IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO:

In the matter between:

SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE TRUST	First Applicant
ZIMBABWE EXILES FORUM	Second Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE HEAD OF THE PRIORITY CRIMES LITIGATION UNIT	Second Respondent
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Fourth Respondent

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FOUNDING AFFIDAVIT

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INTRODUCTION

I, the undersigned

NICOLE FRITZ

do hereby make oath and say as follows:-

1. I am an adult female South African citizen and make this affidavit on behalf of the First Applicant in these proceedings.

2. I am duly authorised to bring this application and to depose to this founding affidavit on behalf of the First Applicant. I attach hereto marked **NF1** a copy of the First Applicant's Deed of Trust and furthermore attach marked **NF2** a copy of a resolution by the First Applicant's Board of Trustees authorising the First Applicant to launch this application.

3. The Second Applicant has similarly authorised me to bring this application. I attach hereto marked **NF3** a copy of the Second Applicant's Constitution and furthermore attach marked **NF4** a resolution of the Second Applicant's Board authorising me to launch this application. I furthermore refer to the supporting affidavit of Gabriel Shumba confirming that the Second Applicant associates itself with this application.

4. The facts contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge. Where I make legal submissions, I do so on the basis of advice that the Applicants have received from their legal representatives, which advice I verily believe to be correct.

THE APPLICANTS

5. The First Applicant is **THE SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE TRUST**, known as the Southern Africa Litigation Centre (SALC). I am the current director of SALC and have personal knowledge of the facts giving rise to this application.

6. SALC is an initiative of the International Bar Association (IBA) and the Open Society Initiative for Southern Africa (OSISA), and it aims to provide support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the southern Africa 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.

7. 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 crises 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 ameliorating or reforming measures has required that SALC consider a variety of initiatives in support of human rights and public interest law defenders.

8. One such initiative has been to utilise South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("*the ICC Act*") 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 that is the basis of this application.

9. The Second Applicant is the **ZIMBABWE EXILES FORUM**.

10. The mission of the Second Applicant is to combat impunity and achieve justice and dignity for victims of human rights violations occurring in Zimbabwe with particular emphasis on the exiled victims.

11. The Second Applicant's interest in the relief sought in this matter appears clearly from its aims and objectives. The Second Applicant seeks to achieve its mission, *inter alia*, by the following:

    11.1. Monitoring, documenting and researching violations of the rights of those in exile with a view to working towards their protection

    11.2. Assisting victims of human rights abuses occurring in Zimbabwe to obtain access to justice and redress that is ordinarily denied them in Zimbabwe.

    11.3. Facilitating the prosecution at regional and international platforms of perpetrators of human rights violations in Zimbabwe, with a view to discouraging impunity.

    11.4. Providing any other assistance necessary for the dignity and well-being of all exiles from Zimbabwe, in particular victims of torture, political violence and other human rights abuses.

    11.5. Dissuading Zimbabwean exiles from crime.

11.6. Cultivating and fostering a sense of national pride and patriotism among Zimbabwean exiles with a view to facilitating return to Zimbabwe after democracy has been restored.

12. I shall refer to the First and Second Applicants collectively as "*the Applicants*" unless the context necessitates otherwise.

13. The Applicants bring this application:

13.1. in their own interest in terms of Section 38(a) of the Constitution, 1996 ("*the Constitution*");

13.2. on behalf of and in the interests of the victims of torture in Zimbabwe who cannot act in their own name in terms of Sections 38(b) and (c) of the Constitution;

13.3. in the public interest in terms of Section 38(d) of the Constitution.

14. The Applicants have brought this application in their own interests pursuant to their respective aims and objectives (described above) as concerned civil society organisations.

15. Furthermore, I submit 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 peremptory norm from which no derogation is permitted). Because torturers are considered under international law to be

enemies of all humankind (*hostes humani generis*), the Applicants have an interest in the prohibition of torture and the apprehension of torturers.

16. I furthermore submit that the victims of torture identified in the torture docket to which I refer below are manifestly vulnerable individuals who rely on public interest groups such as the Applicants for the protection and vindication of their rights, and who cannot (primarily for fear of reprisal) assert claims in their individual names. Indeed, I point out below that there is a continuing concern for the safety of the victims in Zimbabwe, such that their confidentiality requires protecting through erasing reference to their names in these application papers.

