tasked with the investigation of bombings and conducted a round-up of all persons suspected or implicated therein. The Harvest House incident was therefore not a stand-alone one, but an integral part of a police action commencing on 26 March 2007 and concluding with the arrest of the last suspect in April 2007. Twenty six persons were arrested during this round – up and fourteen did not even claim any membership or association with the MDC. In respect of the Harvest House incident, at least four of the persons detained and tortured also did not claim any association with the MDC. Although several witnesses claimed that they were questioned about MDC affairs and that derogatory remarks were made about their support of the MDC, the primary focus of the alleged interrogations and torture appear to have been directed at obtaining confessions in respect of specific crimes. For instance, witness number 4 alleged that he would have been beaten to death if he did not produce the diary which indicated where certain petrol bombings were to take place. Witness number 10 also claimed that he

was accused of commanding a specific bombing, and witness number eleven alleged that he had been accused of being responsible for certain bombings during the previous week.

9.

In the light of those mentioned facts (I have not mentioned all of them) it appeared to the Brigadier that it would be problematic in trying to establish that when the police officers carried out the said acts of torture they knew that they were contributing to a wide spread and systematic attack on the MDC in order to further a political strategy of the ruling party. In the event of this not being established, the issue of a crime against humanity would fall away, and with it, any possible basis upon which the South African authorities could lawfully be involved with the matter. The material submitted by First Applicant also contains statements relating to the torture of the leader of the MDC and other MDC officials after a rally on 11 March 2007. Further extensive investigations in Zimbabwe would have to be conducted in order to establish whether this event constituted a crime against humanity, which could be legitimately investigated by the South African authorities. He pointed out that First Applicant also sought the investigation of six Ministers and Heads of Department on the basis of "command responsibility" In this context Article 28 (b) of the International Rome Statute was relevant. None of the witnesses implicated the command structure at all. By way of summary therefore the investigation of all aspects of the alleged crime against humanity

would have to be conducted in Zimbabwe. The Fourth Respondent had no general power to do such investigations, and in any event, he was of the view that an investigation could only be contemplated if it was proven that the implicated parties were present in South Africa after the commission of the crimes. He did such investigations as were necessary in this context and stated that the relevant database revealed that;

1.1 Eleven of the alleged torturers had never visited South Africa;

1.2 One such alleged torturer did visit South Africa once in January 2009 and once in 2010;

1.3 The Minister implicated in First Applicant's memorandum last visited the country in January 2008;

1.4 The head of a Department mentioned only visited South Africa on certain occasions in 2009 but not at all during 2010;

1.5 The Minister referred to in the memorandum visited South Africa only once in 2008 (a visit of less than 24 hours duration) and subsequently never visited South Africa again;

1.6 Another head of a Department mentioned had never visited South Africa;

1.7 Not a single one of the persons implicated had at all been present in South Africa during the period 14 to 31 March 2008. (It was not explained why, only this period had been considered.)

10.

First Respondents Reasons;

First Respondent also made a lengthy answering affidavit. He had agreed with the decision of the Fourth Respondent. When he had received the Commissioner's letter, he had identified the reasons for him deciding not to initiate an investigation as having been the following;

1.1 The statements compiled by the First Applicant fell short of a thorough court- directed investigation;

1.2 SAPS could not conduct the investigation which would be necessary to overcome the shortcomings;

1.3 SAPS could not accept the offer of the First Applicant to gather evidence on its behalf for the reasons stated;

1.4 The undertaking of an investigation could tamper the existing and ongoing investigation of crimes committed in South Africa where co-operation from the Zimbabwean police was necessary;

1.5 The undertaking of an investigation could also negatively impact on South Africa's international relations with Zimbabwe.

As said, the First Respondent accepted the validity of these reasons and stated that he had those concerns all along. First Respondent was of the view that the case reported by First Applicant called specifically for a very professional, thorough and all embracing investigation. He agreed with the summary of shortcomings pointed out by Brigadier Marion.

Having regard to the mentioned deficiencies he would never support the arrest of any of the implicated parties if such deficiencies existed or continued to exist. The crimes sought to be investigated were solely committed in Zimbabwe. Any investigation would have to be conducted in that country. He was fully aware of the need, under those circumstances, to evoke mutual legal assistance mechanisms in order to acquire evidence from a foreign state and in this context also referred to the NPA directives relating to investigations abroad. This document highlighted that neither a prosecutor nor an investigator would have any powers in a foreign state and that all assistance had to be obtained through the relevant authorities in the foreign state. An investigator working abroad was bound by the legislation of that country. With reference to the Rome Statute of the International Criminal Court, and the domestic Rome Statute, he stated that he did not take either of these Statutes into consideration when deciding to accept the decision of the Fourth Respondent. He was of the view that these Statutes did not impose any obligation on any of the Respondents to investigate the case having regard to the above -mentioned considerations. The material provided by First Applicant fell short of a proper investigation as contemplated by the NPA's policy. In his view therefore the Fourth Respondent had valid reasons, based on the legality and national interest and policy, not to initiate an investigation. He therefore himself acted perfectly correctly in accepting those reasons.

11.

From Fourth and First Respondents version, the following facts are obvious at this stage:

11.1 the docket was examined to ascertain whether it contained sufficient information for a so-called court-directed investigation, ie whether it could enable a prosecutor to make a properly informed decision whether or not to prosecute;

11.2 the docket was therefore not considered with the view to conduct further investigations into the alleged deficiencies and future evidential and/or legal requirements;

11.3 First Respondent did not take the ICC Act or the Rome Statute into account, and therefore did not even apply his mind to the proper context in law;

11.4 political considerations were taken into account by institutions, which, according to law, are obligated to act independently in the context of the Constitution and the legislation governing their functions, duties and obligations;

11.5 a number of the implicated torturers had in fact visited South Africa during certain periods;

11.6 Brigadier Marion stated that a prosecutor would not have prosecuted the facts before him, but would have directed that further investigations be conducted. The irony is obvious: this is precisely Applicants' point, the crux of their argument is that Respondents were in law obliged to conduct an investigation.

12.

Applicants *Locus Standi*;

It is necessary to describe First Applicant's role as set out in the founding affidavit. SALC is an initiative of the International Bar Association and the Open Society Initiative for Southern Africa, and it aims to provide support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the Southern African region. SALC's model is to work in conjunction with domestic attorneys in each jurisdiction who are interested in litigating important cases involving human rights or the Rule of Law. SALC supports these Attorneys in a variety of ways, including, as appropriate, providing legal research, training and mentoring, and monetary support. While SALC aims primarily to provide support on a specific case – by- case basis, its objectives also include the provision of training and the facilitation of legal networks within the region. It was stated that for obvious reasons SALC's attention has in the recent past been directed towards the problems in Zimbabwe, a country which has been, and is currently experiencing "political and economic crisis of catastrophic proportions". Political violence has risen dramatically and state agents have been identified as key perpetrators of violent acts against human rights activists, civil society leaders, and political opposition leaders. Of particular concern to SALC has been the "almost total collapse of the Rule of Law". The magnitude of the crisis together with a corresponding failure on the part of Zimbabwean Authorities to

introduce any mediating or reforming measures has required that SALC consider a variety of initiatives in support of human rights and public interest law defenders. One such initiative has been to utilise South Africa's implementation of the Rome Statute ("the ICC") to request South African authorities to investigate and prosecute individuals in Zimbabwe who are allegedly guilty of torture as a crime against humanity. It is this request and the inappropriate response thereto by the Respondents, so it is alleged, that is the basis of this application. The Second Applicant is the Zimbabwe Exiles Forum. Amongst others, so it is stated, its object is to assist victims of human rights abuses occurring in Zimbabwe to obtain access to justice and redress that are ordinarily denied them in Zimbabwe. It also provides assistance necessary for the dignity and wellbeing of all exiles from Zimbabwe, in particular victims of torture, political violence and other human rights abuses.