17. The Applicants also bring this application in the public interest.

    17.1. One of the reasons this application is brought is out of the public interest concern that without effective prosecution of those guilty of torture as a crime against humanity in Zimbabwe there is a risk of South Africa becoming a safe haven for torturers who may travel here freely with impunity.

    17.2. The South African public feels the destabilising effects of the Zimbabwean crisis and effective measures, as are available to the National Prosecuting Authorities and the Police Services, addressing the widespread impunity which is sadly a characteristic of the crisis may help stem the fallout and its effects.

17.3. As the existence, aims and objectives of the Second Applicant affirms, political violence and intimidation has compelled many Zimbabweans to flee that country for South Africa. These Zimbabwean exiles – as refugees and as residents – now constitute an important part of the South African public and it is evidently in their interest that accountability be sought for those responsible for crimes of international concern in Zimbabwe.

17.4. It is in the public interest that South Africa comports itself in a manner befitting this country's status as a responsible member of the international community and that it would 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, and acting to avert the further commission of crimes against humanity in circumstances where the directly implicated state is manifestly failing to protect its population.

18. The Applicants thus assert a public interest in South Africa complying with its international and domestic legal obligations to act against the perpetrators of international crimes.

19. In the circumstances, I submit 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

interests, in the interests of the affected individuals who are otherwise unable to act in their own name, and the public interest.

THE RESPONDENTS

20. The First Respondent is **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**. He is cited in his official capacity as such by virtue of the provisions of Uniform Rule of Court 53(1).

20.1. Under section 179 of the Constitution, it is the First Respondent who is the head of the National Prosecuting Authority ("*the NPA*"), and the NPA has the power and duty to institute criminal proceedings on behalf of the State.

20.2. Furthermore, under the ICC Act, section 5(1) stipulates that "*[n]o prosecution may be instituted against a person accused of having committed [an international crime] without the consent of the National Director [of Public Prosecutions]*". And section 5(3) of the ICC Act provides that when reaching a decision about a prosecution, the National Director must recognise South Africa's obligation under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed an ICC crime.

21. This application will be served on the First Respondent care of the State Attorney, Pretoria in terms of Uniform Rules of Court 4(9). Because of the obligations on the First Respondent under the ICC Act, the First Applicant directed a request to the NPA that it initiate an investigation under the ICC Act of certain individuals that the First Applicant identified as being responsible for the crime against humanity of torture in Zimbabwe.

22. To date no action has been taken by the NPA either individually or in concert with the South African Police Services against the individuals identified in the First Applicant's request. And no reasons have been provided by the NPA for this failure. Accordingly this application is directed in the first instance against reviewing and setting aside the NPA's refusal and/or failure to take action against individuals who are alleged to have committed crimes against humanity in Zimbabwe.

23. The Second Respondent is **THE HEAD OF THE NATIONAL PROSECUTING AUTHORITY'S PRIORITY CRIMES LITIGATION UNIT** ("*the PCLU*"). The Second Respondent is cited in his official capacity as such by virtue of the provisions of Uniform Rule of Court 53(1). In terms of Uniform Rule of Court 4(9), this application will be served on him care of the State Attorney, Pretoria.

24. The Second Respondent was appointed a Special Director of Public Prosecutions by former President Mbeki on 24 March 2003 in terms of section 13(1)(c) of the

National Prosecuting Authority Act. Section 13(1)(c) provides that the President "*may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette*". He continues to hold this position.

25. In terms of Government Gazette No 24876 of 23 May 2003 confirming his appointment, the Second Respondent is given two powers:

25.1. First: to "*head the Priority Crimes Litigation Unit*"; and

25.2. Second: to "*manage and direct the **investigation** and **prosecution** of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act No. 27 of 2002) ...*" (emphasis added).

26. The PCLU is thus specifically tasked with dealing with the ICC crimes set out in the ICC Act, and the Second Respondent is empowered to "*manage and direct the investigation*" of such crimes.

27. The First Applicant's request for an investigation of crimes against humanity in Zimbabwe was accordingly directed to the NPA, through the PCLU. Whether because of the First Respondent's failure to provide consent for the initiation of such a prosecution or otherwise, the Second Respondent has to date failed to initiate or has been prevented from initiating an investigation under the ICC Act

in response to the First Applicant's request. The effect thereof is that the NPA (with the First Respondent as its head) has refused and/or failed to comply with its obligations under the ICC Act.