12.1 Accordingly, the Applicants state that they bring this application in their own interest in terms of s38 (a) of the Constitution of 1996, on behalf of and in interest of the victims of torture in Zimbabwe who can not act in their own name in terms of s38 (b) and (c)of the Constitution, and in the public interest in terms of s38 (d) of the Constitution. They also bring this application in their own interest pursuant to their respective aims and objectives as concerned civil society organisations. They say that torture as a crime against humanity is one of the most

universally condemned offences, the prohibition of which is regarded as a norm of *jus cogens* under international law (a preventary norm from which no derogation is permitted). Because torturers are considered on the international law to be enemies of all human kind, the Applicants have an interest in the prohibition of torture and the apprehension of torturers. The victims of torture identified in the torture docket are manifestly vulnerable individuals who rely on public interest groups such as the Applicants for the protection and vindication of their rights, and who can not (primarily for fear of reprisal) claim in their individual names. Because there is a continuing concern for the safety of the victims in Zimbabwe, confidentiality required protection through erasing reference to their names in the application papers. The Applicants also bring this application in the public interest. They say that one of the reasons why this application is brought out of the public interest concern is that without effective prosecution of those guilty of torture as a crime against humanity there is a risk of South Africa becoming a safe-haven for torturers who may travel here freely with impunity. Applicants say that it is in the public interest that South Africa comports itself in a manner befitting this countries' status as a responsible member of the international community, and that it should do so by seeking to hold accountable those responsible for crimes that shock the conscience of all humankind, and by fulfilling the responsibility to protect doctrine of crimes, and

acting to avert the further commission against humanity in circumstances where the state is manifestly failing to protect its population. They assert the public interest in South Africa complying with its international and domestic legal obligations to act against the perpetrators of international crimes. In the circumstances, it was submitted that the degree of vulnerability of the people affected, the nature of the rights said to be infringed, the consequences of the infringement of those rights, and the egregiousness of the conduct complained of, make it plain that the Applicants are entitled to bring this application in their own interest, in the interest of the affected individuals who are otherwise unable to act in their own name, and the public interest. Fourth Respondent sought to argue the Applicants' lack of *locus standi* as a first point. Because I was of the *prima facie* view that such argument should not be divorced from the proper factual context, I decided not to hear this argument *in limine* but as part of the Respondent's overall argument. Fourth Respondent submitted that it was understandable why the Applicants did not rely on the provisions of s38 (e) of the Constitution: none of the alleged victims of the alleged crimes against humanity were members of the Second Applicant. It was also said that neither the First Applicant nor the Second Applicant referred to any written mandate or Powers-of-Attorney by any of the alleged victims of the so - called crimes against humanity, mandating either of the Applicants to request an

investigation or prosecution in terms of the domestic ICC Act on their behalf. It was said that it was a principle that the question of legal standing is not only a procedural matter, but also a question of substance. It concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted. An Applicant therefore had to show that it was the rights – bearing entity, or was acting on the authority of the entity, or that it had required its rights. In this context reference was made to ***Land and Agricultural Development Bank of South Africa v Parker 2005 (2) SA 77 (SCA) at par 44,*** and ***Sandton Civic Precinct Pty (Ltd) v City of Johannesburg and another (2009) 1 All Sa 291 (SCA) at par 19.*** Of course, neither of these mentioned decisions dealt with *locus standi* in the context of abuse of human rights in whatever form. Fourth Respondent also submitted that the facts of this matter were distinguishable from any other class action alleging an infringement of a right contained in the Bill of Rights, for the simple reason that the persons' whose alleged interest and rights were affected, were all foreign nationals not present in the Republic of South Africa. Dealing with Applicants' reliance on the broader approach to standing in Constitutional litigation Respondents say that: "the Applicant has alleged neither a threat of a prosecution in which compelled evidence may be led against them, nor an interest in the infringement or threatened infringement of the rights of other persons". Referring to further

dicta of O'Regan J. in this context, Fourth Respondent says that it is clear that an Applicant may acquire standing on the basis of infringement of a right of another person, provided that the Applicant has a sufficient interest in the right. The real bearers of the interest and rights in the circumstances of this matter were the alleged victims of the so - called crimes against humanity, who were all foreign nationals not present in the Republic. In this regard, they say, it behooves no argument that the Constitution and more specifically the Bill of Rights contained in the Constitution can not be applied extraterritorially, and conversely can also not be relied upon by foreigners not present in the Republic of South Africa, or for that matter anyone acting on their behalf. In this context reliance was placed on the judgment in ***Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC)*** where it was stated in par 32 that the fact that the State was required to respect, protect, promote and fulfill the rights in the Bill of Rights, did not mean that the rights under our Constitution attached to them when they were outside of South Africa, or that the State has an obligation under s7 (2) of the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights which extends beyond its borders. Those were different issues which depend in the first instance whether the Constitution can be construed as having extra-territorial effect. Fourth Respondents then referred to par. 36 of the judgment where the following was said; "the

starting point of the enquiry into extra-territoriality is to determine the ambit of the rights that are the subject matter of s7 (2). To begin with two observations are called for. Firstly; the Constitution provides the framework for the Government of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights which vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity, and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefits of that protection when they move beyond our borders. In the same judgment the extraterritoriality of international law was discussed, and reference was made to the principle that State may not exercise its authority in any form in the territory of another state. Accordingly, so it was argued, that viewed from whatever perspective, the alleged victims of the alleged crimes could not rely on any of the provisions of the Constitution *in absentia,* and the Applicants could conversely not rely on any infringement of interests or rights under the domestic ICC Act, either in their own interest or on behalf of any of the alleged victims. It was therefore submitted that the Applicants could not allege or assume any “interest in the rights of persons who had attained no rights under our Constitution, for want of those persons

presence in the republic of South Africa. It was accordingly submitted that the Applicant's reliance on a variety of case law in support of their professed standing in terms of s38 of the Constitution was misplaced, as all of those judgments related to representative litigation on behalf of persons or members of the public present in South Africa. One of these cases is ***Kruger v President of the Republic of South Africa 2009 (1) SA 417 (CC).***

12.2 A number of questions that had to be answered, although this was not easy, were those posed in ***Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at par 15. Section 38 (b)-(e)*** manifestly went beyond common law rules of standing, and such extension accorded with constitutionalism. One could however ask whether a person bringing a constitutional challenge as a member of, or in the interests of, a group or class of persons required a mandate from members of the group or class, what it is that constituted that class or group, what would be the nature of the common factor, and what entitled someone who is not a member of the group or class to act on behalf of those who are i.e must such person demonstrate some connection with the member or some interest of the outcome of the litigation, what should be the nature of such "connection" or "interest" and in what way if at all must the "interest" differ from that envisaged in s38 (a). The

Applicant was then also criticized for not following the approach formulated by Traverso DJP in ***First Rand Bank Limited v Chaucer Publications Pty (Ltd) 2008 (2) SA 592 (CC)*** and that Applicants would not have succeeded in such an application to establish the necessary *locus standi* to institute a class action for the following reasons;

1.1 It was clear that the decision sought to be reviewed by the Applicants is a decision not to investigate alleged crimes committed under the domestic ICC Act. It follows logically that the only persons whose rights may be adversely affected by this decision are the alleged victims of the crimes;

1.2 The decisions sought to be reviewed by the Applicants did not affect any of the Applicants' rights derived from the domestic ICC Act;

1.3 The decision sought to be reviewed can not be said to have adversely affected the rights of any of the alleged victims and which had a direct and external legal effect, whether in violation of the PAJA rights, s237 and s195 of the Constitution rights**,** or the principle of legality, for the simple reason that the alleged victims were all foreign nationals not present in the Republic. (This was said in the context of the definition of "Administrative Action" in PAJA).

1.4 In any event, the Applicants' rights, whatever they may be, and the alleged victim's rights were not similarly affected. There was therefore no common interest which related to the alleged infringement of a fundamental right as required by s38 of the Constitution. Applicants could not and can not rely on any of the rights in the Bill of Rights in their own interest, or for that matter can they also not rely on any of the other provisions contained in the Constitution. Not even s195 of the Constitution obliges any of the Respondents towards any foreign national not present in South Africa.

13.