28. The Third Respondent is the **DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**. The Third Respondent is cited in his official capacity as such by virtue of the provisions of Uniform Rule of Court 53(1). In terms of Uniform Rule of Court 4(9), this application will be served on him care of the State Attorney, Pretoria.

29. In terms of section 5(5) of the ICC Act, if the National Director of Public Prosecutions declines to initiate the prosecution of a person under the Act, the Director-General for Justice and Constitutional Development must be provided with the full reasons for that decision. The Director-General is then obliged to forward the decision, together with reasons, to the Registrar of the International Criminal Court in The Hague.

30. Given that the NPA has declined to initiate a prosecution in response to the First Applicant's request, section 5(5) of the ICC Act is applicable and the Third Respondent accordingly has an interest in the relief that is sought in this application. For purposes of the Record required to be furnished in terms of Rule 53, the Third Respondent is called upon to explain the decision he took and to furnish the reasons that were required to be forwarded to the International Criminal Court.

31. The Fourth Respondent is **THE NATIONAL COMMISSIONER OF POLICE**. He is cited in his official capacity as such by virtue of the provisions of Uniform Rule of Court 53(1). In terms of Uniform Rule of Court 4(9), this application will be served on him care of the State Attorney, Pretoria.

32. When the First Respondent eventually and belatedly responded to the First Applicant's request for action to be taken against the persons named in its request, the First Respondent stated that he was awaiting the cooperation of the Fourth Respondent for investigation of the individuals concerned.

33. In the First Respondent's final communication with the First Applicant on 19 June 2009 the First Applicant was informed that the Acting National Commissioner of Police had advised the First Respondent that "*the South African Police Service does not intend to initiate an investigation into the above matter*". No reasons were provided for this decision of the Fourth Respondent. The Fourth Respondent is called upon to furnish such reasons in terms of Rule 53.

34. Accordingly, this application is directed against the refusal and/or failure by the First, Second and/or the Fourth Respondents to take action in response to the fully substantiated request contained in the First Applicant's dossier.

35. For ease of reference, and unless the context indicates otherwise, I will refer to this refusal or failure as the "*impugned decision(s)*", and to the relevant respondents as "*the Respondents*".

THE FACTS GIVING RISE TO THIS APPLICATION

36. I begin by detailing the factual basis for the relief sought by the Applicants.

Introduction

37. The Applicants – acting in their own and the public interest and pursuant to their concern for the rights of numerous Zimbabwean nationals who are alleged to have been tortured on a widespread or systematic scale by Zimbabwean officials – are compelled to launch this application. They are compelled to do so by the refusal and/or failure by the Respondents to initiate and take appropriate action in respect of crimes against humanity in Zimbabwe. The refusal/failure is in response to detailed and motivated representations by the First Applicant of 16 March 2008 and directed to the PCLU in which the National Prosecuting Authority was requested to take action in respect of alleged crimes against humanity committed in Zimbabwe.

38. The representations by the First Applicant were made in terms of the ICC Act which empowers South Africa, *inter alia*, to investigate and prosecute crimes against humanity perpetrated by individuals who are not South African nationals or have not committed such crimes on South Africa's territory if such persons, after the commission of the crime, are present in the territory of the Republic.

39. The intention behind the initiative is both to ensure some form of accountability for the people of Zimbabwe at a time when their own justice system has all but collapsed and also to secure South Africa's interest against becoming a 'safe haven' for perpetrators of the most egregious international crimes.

40. The First Applicant prepared its request in the knowledge that the ICC Act's requirement of "presence" could be satisfied, since several of the perpetrators named in the First Applicant's representations travel to South Africa on official business, in some instances for co-operative endeavours such as the South Africa/Zimbabwe Joint Permanent Commission on Defence and Security. Moreover, given Zimbabwe's economic collapse, many of those named travel to South Africa to obtain desired commodities and services, including healthcare.

41. The First Applicant's representations include detailed testimony relating to the events that took place in Zimbabwe on 28 March 2007. On that day, Zimbabwean police conducted a raid on Harvest House, the headquarters of the opposition party, Movement for Democratic Change (MDC). Initially over 100 people were taken into custody, including those who happened only to work in nearby shops or officers. Individuals affiliated with the MDC were detained in police custody for several days where they were continuously tortured with the aim that they implicate themselves and/or others in a spate of bombings that had taken place in Zimbabwe. Repeated patterns of torture included mock execution, waterboarding and the use of electric shock.