In their argument the Applicants dealt with Respondents points *in limine,* and in the context of *locus standi* stated that the Respondents' objection to the Applicant's standing confirmed the Respondents' capricious approach to the Applicants, as well as their failure properly to understand the law and issues relevant to this application. They say that Applicants' argument relating to the applicability of the Constitution confirms their unfortunate failure to understand the very statute which governs their conduct in this application, namely the ICC Act. In order to give affect to the principle of universal jurisdiction, and to confer jurisdiction on domestic courts for international crimes, the ICC Act deems that all crimes contemplated by that Act, wherever they may occur, are committed in South Africa. Therefore it was legally irrelevant

that the victims were tortured in Zimbabwe, because the ICC Act requires that they are to be regarded as having been tortured in South Africa. The Constitution, and its protections, therefore must be considered as extending to victims of the alleged torture raised in the torture docket. Respondents' approach, according to this argument, would lead to the untenable situation that it would deny victims of international crimes standing in South African proceedings, and would shield decision-makers, like the Respondents, from accountability when faced with making decision regarding prosecutions of international crimes that had occurred outside South Africa. This would make a mockery both of the universal jurisdiction principle endorsed by Parliament when enacting the ICC Act, as it would render the legislative provisions redundant, as well as the principle of accountable governance to which the Constitution commits South Africa. This could not have been the intention of the legislators or of the Constitution drafters. The application also concerned a review in terms of PAJA. As this legislation gave effect to the constitutionally protected right to administrative justice, protected in s33 of the Constitution, section 38's provisions regarding standing should be read into PAJA. Applicants also argued that the courts have accepted that in light of the need to give effect to the Constitutional values, and because s38 of the Constitution has created new and different grounds of *locus standi,* the approach to standing when dealing with constitutional issues must be broader than the traditional approach under the common law. See in this context ***Ferreira v Levin supra par 230 and Kruger supra at par***

23. In ***Ferreira v Levin (at par 226)*** O'Regan J said that (in the context of s7 (4) of the interim Constitution) a person may have an interest in the infringement or threatened infringement of the right of another, which would afford such person the standing to seek Constitutional relief. The Constitution required a broader approach to standing and I therefore respectfully agree with that approach, which differs from the more narrow interpretation followed by Ackerman J, in that case. Applicants argue that SALC's mandate is to provide support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the Southern African region. The magnitude of the crisis in Zimbabwe and the failure on the part of Zimbabwean authorities to introduce any ameliorating or reforming measures has required that SALC consider a variety of initiatives in support of human rights and public interest law defenders. SALC was accordantly not barred from bringing an application in its own interest, namely an interest in ensuring investigations and prosecutions of those suspected of having committed crimes against humanity. SALC acted in its own interest when it compiled the torture docket, and thereafter submitting it to the Second Respondent. The Second Applicant has an organisational mission to combat impunity and achieve justice for victims of human rights violations in Zimbabwe. In order to achieve this, it monitors, documents and researches human rights violations of Zimbabweans in exile in South Africa, and assists victims to obtain access to justice and redress for these violations that it denied them in Zimbabwe. One way in which they do this is facilitating the prosecution

of the perpetrators at the regional and international level. They therefore have a clear own interest in this application. The litigation presently before this court was the first of its kind in South Africa. Advocate Ackerman SC on behalf of the Second Respondent had explained to Advocate Mpshe SC (at one stage) the novelty and public importance of the torture docket. The Applicants had a clear standing in the public interest in this particular context. See ***Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) at par 15.*** In ***Albutt v Center for the Study of Violence and Reconciliation and Others 2010(3) SA 293 (CC),*** Ngcobo CJ accepted that the governmental organisations that had brought the challenge of the granting of amnesty to various prisoners had standing in their own interest and in the public interest. The learned Chief Justice (at par 33-34) held that our Constitution adopts a broad approach to standing, in particular when it comes to the violation of the rights in the Bill of Rights. Civic organisations would also have an interest in ensuring compliance with the Constitution and the Rule of Law. The broad approach to standing in this context was also recently followed by the Supreme Court of Appeal in the decision of ***Democratic Alliance and Others v The Acting National Director of Public Prosecution and Others (2012) ZASCA 15 (20 March 2012).*** In **Lawyers for Human Rights** (supra) Yacoob J set out the criteria to be met when courts are seized with the question of whether a party does, in fact, act in the public interest. The enquiry would examine whether the application involves alive, rather than abstract issues; the nature of the infringed

right and the consequences of the infringement; relief sought and whether it would be of general and prospective application; the range of persons who may be affected by a court order, the vulnerability and whether they had the opportunity to present evidence and argument to the court; and whether there is an alternative, reasonable and effective manner in which the challenge could be brought. Applicants accordingly submitted that they had met all of these criteria elucidated by Yacoob J. The complainants of the torture have had their rights to dignity and freedom and security of the person violated in the most egregious manner; and they have been placed in an extremely vulnerable position because of the lack of avenues in Zimbabwe through which to challenge their rights infringements, and to ensure future protection. Applicants argue that the conduct of the Respondents in choosing not to investigate the evidence presented by the First Applicant is in disregard of South Africa's domestic and international obligations, and the consequences thereof are grave for the ideals of accountability and transparency in the south African public administration, particularly in respect of conduct that the international community has labeled "crimes against humanity". In line with this argument therefore they submitted that a number of groups are affected by the impugned decisions:

13.1 The Applicants, whose rights to have the decision made lawfully and in accordance with Constitutional and statutory obligations has been infringed;

13.2 The victims of the alleged torture, who have been denied the opportunity to see justice done;

13.3 The general South African public, who deserved to be served by a public administration that abides by its national and international obligations. It was also in the public interest that South Africa comports itself in a manner befitting this countries' status as a responsible member of the international community, and this would be done by seeking to hold accountable those responsible for crimes that shock the conscience of all human kind. By initiating an investigation into the allegations of torture the Respondents could ensure that the individual obligations were met in this regard. The decision not to do so is effectively a shirking of these responsibilities, and therefore is of concern to the South African public. The public clearly has an interest to the manner in which public officials discharge their duties under this legislation.

13.4 A number of decisions of the Constitutional Court and that of the Supreme Court of Appeal dealing with the concept of *locus standi* in the context of constitutional litigation are quite clear; a broad approach is required. Fourth Respondent's argument was that these decisions are distinguishable on the basis that none of the victims were South Africans or even present in South Africa. I agree however with the Applicants' contentions that the decisive factor in the present context is the ICC Act. In the present instance the quality of *locus standi* has

to be decided, not by mere reference to prior decisions of the Constitutional Court and the Supreme Court of Appeal, which both adopt a broad approach in constitutional litigation, but more importantly in the context of the Rome Statute and the domestic Act of 2002, the ICC Act. The former emphasises in its preamble that it is the duty of every state to exercise its jurisdiction over those responsible for intentional crimes. In the preamble to the ICC Act, Parliament committed South Africa, as a member of the international community, to bringing persons who commit such crimes to justice under South African law where possible. The Act, read in the context of its purpose and Rome Statute, seems to require a broad approach to traditional principles of standing. Section 3(d) read with s2 requires the High Courts of South Africa to adjudicate cases brought by persons accused of a crime committed in the Republic, and even beyond its borders in certain circumstances. The relevant international imperative must not be lost sight of, and the Constitutional imperative that obliges South Africa to comply with its relevant international obligations. The complimentarity principle referred to in Article 1 of the statute must also not be lost sight of in this context. This states that the ICC has jurisdiction complementary to national criminal jurisdictions. Section 4(3) of the ICC Act is also relevant, as it goes beyond “normal” jurisdictional requirements. In the context of the purpose of that Act, s3 requires that a prosecution be enabled as far as possible. Seen holistically

therefore, all the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute, crimes against humanity within the ambit of the provisions of s4(3) of the ICC Act, and it is in the public interest that the State does so. In the context of that Act it is not decisive that the crimes contemplated by that act were not committed in South Africa. Section 3 of the South African statute makes this abundantly clear in my view, and I therefore hold that Applicants have *locus standi* in the litigation before me. It is my view that the Applicants are entitled to act in their own interest in the present context, and also in the public interest in particular. They do not have to be the "holders" of any human rights themselves. They certainly have the right, given their attributes, to request the state, in the present context, to comply with its international obligations on behalf of those who cannot do so, and who are the victims of crimes against humanity.