42. The consistency in detail as to the types of abuse inflicted during this episode (in which there were repeated instances of torture), and when compared to other episodes of repeated torture, as well as the recurring involvement of several named perpetrators speaks to the systematic use of torture on the part of police and supports a conclusion that crimes against humanity have been and continue to be perpetrated in Zimbabwe.

43. This application accordingly concerns South Africa's obligations at two levels. First, it concerns South Africa's compliance with its international treaty obligations under the Rome Statute of the International Criminal Court; and second, it concerns South Africa's domestic statutory obligations under the ICC Act as well as the Constitution.

44. The Applicants seek an order from this Court declaring the refusal/failure by the Respondents to initiate an investigation to be unlawful and a mandamus directing the Respondents to appropriately reconsider the decision within a reasonable period of time.

The First Applicant's representations in the torture docket

45. On 16 March 2008, I hand-delivered to the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA) a memorandum and accompanying docket of information and evidence regarding international crimes

committed in Zimbabwe on behalf of the numerous victims of these international crimes in Zimbabwe. I did so on behalf of the First Applicant.

46. It was agreed between representatives of the PCLU and SALC that the names of the victims and of the alleged perpetrators would be kept strictly confidential while the request was being considered. That was out of a very real concern for the safety of the victims. It was also intended to ensure that any of the alleged perpetrators were not "tipped off" about the possibility of their being arrested in South Africa on the strength of an arrest warrant issued in response to the evidence contained in the docket.

46.1. I attach hereto marked Annexure **NF5** a copy of the memorandum. I further attach marked Annexure **NF6** a copy of the docket – the original copy containing signed versions of the affidavits of those tortured having been submitted to the NPA.

46.2. The entire contents of the memorandum and docket are to be regarded as expressly incorporated herein.

46.3. Out of continuing concerns for the safety of the victims and a desire to maximise the chance of arresting any of the alleged perpetrators in future, I have erased from the memorandum and the docket the names of victims and perpetrators. I reiterate that this information is known to the NPA and the PCLU, and I submit that this Court can decide this application without

having sight of that information, failing which, steps will be taken when the matter is heard to enable the court to have sight of an unedited version of the docket, subject to appropriate safeguards.

47. The docket of information contains numerous affidavits testifying to the personal experience of widespread torture at the hands of Zimbabwean police. It focuses on the torture of opposition activists which occurred subsequent to a police raid on 28 March 2007 on Harvest House in Harare – the headquarters of the Movement for Democratic Change. In addition, the docket contains corroborating accounts – testimony of doctors, lawyers and family members – and medical records. It also contains reports of reputable and independent organisations such as Human Rights Watch and Amnesty International which document both the events subsequent to 28 March 2007 and other separate clusters of the systematic use of torture on the part of Zimbabwean police. The adequacy of the evidence in the docket for purposes of the request to the Respondents has never been questioned, nor could it be.

48. The memorandum that accompanied the docket was prepared by Advocates Wim Trengove SC, Gilbert Marcus SC, and Max du Plessis. The following elements were highlighted in the memorandum:

48.1. *First*: that SALC has gathered evidence which shows that certain Zimbabwean officials are guilty of the crime against humanity of torture;

48.2. *Second*: that those officials from time to time visit South Africa and that, if and when they do so, South Africa is under a duty at international law and under the ICC Act to apprehend and prosecute them, and;

48.3. *Third*: that it is the NPA's function under the ICC Act, to discharge that duty on behalf of the state.

49. The memorandum further detailed a number of factors which weigh in favour of a decision by the NPA to institute an investigation or a prosecution; and the authors of the memorandum explained that these considerations indicate that an investigation or prosecution under the ICC Act should ordinarily follow and that there must be compelling reasons of public interest to forestall or prevent such action by the prosecuting arm of government.

50. The memorandum requested the following from the NPA:

50.1. *First*: that the NPA, through the PCLU, consider the memorandum together with the evidence contained in the docket in order that it may with all reasonable speed decide to initiate an investigation under the ICC Act of acts of torture as a crime against humanity committed by the named perpetrators in Zimbabwe;

50.2. *Second*: if the need arises, 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;

50.3. *Third*: that the NPA communicate its decision/s in respect of a prospective investigation to the Director of SALC, Ms Nicole Fritz, at SALC's address.