13.5 On behalf of Applicants Mr. W Trengrove SC argued that the First Applicant was the complainant. It did not have to show that its own interest had been affected. Respondents had not made a "proper" decision, ie not one made according to law. In any event, there had been no "proper" decision, and Respondents were in law obliged to uphold international documents. Furthermore, First Respondent said the following in its written argument: "As far as the First Applicant is concerned it has an interest in torture, the Rome Statute and the situation in

Zimbabwe. We submit that once a proper decision has been made in respect of its request it ceased to have any further interest greater than that of the ordinary member of the public" It should be obvious, I must say at this stage, that whether or not a "proper" decision has been made, is precisely the issue herein. The public interest element is the crux here in any event. In **Kruger** supra (par 23), s38 of the Constitution was also not directly applicable, in that no infringement of any human right had been alleged. Nevertheless a generous approach to standing was adopted. In ***Bio Energy Africa Free State (Edms) Bpk v Freedom Front Plus 2012 (2) SA par 15,*** the full bench of that court stated that it seemed evident that the Constitutional Court had given an extended interpretation to s38 to incorporate violations of, and threats to all the rights, obligations, values and principles contained in the Constitution committed by public bodies or public officials. This would include any executive or administrative act or conduct of any organ of state. In **Albutt** supra, the learnerd Chief Justice granted the Applicant NGO standing on the basis that a particular process had to comply with the Constitution and the Rule of Law. Also, the victims of that process had been unable to seek relief themselves. I must add that the court also held that it was axiomatic by then that the exercise of all public power meant complying with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the Rule of Law. See also: ***Democratic***

Alliance v Ethekwini Muncipality 2012 (2) SA 21 SCA. (I will return to this topic hereunder). In the context of standing, I was also referred to ***Freedom under Law v Acting Chairperson Judicial Service Commission and Others 2011 (3) SA 549 SCA at par 21*** with reference to the public interest element, and ***Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 (5) SA 388 (CC) at par 17.*** One of the public interest facets therein was the protection and advancement of the understanding of, and respect for the Rule of Law and the principle of legality. Mr Trengrove SC also referred me to the decision of the Supreme Court of Canada cited as ***Canada (Justice) v Khadr 2008 SCC 28.*** This was done in the context of the Fourth Respondent's written argument that the Bill of Rights contained therein cannot be applied extraterritorially, and conversely could not be relied upon by foreigners not present in the Republic of South Africa, or for that matter anyone acting on their behalf. In that case, a Canadian government organization "interviewed" Mr. Khadr at the notorious prison in Guantanamo Bay (Cuba) and shared the contents of that "interview" with American authorities. He sought an order that the government be required to disclose to him all documents in their possession relevant to the charges he was facing, for the purpose of his defence. Had the process been in Canada, he would have been entitled to full disclosure of information in the hands of the government under s7 of the

Canadian Charter of Rights and Freedoms. The Federal Court of Appeal applied such principle and ordered disclosure. On further appeal the government had argued that this constituted an error, because the Charter did not apply to the conduct of Canadian agents operating outside Canada. The argument was based on international law principles against extraterritorial enforcement of domestic law and the principle of comity, which implies acceptance of foreign laws and procedures when Canadian officials were operating abroad. With reference to ***R v Hope [2007] 2 S.C.R 292, 2007. SCC 26,*** the court referred to an important exception nl. that comity could not be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held therein that the defence required by the principle of comity "ends where clear violations of international law and fundamental human rights begins". The court also held that in interpreting the scope and application of the Charter, the courts should seek to ensure compliance with Canadian's binding obligations under international law. In **Khadr** it therefore held that if the Guantanamo Bay process under which he was being held was in conformity with Canada's international obligations, the Charter had no application, and his application for disclosure could not succeed. However, if Canada was participating in a process that was violating Canada's binding obligation under international law, the Charter applied. The detention and trial of

Mr. **Khadr** at the time of the "interview" constituted a clear violation of fundamental human rights protected by international law, and Canada had been a signatory to for Geneva Considerations of 1949 which had been incorporated into Canadian law. The Charter applied to the extent that the conduct of Canadian officials invoked it into a process that violated Canada's international obligations. The decision seems particularly apposite in the present case, and I adopt its reasoning. I agree with the Applicants' argument that a number of groups are affected by the impugned decision nl. the Applicants' rights to have the decision made lawfully and in accordance with constitutional and statutory obligations has been infringed, the victims of the torture who had been denied the opportunity to see justice done, and the general South African public who deserve to be served by a public administration that abides by its national and international obligations. The public clearly has an interest in a challenge to the manner in which public officials discharge their duties under the relevant legislation.

14.

Reviewability of the decision of Fourth Respondent:

On behalf of First Respondent it was submitted that in the context of reviewability in terms *PAJA,* the courts have applied the following tests when reviewing administrative action;

14.1 Where the action related to a point of law, the test of correctness was applicable;

14.2 Where the action related to an issue of fact, the test was one of reasonableness. In this context reliance was placed on ***Bato Star Fishing Pty (Ltd) v Minister of Environmental Affairs and Tourism and Others 2000 (4) SA 490 (CC) at par 25 and 26***; ***Minister of Health and another v New Clicks SA Pty (Ltd) and Others 2006 (2) Sa 311 (CC) at par 95 to 96.*** It was submitted that the issue of the NPA powers and the interpretation of the mutual legal assistance instruments were legal issues, and the other grounds were factual. It was pointed out that Counsel for the First Applicant had submitted in their heads of argument that the institution of an investigation and prosecution was a discretionary power. The court should be less inclined to interfere with the exercise of a discretionary power as opposed to failure to comply with a positive duty. In the present matter the decision not to institute an investigation was taken by the Fourth Respondent, and not the First Respondent. In accepting this decision, Advocate Mpshe SC exercised a prosecutorial discretion, and the exercise of such discretion would be rarely set aside on review. In ***Grey's Marine Hout Bay Pty (Ltd) and Others v Minister of Public Works,*** the court held (at par 23 to 24) that properly interpreted, "administrative action" is <u>action that has the capacity to effect legal rights.</u> See also ***Oosthuizen Transport Pty (Ltd) and Others v MEC,***

Road Traffic Matters Mpumalanga and Others 2008 (2) SA 570 (T) at par 29. In ***Steenkamp NO v The Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC),*** the Constitutional Court in referring to the mentioned **Grey's Marine** decision, stated that administrative action applied where a decision " materially and directly affected the legal interest or rights" of persons. The relevant refusal decision herein accordingly clearly effects and has a capacity to affect the Applicants' legal interest or rights, so it was argued on behalf of the Applicants. In any event the Applicants submitted that an incisive debate on this topic was not necessary in as much as they sought reviewability also under the "safety – net" that is the principle of legality. The guarantee of the Rule of Law in s1 (c) of the Constitution, is constitutionally justiciable. Conduct which falls foul of the principle of legality is liable to be set aside .See ***Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1991 (1) SA 374 (CC) par 56 to 59, President or Republic v South African Rugby Football Union 2000(1) SA 1 (CC) at par 148;***

14.3 The exercise of all public power must comply with the Constitution, which is the Supreme Law, and the doctrine of legality, which is part of the Rule of Law. In the present context, Applicants say that the well-motivated and compelling request contained in the torture docket meant that the Applicants had a right to have their request properly considered by the

> Respondents, and decided upon rationally, in good faith, and in accordance with the principle of legality. In the context of this case, the Rule of Law and the principle of accountability that is part of it, together meant not only that the Respondents were obliged to accept and properly consider the torture docket, and to do so timeously. It also meant that the Respondents' response to the torture docket had to be performed with due respect for the enabling law applicable to their functions, and with respect for the values of the Constitution and South Africa's weighty international law obligations to take effective action against perpetrators of the most serious crimes against humanity.

15.

Applicants submitted that South Africa, through its ratification of the Rome Statute and subsequent domestication thereof through the ICC Act, assumed a number of binding obligations. Parliament's intention in this respect was unambiguous; namely that South Africa had committed itself to the investigation and prosecution of serious international crimes.

These obligations were imposed both in terms of international law and South African law. In this regard the Respondents, as a responsible officials for the proper administration and enforcement of the ICC Act, in failing to initiate an investigation, thereafter attempting to justify their

decision on the basis of material errors or fact and law, and through taking into account irrelevant factors and failing to consider relevant ones, have flouted both their domestic and international obligations. Accordingly, and in failing to discharge their obligations, the Respondents individually and collectively have rendered their conduct susceptible to review on a number of grounds, either under PAJA or the principle of legality. Respondents failed to discharge their individual and or collective responsibility to initiate, manage and direct an investigation in a co-operative manner as envisaged by the ICC Act, and legally required in terms of the NPA Act and SAPS Act, as read with the Presidential Proclamation relating to the Second Respondent. It was submitted that the reasons filed by the Respondents together with their answering affidavits confirmed that they had failed to apply their mind seriously to their obligations under the ICC Act, and to have wholly misunderstood the nature of that Act and their duties hereunder.

16.

In terms of s 6 (2) (d) of *PAJA*, a court is empowered to judicially review an administrative action which was materially influenced by an error of law.