51. The memorandum and docket (which are to be regarded as expressly incorporated herein) will hereafter jointly be referred to as "*the torture docket*".

52. The Respondents' statutory duties were triggered under the ICC Act once it was placed in possession of the supporting evidence the First Applicant submitted and the seriousness of the crimes revealed by its torture docket. The evidence tendered by the First Applicant (which has never been questioned by any of the Respondents) shows that identified individuals committed serious crimes defined in the ICC Act and that reasonable cause existed to believe those individuals visited with sufficient regularity as to make their arrest and prosecution a real prospect.

53. I furthermore draw attention to the following reports that detail evidence of continued and widespread acts of torture in Zimbabwe that have occurred since 16 March 2008 when the torture docket was submitted to the NPA. I attach hereto marked **NF7** a copy of reports by reputable human rights organisations in relation to recent events in Zimbabwe. I submit that the reports confirm the submission

made in the First Applicant's torture docket that torture in Zimbabwe has continued to occur on a widespread and systemic basis and accordingly individuals who are engaged in torture with knowledge of that wider context are responsible for torture as a crime against humanity. Furthermore, the reports demonstrate that those involved in torture are not prosecuted, and that there is effective impunity for the perpetrators in Zimbabwe notwithstanding their involvement in crimes against humanity.

54. I have mentioned that I hand-delivered the torture docket to the PCLU on 16 March 2008. I did so because I understood that the PCLU is responsible to "*manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act No. 27 of 2002)*".

55. After more than eight months had passed without a formal response to the torture docket and the First Applicant's request for an investigation, the First Applicant directed a further letter dated 1 December 2008 to the NPA (copied to the Director-General of the Department of Justice and Constitutional Development) in which the First Applicant:

55.1. recorded that it had been more than eight months since the torture docket was submitted to the NPA;

55.2. requested the NPA to arrive at a decision with all reasonable speed in response to the First Applicant's request for an investigation and prosecution of acts of torture as crimes against humanity, and that the NPA's decision be finalised by no later than Monday 5 January 2009 and communicated to SALC, and;

55.3. in the event of a negative decision, the NPA was requested to provide full and adequate reasons for its failure to initiate an investigation and prosecution as requested and to provide those reasons to SALC by no later than Monday 5 January 2009.

56. I attach hereto marked **NF8** a copy of the 1 December 2008 letter, together with a facsmile transmission as proof of the letter's receipt.

57. Then, by way of a letter dated 15 December 2008, and with the intention of actively encouraging and facilitating any decision by the NPA to investigate the offences detailed in the torture docket, the First Applicant wrote to the head of the PCLU (which letter was copied to the Director General of Justice and Constitutional Development and the National Director of Public Prosecutions). In this 15 December 2008 letter, the First Applicant tendered to offer specific assistance in respect of any investigation that the PCLU initiated on the strength of the evidence provided by the First Applicant in the torture docket. In particular the First Applicant undertook to:

57.1. assist the PCLU in identifying witnesses and other individuals who can corroborate the provided evidence of systemic torture by specific Zimbabwean officials;

57.2. make necessary arrangements, including covering travel and accommodation costs for identified witnesses so that they are available to the PCLU in furtherance of the investigation;

57.3. provide the NPA with additional information regarding continued torture by Zimbabwean officials, and to assist the PCLU in seeking to obtain evidence and testimony corroborating such information.

58. The First Applicant indicated that in light of these undertakings it looked "*forward to [a] timely response regarding the investigation, by 5 January 2009 at the latest*".

59. I attach hereto marked **NF9** a copy of the 15 December 2008 letter, together with a facsimile transmission as proof of the letter's receipt.

The NPA's (belated) formal response

60. In the meanwhile, it appears that the First Applicant's earlier letter of 1 December 2008 had in fact spurred the NPA into offering a formal response for the first time to the First Applicant's request.

61. On 18 December 2008, the First Applicant received a facsimile from the Acting National Director of Public Prosecutions (Adv MJ Mpshe SC), which had apparently been finalised on 10 December 2008, but only signed on 17 December 2008. In that letter the NPA recorded that the NPA had considered the First Applicant's representations and was of the view that the allegations must be investigated by the South African Police Service before the NPA could make a decision on the matter. Adv Mpshe SC recorded that he had therefore requested the Acting National Commissioner to render the necessary assistance. He further stated that because "*the complainants are not residents of South Africa, which make it impossible to make a speedy decision*", he did not anticipate that the NPA would revert by the First Applicant's 5 January 2009 deadline.