See ***City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) at par 91.*** In the present case the Respondents' refusal decision was rooted in material errors of law as a result of the;

16.1 individual or collective failure of the Respondents to act in accordance with their international and domestic obligations when seized with the First Applicant's request;

16.2 the failure of the First and Second Respondents to manage and direct the investigation in accordance with the ICC Act read with the SAPS Act and the NPA Act. The answering affidavit of these Respondents contained ex post facto attempts to justify their decision not initiate an investigation, which reasons were contrary to the views expressed by the Second Respondent at one stage. It is convenient to mention at this stage that the Second Respondent belatedly filed an answering affidavit on 22 March 2012. He gave the reasons for the late filing thereof, and I was of the view that it would be the interests of justice that this affidavit be accepted and considered. An answering affidavit was filed, and it appeared that he had a change of heart in the sense that he had raised the same concerns that the Fourth Respondent had. I do not intend on dealing with that issue any further, but there is no acceptable evidence for the suggestion that Adv. Macadam SC had improperly attempted to muzzle his views. The Second Respondent is mandated under s 13 (1) (c) of the NPA Act to manage and direct the investigation and prosecution of the Rome Statute crimes. At one stage he had been of the opinion that the Fourth Respondent should at least have opened the docket and commenced with an investigation. He had not been

satisfied with the reasons advanced by the Fourth Respondent. He stated in his affidavit that after considering the following; (during May 2009)

a. the relevant law;
b. the facts presented by the SALC;
c. the seriousness of the crime;
d. the practical difficulties that the SAPS may encounter in the investigation of the case;
e. the international obligations imposed on South Africa to prosecute crimes against humanity;
f. the appreciation that South Africa should not be accused of being"unwilling or unable to investigate Rome Statute crime, he was of the view that an ***investigation*** was justified. Political consequences were not taken into consideration when he requested the Fourth Respondent to investigate the matter. In his view at that stage he would have expected SAPS to do at least the following;
g. to register a complaint and/ or open a docket and or an investigation;
h. to assign an investigating officer to attend to the complaint/ investigation;
i. to liaise with the First Applicant and to discuss the difficulties which the SAPS encountered or may encounter;

j. to obtain witness' statements and evidence as far as possible and file them in the docket;

k. to approach the Second Respondents for guidance on the difficulties encountered with the investigation;

l. to submit the docket to the NPA for a decision on whether or not to prosecute, he was of the view that these were the usual steps that had to be taken by the SAPS when receiving a complaint. This in essence ensured that the proper administration of justice was seen to have been done. In the present context this view was correct, and the other Respondents should have adopted it.

17.

Applicants argued that First Applicant's organisational mandate was to support human rights and public interest lawyers in the region to obtain justice for victims of human rights violations. The decisions not to initiate an investigation therefore directly and adversely affected its rights by hampering the achievement of their objective. The decisions therefore fall within the ambit of the definition of "administrative action" in PAJA. The decision also had the capacity to adversely affect the rights of victims. First and Fourth Respondents in turn argued that PAJA was not applicable on the facts.

18.

Applicants themselves, as I have pointed out, submitted that an incisive debate of this topic was not necessary, inasmuch as I ought to decide the issue in the context of the principle of legality. I agree with that approach. The principle of the legality is the light-house. If I uphold the review under that heading, I need not decide whether grounds of review exist in terms of PAJA. In any event some of the grounds referred to I s6(2) of the Act derive from the principle of legality and there is substantial overlapping. I respectfully agree that sound judicial policy requires the court to decide only that which is demanded by the facts of the case and which is necessary for its proper disposal. This is particularly so in constitutional matters. See **Albutt** supra at par. 82.

19.

I have already referred to the principle of legality that all public power must be exercised lawfully, rationally and in good faith.
Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) par 79, Fed sure Life Assurance Ltd at par 56-59, Pharmaceutical Manufacturers Association of South Africa and Another: in re: ex parte President of the Republic of South Africa and Others 2010 (2) SA 674 (CC) at par 83-85 and ***Rail Commuters Action Group v Transnet Ltd T/A Metro Rail 2005 (2) SA 359 (CC) at par 75.*** In this case O'Regan J, for a unanimous bench, addressed the value of government accountability

contained in various sections of the Constitution. The affect of the principle of legality is that any conduct which transgresses it, falls to be set aside.

20.

20.1 In the context of the relevant legislation Applicants submitted that their well-motivated and compelling request contained in the torture docket meant that the Applicants had a right to have their request properly considered by the Respondents and decided on rationally, in good faith, and in accordance with the principle of legality. The Respondents therefore had to apply their minds to the request properly, and obviously contextually. Applicants stated in their written heads of argument that, having regard to Respondents' answering affidavits, there was a well-founded apprehension that they had not acted in good faith, but had instead adopted a carping, defensive, and evasive position to avoid their duties in law. I do not for purposes of this judgment intend to go into this topic in any great detail, but Applicants' comments in this regard seem to be well justified. For instance, Applicants' *bona fides* were attacked, they were accused of publicity seeking, and almost reprimanded for daring to place an undue burden, which was an obvious waste of time, on them. These attacks herein were in my view unfortunate and unjustified, as they did not address the real crux of the case nl. whether the Respondents' response to the torture docket had

been performed with due respect for the enabling law applicable to the functions, and with the respect for the values of the Constitution and South Africa's international law obligations.

21.

The Powers of the NPA, SAPS, and Head of the Priority Crimes Litigation Unit;

the ICC Act;

I have already referred to the preamble. I have also referred to the definition of "a crime against humanity". I have mentioned the objects of the Acts, amongst others s3 (d), which refers to such a crime having been committed in the Republic but also "beyond the borders of the Republic" in certain circumstances. Chapter 2 of this Act deals with jurisdiction of South African courts in respect of crimes, and makes a crime against humanity a crime under South African domestic law. Section 4(1) has no requirement of presence. I will deal with the provisions of s4 (3) (c), and the relevant argument in connection therewith in a separate paragraph hereunder.

Section 5(1) states that no prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director of Public Prosecutions. His consent is clearly not required when the Fourth Respondents institute an investigation.

22.

The National Prosecuting Authority Act 32 of 1998 as amended;

I have referred to some of the provisions of this Act as amended in paragraph 1.2 supra. The docket was hand delivered to Second Respondent on 14 March 2008. At that time the 1998 Act was still in existence, and the Amendment Act 57 of 2008 only came into operation on 6 July 2009, ie : after the impugned decisions. The new structure introduced by that Act must be considered when I make an order It is at the present time, for purpose of this order, not affected by the judgement in ***Glenister v President of the Republic of South Africa [2011] ZACC 6.***. First Respondent pointed out that in March 2008, the only investigating directorate in existence was the directorate of special operations ("DSO" or "Scorpions"). They say that already as at 8 May 2008 the draft bill had been published for the Scorpions' disolution. (see Government Gazette no. 31037 of 8 May 2008). They say that it would have been illogical to refer a complex investigation to a structure that was in the process of disbanding. Section 7 of the unamended Act provided for these investigation directorates, and in s24 referred to the powers, duties and function of directors. Section 24(1)(c) stated that a director had the power to "supervise, direct and co-ordinate specific investigations".

In the context of the NPA Act, s179 of the Constitution and the Prosecution Policy that I have already referred to, First Respondent

argued that none of these documents authorised the Second Respondent to initiate investigations or for the First Respondent to do so itself, in respect of crimes falling within the mandate of Second Respondent. In March 2008 the limited investigative power conferred upon the NPA by virtue of the NPA Amendment Act 61 of 2000, was located solely in the investigating directorates referred to in s7 of NPA Act. The Second Respondent was not appointed as an investigating director in terms of s7, and could not exercise these powers. In fact therefore, the only investigating directorate in existence in March 2008 was the directorate of special operations, the so called “Scorpions”. s24 (1) (c) also did not confer upon any director of public prosecution the power to initiate investigations. First Respondent therefore argued that the lack of a legal basis to initiate investigations was confirmed by s24 (7) of the Act, which states that when a director is considering the institution of a prosecution, and is of the opinion that a matter connected therewith requires further investigation, he must request the Provincial Commissioner of Police for assistance in the investigation of that matter. That commissioner was required, in as far as practical, to comply with their request. The relevant **Presidential Proclamation** mandating the Second Respondent to manage and direct investigations and prosecutions must be interpreted in terms of that legislation. First Respondent emphasises, in that context, that the Proclamation did not empower him to initiate investigations. Accordingly, First Respondent submitted that a decision by a member of the NPA to initiate a criminal investigation in the absence of a legal

provision authorising such, would render that investigation null and void. In that context reliance was placed on ***Powell NO and Others v van der Merwe NO and Others 2005 (1) SACR 317 (SCA) at par 22-23***.

23.