62. I stress that it took from 16 March 2008 (the date on which the torture docket was submitted) until 18 December 2008 (the date the Acting National Director of Public Prosecution's 10 December 2008 letter was faxed to the First Applicant) for the First Applicant to receive a formal response from the NPA. That is an inordinate delay at the best of times, but particularly so when it is recalled that the First Applicant requested in the torture docket that the NPA consider the torture docket "*in order that it may with all reasonable speed decide to initiate under the ICC Act an investigation of acts of torture as a crime against humanity committed by the named perpetrators in Zimbabwe*".

63. Moreover, the response from Advocate Mpshe SC that the matter must be investigated by the South African Police Services:

63.1. amounts to an abdication of the duty imposed on the prosecuting authorities by the ICC Act; and

63.2. does not explain why it took so long for the response – inadequate and unlawful as it was – to be furnished.

64. I attach hereto marked **NF10** a copy of the NPA's letter dated 10 December 2008.

The First Applicant's final request for a decision and the Respondents' failure and/or refusal to respond

65. It may be surmised that but for the First Applicant's letter of 1 December 2008 the NPA would have continued to close its eyes to the First Applicant's representations in the torture docket submitted eight months' earlier on 16 March of that year.

66. Certainly there was no response from any of the respondents by the 5 January 2009 deadline set in the First Applicant's 1 December 2008 letter, including no response to the First Applicant's undertakings expressed in its 15 December 2008 letter to assist the NPA with any proposed investigation.

67. This delay on the part of the NPA is inexplicable – there is no reason provided at all to explain why it took the NPA nine months to provide a response to the

detailed evidence and submissions in the First Applicant's torture docket. The delay is furthermore inexcusable in the context of the ongoing torture and other serious human rights violations that are part of life in Zimbabwe. I refer in this regard to the reports of reputable human rights organisations that I earlier annexed to this affidavit, and the level of impunity with which crimes such as torture continue to be committed in Zimbabwe. I submit that it is obvious that one of the reasons Parliament provided the South African authorities with power under the ICC Act to investigate and prosecute such crimes against humanity was in order to deter those who are responsible for engaging in such violations. A direct result of the NPA's continuing failure to perform its duties under the provisions of the ICC Act is to ensure that individuals who might otherwise be deterred by threats of investigation or prosecution for crimes against humanity continue to act with impunity.

68. Accordingly, the First Applicant was obliged to direct a further letter dated 8 January 2009 to Adv Mpshe SC, the Acting National Director of Public Prosecutions, Adv Anton Ackerman, the Head of the PCLU, and Mr Tim Williams, the Acting Commissioner of Police, and styled it: **FINAL REQUEST FOR DECISION BY 30 JANUARY 2009**.

69. In this letter the First Applicant:

69.1. expressed its disappointment at the length of time (nine months) it had taken to receive the NPA's formal response to the First Applicant's torture docket request.

69.2. expressed its surprise that it had taken the Acting National Director of Public Prosecutions so long to adopt the view that the NPA could not make a decision until the SAPS had decided to investigate the matter;

69.3. recorded that it remained unclear whether the SAPS had the torture docket and what it is that the SAPS was meant to investigate; and

69.4. recalled its 1 December 2008 undertakings to assist in identifying and transporting witnesses to South Africa.

70. Given the already inordinate time it had taken to receive a formal response from the NPA, plus desirous of avoiding a situation in which the NPA attempted to abdicate its responsibility in respect of its obligations under the ICC Act, the First Applicant made its position clear. It:

70.1. called on "*the NPA, after consultation with the SAPS and any other relevant department, to make its decision by not later than Friday 30 January 2009, and if the decision is negative to provide full and proper reasons*"; and

70.2. cautioned that "*[i]f no decision is received from your office by close of business on 30 January 2009, SALC will be obliged to assume that the NPA's decision is negative*".

71. I attach hereto marked **NF11** a copy of the First Applicant's 8 January 2009 letter and the facsimile transmission report as evidence of its receipt.