There was also another very valid reason why the NPA should not initiate investigations, and I was referred to s205 (3) of the Constitution. This provision defines, *inter alia,* the objects of the Police Service to investigate crime, and to uphold and enforce the law. The NPA, in initiating investigations without any legal basis, would be usurping the constitutional mandate of SAPS. I was also referred to **du Toit Others, Commentary on the Criminal Procedure Act** at 1-4l to 1-4m where the different roles of the SAPS and the NPA were discussed. Amongst others it was stated that an initial investigation was or would be conducted by the Police, and that the prosecutor, himself, did not in principle actively participate in any investigative work. Accordingly it was submitted that the First Respondent had correctly referred the request for the initiation of an investigation to the Fourth Respondent. The issue of the Second Respondent or the First Respondent initiating the investigation was now of purely academic interest in that, having regard to the **South African Police Service Amendment Act 57 of 2008** and the **National Prosecuting Authority Amendment Act 56 of 2008**, the DSO had been dissolved, and the Directorate for Priority Crimes Investigation came into effect on 6 July 2009, which was some

five months before the Applicants lodged this application, and after the decision not to institute an investigation had been taken. Therefore, none of the investigating directorates referred to in s7 of the NPA Act were in existence, and consequently there is now no legal provision to enable the NPA to initiate investigations. It also appeared from Schedule 1 of the amended SAPS Act, that the offences created in terms of the domestic Rome Statute fell within the mandate of the said Directorate for Priority Crime Investigation. Section 17D(3) of the amended Act took away the power of the NPA to initiate investigations in respect of such offences. This **Presidential Proclamation** establishing Second Respondent had not been recalled, and it must therefore as from 6 July 2009 be considered to be the dedicated component of prosecutors in respect of the domestic Rome Statute offences. It was submitted that in the light of the above mentioned, the contention that Applicants maintain that it was the responsibility NDPP and/ or the Second Respondent to initiate an investigation, was bad in law. The Rome Statute, according to First Respondent, also contained no provision which could be cited for authority for either the NDPP or any other member of the NPA to initiate an investigation.

24.

The Presidential Proclamation relating to the Second Respondent was made under s13(1)(c) of the NPA Act. Advocate Ackerman SC was appointed as Special Director of Public Prosecutions and “to exercise the powers, carry out the duties and perform the functions necessary,

within the office of the National Director of Public Prosecutions as directed by the National Director and-

a. in particular, to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the implementation of the Rome Statute of the International Criminal Court Act 2202 (Act no. 27 of 2002)".

Mr W Trengrove SC relied on the specific wording of this proclamation, and also that of s7 of the NPA Act, and in particular to s7 (1)(iii) which referred to criminal activities committed in an organised fashion. A crime against humanity fell within that type of crime by definition. It was therefore his submission that the mentioned Scorpions at the time had the power to investigate crimes against humanity, and that the First Respondent was in control, in that context, in terms of s22 (1) of the NPA Act. It must be remembered it had been contended by the First and the Second Respondents that they had never made a decision not to investigate as this decision had been made by the Fourth Respondent.

25.

Mr W Trengrove SC argued that all of the Respondents' arguments were untenable:

Firstly, they ignored the legal obligations of Second Respondent to "manage and direct investigations" of crimes contemplated in the ICC Act, and secondly, they demonstrated, on the Respondents' own

version, that they had not made a decision, but had abdicated their legal duties by unlawfully placing the responsibility on the Fourth Respondent. Mr W Trengrove SC accordingly submitted that the designation of international crimes as " priority crimes", the establishment of dedicated units to investigate and prosecute them, and the weight given to investigation in priority crimes in the various policies, made it clear that the nature of these crimes necessitated, and do necessitate, a multi-disciplinary approach that recognises the complicity of investigations and prosecutions, and which required the First and Second Respondents to play a guiding role in respect of such investigations. Furthermore, such involvement by a prosecuting authority in the investigation of international crimes was common place. The Respondents themselves, in the answering affidavits referred to such special investigative units in many countries in Europe, as well as in Canada and the United States. The rationale for the establishment of such special units was that serious international crimes required specialised investigative approaches, knowledge of international crimes and international criminal law. South Africa was no different in this respect. Acknowledging the need to ensure that cases of this nature were dealt with properly, South Africa identified the Second Respondent as the unit that possessed the necessary expertise to manage the investigations and prosecute serious international crimes. Additionally, the specialist investigating directorate was the unit within the NPA to assist in the investigation of international crimes. Also, the South African Prosecution Policy in part 8 required the NPA to co-

operate and interact with the Police and other constituent agencies. In any event, it was argued on behalf of the Applicants that it was obvious that if the First Respondent had the power to prosecute priority crimes, then it would have the necessary and incidental powers to do whatever was necessary to achieve that purpose, which would include the power to investigate. In the present context that may be so, but not generally, it seems. See **Glenister supra** at par 76-77. Applicants therefore submitted that in relation to South Africa and the mandate of Second Respondent, the use of the term “manage and direct” in the relevant Proclamation, clearly captured the legal and practical requirement imposed upon its Head, nl, of meaningful engagement and involvement alongside the SAPS in the investigation of ICC Act crimes. Having regard to objects of that Act, there could be no doubt that the power incidental to or necessary for the achievement of the ICC Act’s purposes includes the power of the PCLU to engage in investigation particularly in the multi-disciplinary manner envisaged under the SAPS Act and the NPA Act. The First Respondent’s contention that the Rome Statute did not provide the Second Respondent or himself with any power to initiate an investigation was therefore materially flawed. It ignored the special status according to international crimes, and the need for special procedures to be developed and adopted, and it ignored the very clear terms of the SAPS Act that had to be read together with the ICC Act and which, as was said, required multi-disciplinary approach. Accordingly it was submitted by Mr. W. Trengrove SC that it was a material legal misdirection for the First

Respondent to assert that “all that the Second Respondent could lawfully do in respect of the request submitted by the First Applicant was to refer the matter to the office of the Fourth Respondent”. Also, in that context, it was submitted that the “passing of the buck” to Fourth Respondent amounted to a deferral, and abdication of lawfully prescribed functions. In this context reference was made to ***Hofmeyer v Minister of Justice 1992 (3) SA 108 (C)*** where it was held at 117 (F-G) it is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else”.

It was therefore contended that in failing to ensure their continued involvement in the matter, the SAPS did not have the specialised guidance of the PCLU, and accordingly the NPA failed to manage and direct the investigation in a multi-disciplinary manner as required by law and under their own policy. In that context reference was made to **Bato Star** supra at par 100, where it was stated that if there was a relevant applicable policy, then the Minister had to exercise his discretion in accordance with such policy. He had a duty to give effect to that policy. First Applicant had therefore been perfectly entitled to submit the docket of the office of the Second Respondent, and the First and Second Respondents failure to manage and direct the investigation as

required by law was a result of a material error of law, which according to the principle of legality stood to be reviewed and set aside.

26.

The South African Police Service Act 68 of 1995 as amended by Act 57 of 2008;

Section 11(1) of the Act referred to s218(1) of the Interim Constitution which is now s205(3) of the Constitution. The National Commissioner had to exercise the powers and had to perform the duties and functions necessary to give affect to the constitutional provisions. Since 6 July 2009 s17 (A) was operative, and there was a change-over from the "Scorpions" to the "Hawks". Section 17(B) (a) specifically dealt with serious organised crime. Section 17(D) dealt with national priority offences, as did s17(D)(3) and s17(F), which required a multi-disciplinary approach. Before 6 July 2009 the powers and duties of the Police Service in the present context was exercised by the mentioned "Hawks". It was pointed out that in First Respondent's answering affidavit (page 1305 par 13) he had in fact agreed with that approach, and had said the following: "it is also practice in complex matters for investigating officers to approach the Directors of Public Prosecutions at an initial stage of an investigation and prior to the arrest of suspects to appoint a senior member of the NPA to give guidance to the investigation". The very simple conclusion was that Fourth Respondent had the power and the duty to investigate ICC crimes committed inside or outside of South Africa, that Mr. Williams had been wrong in his

reasoning and conclusion, and that this cast a shadow over all other reasons. The decision of the Fourth Respondent and the acquiescence or agreement therewith of the First Respondent, were mistakes of law, and therefore reviewable. Their power was not exercised lawfully, and if they had discretion, they did not exercise such discretion. Respondents did not discharge their obligations in accordance with South Africa's international obligations, nor with an appreciation and sound understanding of international customary and criminal law, nor in accordance with the ICC Act, read with the Presidential Proclamation, the SAPS Act and the NPA Act. Furthermore, they were required to act rationally when making decisions pursuant to the ICC Act. In this context reference was made to ***Affordable Medicines' Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at par 35*** where the following was said: "the exercise of discretion by the Director-General is subject to certain constraints, apart from the constitutional constraints. In the exercise of his or her discretion, the Director-General must have regard to all relevant considerations and disregard improper considerations. The conditions that he/she is permitted to impose are those that are rationally related to the purpose for which his/her discretionally powers were given".

27.

The decision not to institute an investigation required the Respondents to take a number of factors into consideration and to ignore the irrelevant ones. The primary obligation was to ensure that the purposes

and objects of the ICC Act were discharged in accordance with South African international obligation to investigate and prosecute perpetrators of international crimes in light of the information placed before the Respondents. In order for the Respondents decisions to be rational, their decision had to be "based on accurate findings of fact and the correct application of the law".

See ***Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) at par 47: "***The doctrine of legality which was the basis of the decisions in Fedsure Sarfu and Pharmaceutical Manufacturers, requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of true facts;…". In that decision the SCA stated the following as conclusion: "whether a review should succeed in the matter such as the present will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interest of the person in whose favour a decision has been. Ultimately, a value judgement, balancing all the relevant factors will be required." In this context I may refer to First Respondents' heads of argument where they say (at page 71) "the domestic Rome Statute was enacted in order to ensure the effective implementation of the international statute. The preamble of the international statute is therefore binding upon the Republic." Applicants submitted that prosecution cases have to be made out of investigations. I was referred to ***S v Basson*** (1) in this context 2005 (1) SA 171 at par 37, which implied that if a state was under an obligation

to prosecute offences, it was by necessary implications obliged to investigate such offences. I was also referred to ***S v Basson (2) 2007 (3) SA 582 (CC) at par 184***, where the obligations connected to prosecuting crimes against humanity were emphasised. There was an international consensus on the normative desirability of prosecuting such criminals and, by necessary implication, a proper investigation had to be done in all such instances. Accordingly, First and Fourth Respondents (Mpshe SC and Mr Williams) made errors of law regarding the powers and duties in terms of international law and domestic law. I agree with Applicant's submissions and reasoning, and I expressly adopt their conclusions for purposes of this judgment.

28.

Respondents Reported Concern for "Foreign Relations";

Before dealing with that type of reasoning by the First and Fourth Respondents it will be convenient to again refer to what First Respondent said in its heads of argument (page 72 par 51) : "we accept that the NGO reports relating to the situation in Zimbabwe in March 2007 and certain of the witness statements obtained by the First Applicant create a reasonable suspicion that crimes against humanity were committed in Zimbabwe during that period." The issue for them however was whether the necessary proof of these crimes could be obtained in Zimbabwe. Such evidence would have to be obtained via mutual legal assistance mechanisms, which would require the consent of the Zimbabwean Government. They then referred to a number of

such mechanisms which could be potentially applicable. Mr W Trengrove SC argued that the said Respondents had confused different thresholds for different steps that had to be taken in terms of the Statute. Article 53 of the Rome Statute only required that a reasonable basis existed for the decision whether or not to initiate an investigation. It was common cause in the present proceedings that the standard was met, obviously on First Respondent's version as well as I have just pointed out. There were other standards for an arrest, and the confirmation of charges. The sufficiency of material for prosecution purposes was therefore not the proper threshold that was required, and accordingly, Brigadier Marion, as I have already pointed out, was asked the wrong question and gave the wrong answer. The question ought to have been: Is there enough information to warrant an investigation in terms of the applicable law? The answer has to be, yes, and First Respondents have conceded that. Respondents had therefore laboured under an error of law in that context. Mr W Trengrove SC accepted that the Police could not simply enter Zimbabwe, but he did not accept that the Police would not receive any co-operation. He did not accept that that was, or could be, a reason not to initiate an investigation and indeed, Second Respondent's view at one stage had been, to put it colloquially, "see how far you get". Brigadier Marion had analysed certain so-called deficiencies, as have I. In the proper context, witnesses could have been re-interviewed. Brigadier Marion also mentioned First Applicant's alleged bias. That could not be any reason not to investigate, but was merely a misguided

attempt to smear the First Applicant. The attitude of Respondents in this context was based on the pre-conceived refusal to do so, and if Brigadier Marion's reasoning was correct, no prosecution could ever succeed or even be instituted, let alone investigated if the relevant government was complicit in the commission of such crimes, as it would obviously protect itself and the particular perpetrators. First and Fourth Respondents' view was therefore affected by irrelevant political considerations having regard to their duties. Their attitude trivialised the evidence. Diplomatic considerations were also not the business of Fourth Respondent, to put it bluntly. In that context I was referred to a fairly recent decision of ***House of Lords in Regina (Corner House Research and Another) v Director of The Serious Fraud Office (JUSTICE Intervening) {2008] UKHL 60***. This decision is relevant for a number of reasons. It emphasises (of course in the British context) that the Director of Serious Fraud Office is a public official appointed by the Government, but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud, and to prosecute in such cases. Those were powers given to him by Parliament as Head of an independent, professional service, who was subject only to the superintendence of the Attorney General. There was an obvious analogy with the position of the Director of Public Prosecutions. It was accepted that the decisions of the Director were not immune from review by the courts, but authorities made it plain that only in highly exceptional cases would the court disturb the decisions of

an independent prosecutor and investigator. It was also pointed out that the discretions conferred upon the Director in the context of his duties were not unfettered. He had to exercise his power so as to promote the statutory purposes for which he was given them, and he had to direct himself correctly in law. He had to act lawfully. He had to do his best to exercise an objective judgment on the relevant material available to him. He had to exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. It seems to me, I must say at this stage, that those dicta are equally applicable to South African officials in the context of the legislation that I have referred to herein. In that case the Director had discontinued investigating allegations of corruption against an United Kingdom Company. There had been a threat by a foreign state (Saudi-Arabia) to withdraw co-operation on security matters if investigations were continued. If this threat was carried out, public safety and national security would be compromised. It had been made clear to the relevant UK officials, that the relevant threats to national and international security had been grave indeed. The Director had therefore taken the decision to discontinue the investigation with extreme reluctance. The Director had been confronted, as the House of Lords put it, by an ugly and obviously unwelcome threat. He had to decide what, if anything he should do. He did not surrender his discretionary power of decision to any third party, although he did consult the most expert source available to him in the person of the Ambassador, and he did, as he was entitled if not bound to so, consult the Attorney General who,

however, properly left the decision to him. The issue in the proceedings before the House of Lords was not whether the decision was right or wrong, but whether the decision was a decision the Director was lawfully entitled to make. The evidence before the House of Lords was clear, no commercial interests caused the Director to discontinue the investigations, but a clear threat to “British lives in British streets” Public safety was therefore the relevant consideration.

29.

I am of the view that reference to that decision of the House of Lords is particularly apposite. In the present context it was the duty of the First, Second and Fourth Respondents to investigate the docket. It contained sufficient information for purposes of such an investigation, in the context of the Rome Statute. At that stage, it was not their obligation to take political or policy considerations into account. These change in any event from time to time, whilst a proper jurisprudence remains a concrete basis for a stable society living under the twinkling but stern eyes of the Rule of Law. Any such considerations would affectively destroy the efficacy of the ICC Act. Respondents were required to act independently. In the present context, and in the light of the request for an investigation of the torture docket, they had to appreciate the nature and ambit of their duties, and act accordingly. What the First Respondent would thereafter have decided to do with the docket, if I can put it that way, was not a lawful basis for refusing to do an investigation at that stage either. That is a different topic which may or

may not arise in future, and which might or might not have arisen in the past, once the investigation had been completed. It is clear therefore that irrelevant considerations where taken into account at that stage.

30.

Except in the context of powers of a Court given to it in terms of the Constitution, it is ordinarily not competent and desirable that a Court comment on the Governments' policy decisions. In the present context, there is however little doubt that the Rule of Law does not exist in Zimbabwe. The United Nations has dealt with this topic as did the Southern African Development Community. I only need to refer to 3 articles in this regard and those are:

30.1 Zimbabwe: The War on Land, ADVOCATE, December 2009 at 44;

30.2 GCB News "Zimbabwe" ADVOCATE, August 2001 at 40;

30.3 The SADC Lawyers-Association: Media statements, ADVOCATE August 2009 at 10, read with the press releases by the General Council of the Bar on SADC Rulings and the Government of Zimbabwe, ADVOCATE, December 2010.

"ADVOCATE" is published by the General Council of the bar of South Africa.

31.

In my view it is clear that when an investigation under the ICC Act is requested, and a reasonable basis exists for doing an investigation,

political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act. Such considerations may become relevant at a stage when the First Respondent would have to decide whether or not to order a prosecution, but even at that stage the purpose of the ICC Act, and South Africa's commitment thereto, remain relevant considerations that have to be taken into account. I have already mentioned that the First Respondent said in his answering affidavit that he did not take the ICC Act into account at all. It must not be forgotten that the ICC Act itself denies explicitly diplomatic immunity to government officials accused of committing ICC Act crimes. (See s4(2)(a)). The recent trial of **Taylor**, in the International Criminal Court in The Hague, is a case in point. I have little doubt that on the present facts the Fourth Respondent could have initiated the investigation in South Africa by interviewing witnesses, with the assistance offered by the First Applicant if necessary. An attempt should also have been made, without speculating as to the result, to secure co-operation from Zimbabwe through the International Co-operation and Criminals Act 75 of 1996. It must be remembered in that context that the ICC Act under certain given circumstances, deems crimes to have been committed in South Africa. First Applicant's counsel pointed out that if Respondents' contentions were correct, nl, that the NDPP and PCLU have no investigatory powers under South African law, and that the SAPS cannot investigate crimes outside of South Africa, then the ICC Act's conferral of jurisdiction on South African courts to try perpetrators of international crimes who are not

South African, and who commit their crimes outside of South African borders, would be rendered meaningless. It would mean that South Africa would never be able to hold international criminals accountable because, according to the Respondents, they were paralysed to act. This was clearly not consistent with the purpose and object of the ICC Act. It is my view that in deciding whether it was “possible” to bring the perpetrators of international crimes to justice, the Respondents were required to determine whether or not the information before them was sufficient to initiate an investigation, and as I have said, First Respondent admitted that a reasonable suspicion that crimes against humanity were committed in Zimbabwe during that period, existed. It is also strange to say the least that First Respondent said that he did not take the views of Second Respondent, which at on stage were the same as those of the Applicants, into account. It is clear that First Respondent, on his own affidavit, without a thought or concern for the governing international statute or domestic legislation, abdicated his views to those held by the Fourth Respondent. I need scarcely emphasize that the Constitution, s179 has granted him, in the context of the NPA, independence, which he must exercise impartially without fear or favour it is not for him to blindly follow political views or policies, let alone to anticipate such.

32.

Fourth Respondent's Argument;

Fourth Respondent's counsel Mr A Ferreira SC submitted that one argument was determinative of this case: if a South African court had no jurisdiction, there would be no purpose to investigate any allegations. It would merely be an exercise in futility. No South African court would have any jurisdiction in terms of the provisions of s4 of the ICC Act of 2002, only on the basis of an anticipated presence of the perpetrators in South Africa. Section 4(1) of the domestic Act merely criminalised the crime of inhumanity. It did not give the court any jurisdiction. Only s4(3) of the Act could be relevant. As far as the provisions of s4(3) (c) were concerned, I could not read into that section the words "or are anticipated to be present" into that section. If a South African court had no jurisdiction, there would be no duty on the Respondents to initiate an investigation. In reply, Advocate Marcus SC on behalf of the Applicants argued that it was in any event not the Applicants' case that the mentioned "reading-in" was required. He said that the Fourth Respondent's argument confused the meaning of "jurisdiction". He submitted that s4(3) (c) dealt with the fact whether or not an accused person should be present at a trial in the context of the ICC Act. He submitted that this sub-section gave statutory recognition to the principle that a court exercising criminal jurisdiction could only do so if the relevant accused was present. This section had nothing to do with the power to conduct investigations. A trial might or might not

eventuate. I may mention that on the Fourth Respondents own version, a number of the alleged perpetrators had been present in South Africa during certain times, although it was not explained why the Fourth Respondent did not deal with all of the time periods since the date of the impugned decisions, or even at the time of the submission of the docket. If a proper investigation had been made, it would have been the first step that would have enabled the First Respondent to make a subsequent decision whether or not to prosecute, if the perpetrators were present in the territory of the Republic, as some of them indeed had been. Mr Marcus SC is in my view correct in submitting that s4 (3) of the ICC Act dealt with the jurisdiction of the court to try someone after an investigation. He submitted that Fourth Respondent's argument was absurd: it would mean that if a suspect was physically present in South Africa then an investigation could continue. If they then left, even for a short period, the jurisdiction would then be lost. If they then re-entered South Africa, an investigation would continue. I agree that this does amount to an absurdity. One does not know what would have occurred if an investigation had been ordered, it was not simply an open and shut case. Section 4 (3) was concerned with a trial. The ICC Act was silent on an investigation, but in my view it is logical that an investigation would have to be held prior to a decision by the First Respondent whether or not to prosecute.

I am therefore of the view that Fourth Respondent's argument on the meaning of s4 (3) of the ICC Act cannot be upheld.

32.

In the light of all of the above, it is my view that the application must succeed. I must emphasize that the proper context of these proceedings is crucial. My order is not intended to place any obligations upon the First and Second Respondents over and above those required by the legislation relevant herein. There is also no valid reason why the Applicants should not be awarded their costs. I must add that prior to the commencement of the proceedings I had invited the Applicants and the Respondents to propose what relief I ought to grant if I had to find that there was an undue delay by the Respondents in arriving at the impugned decisions, which a delay would have breached s179 and s273 of the Constitution. The delay was admitted, but prejudice was denied. I also invited the parties to propose what order I ought to grant in the context of Prayer 4, nl, that the First Second and Fourth respondents reconsider the Applicants' request originally dated 16 March 2008. As result I was handed two conditional draft orders, by the Fourth Respondent and by the Applicants. I have considered these, and intend amending the conditional proposal by the Fourth Respondent in the light of the Applicant's comment thereon.

33.

In result the following order is made;

1. The decision taken by First, Second and Fourth Respondents in refusing and/ or failing to accede to the First Applicant's request dated 16 March 2008 that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe, is reviewed and set aside;
2. The relevant decisions to refuse such a request are declared to be unlawful, inconsistent with the Constitution and therefore invalid;
3 Applicants request as aforesaid must be assessed by the First, Second and Fourth Respondents, having regard to South Africa's international law obligations as recognised by the Constitution;
4. The Second Respondent is ordered to render all possible assistance to the Fourth Respondent in the evaluation of the request by the First Applicant for the initiation of an investigation. The Second Respondent is ordered to manage and direct such investigation as provided for in terms of the applicable Presidential Proclamation and the NPA Act as amended;

5. The Priority Investigation Unit referred to in chapter 6A of the South African Police Service Act 68 of 1995 as amended shall in accordance with s205 of the Constitution, and in so far as it is practicable and lawful, and with regard to the domestic laws of the Republic of South African and the principles of international law, do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket;
6. In so far as the investigation by this unit is concerned, it is recorded that the Fourth Respondent is unable to ensure the safety of any witnesses in Zimbabwe, and cannot take responsibility for, or be held accountable for the safety of any witnesses, or any prospective witnesses in Zimbabwe, or who will have to travel from Zimbabwe to South Africa and return;
7. The Investigating unit will not procure or secure the attendance of witnesses located in Zimbabwe. If the assistance of the Applicants can facilitate this process, the Applicants must render such assistance;
8. In the event of the Applicants being able to secure the attendance of the witnesses in South Africa, the Applicants will ensure that the witnesses enter South Africa legally and in compliance with any and all relevant immigration laws of South Africa and Zimbabwe;
9. The Respondents, if necessary through collaborative efforts with the department of Home Affairs and the Department of International Relations and Co-operation, will provide the

required assistance to ensure the attendance of such witnesses in South Africa, including through the provision of visas and the waiving for the need of a passport (ie allowing the use of an emergency travel document) where appropriate;

10. It is recorded that any request for mutual legal assistance in terms of the International Co-operation and Criminal Matters Act 75 of 1996, which may be made in the investigative process, will be dealt with by the Second Respondent in co-operation with the investigating unit referred to;

11. The priority crimes units (the investigating unit) will without undue delay communicate all findings to the Second Respondent. After the mentioned investigation has been completed, the Second Respondent is ordered to take a decision whether or not to institute a prosecution. If a prosecution is recommended accordingly, Second Respondent must refer his decision to the First Respondent for confirmation. The record of any such decision is to be submitted to the Applicants.

34.

First, Second and Fourth Respondents are ordered to pay the costs of the application jointly and severally, the one paying, the others to be absolved, including the costs of two senior counsel and one junior counsel.

35.

I must add that I considered the employment of two senior counsel and one junior counsel on behalf of the Applicants as having been a wise and reasonable precaution in the light of the facts and the relevant legislation, and the importance of the matter to the Applicants, the victims and the general public.

8 Mei 2012

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JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

Case no.: 77150/09

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Heard on: 26 March 2012 to 30 March 2012

Date of Judgement 8 May 2012