72. Only the PCLU responded to the First Applicant's final letter of request. It did so in a pithy letter dated 15 January 2009 which acknowledged receipt of the First Applicant's 8 January 2009 letter, and repeated what Adv Mpshe had already stated in his letter of 10 December 2008, namely, that he had asked the SAPS to investigate the matter. A copy of the PCLU's letter of 15 January 2009 is attached hereto marked **NF12**.

73. There was no response from any of the other Respondents.

74. In an attempt to procure some meaningful response from the Respondents the First Applicant directed its final letter [dated 20 April 2009] to the Acting National Director of Public Prosecutions, the Acting National Commissioner of Police, the Head of the Priority Crimes Litigation Unit, and the Director-General: Department of Justice and Constitutional Development. I attach a copy of SALC's final letter marked **NF13**. The letter speaks for itself, but in salient part it:

74.1. called "*on the State, in this instance represented by the NPA in conjunction with the SAPS, to take seriously its obligations under the*

Rome Statute of the International Criminal Court and the ICC Act and to finalise its decision in response to SALC's request by no later than Friday 1 May 2009"; and

74.2. requested that "*[t]he decision must be communicated to SALC", and if it was negative, requested that the State "provide full and adequate reasons for its failure to initiate an investigation and prosecution as requested and to provide those reasons to SALC by no later than Friday 1 May 2009*."

75. In that letter SALC placed on record that should no meaningful response be forthcoming "*it will have been compelled by the State to approach the High Court for appropriate relief*".

76. The deadline of 1 May 2009 was not met. A belated response was eventually forthcoming from the First Respondent on 19 June 2009. I attach hereto marked **NF14** a copy of the response. In it the Acting National Director (MJ Mpshe SC) says just this: "*I have been advised by the Acting National Commissioner of Police that the South African Police Service does not intend to initiate an investigation into the above matter*".

77. The letter does not provide any reasons. To date, there has been no further response from any of the Respondents in relation to the torture docket and the First Applicant's representations therein. The Applicants are thus constrained to regard the response as reflected in the First Respondent's letter of 19 June 2009 as

a refusal and/or failure by the Respondents to take appropriate investigative action in response to the First Applicant's request. The Applicants are accordingly compelled to approach this Court for the relief set out in the notice of motion.

REVIEW OF THE IMPUGNED DECISION(S)

78. I come now to explain what the Applicants' grounds are for submitting that the decision(s) impugned in this application ought to be reviewed and set aside.

79. Before doing so, I am advised to set out certain salient features of the ICC Act. In doing so I intend to highlight the obligations upon the Respondents both under international law and in terms of the statute. It is these obligations – and the Respondents' failure to comply therewith – which are central to the Applicants' case.

South Africa's international and domestic commitment to the prosecution of international crimes

80. The Rome Statute of the International Criminal Court was adopted on 17 July 1998. The treaty came into force in 2002 and allows the International Criminal Court jurisdiction over crimes committed after 1 July 2002. South Africa is a party to the Rome Statute and has been a vocal supporter of the International Criminal Court.

81. In order to give effect to its complementarity obligations under the Rome Statute, South Africa incorporated the Rome Statute into its domestic law by means of the ICC Act. Prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa.

82. Under the ICC Act, a structure is created for national prosecution of crimes defined in the Rome Statute. In other words, the ICC Act allows for the prosecution of crimes against humanity, genocide and war crimes before a South African Court.

83. Of importance in this application is that the ICC Act, in section 4(1), creates jurisdiction for a South African court over ICC crimes by providing that "*[d]espite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime, is guilty of an offence and liable on conviction to a fine or imprisonment*". Section 4(3) of the Act provides for extra-territorial jurisdiction. In terms of that section, a South African court has jurisdiction over a person who commits an ICC crime outside the territory of the Republic and "*that person, after the commission of the crime, is present in the territory of the Republic*". Section 4(3) deems such an offender's crime to have been committed in the territory of the Republic.

84. I am thus advised that the section confers on a South African Court jurisdiction over the offences detailed in the First Applicant's torture docket. Accordingly,

under the ICC Act the prosecuting authority and the police are empowered to initiate an investigation and prosecution against the persons responsible for torture and other crimes against humanity committed in Zimbabwe after 1 July 2002 (the date on which the Rome Statute became operative).

85. The ICC Act recognises the complementary obligation on South African courts to investigate and prosecute the ICC offences of crimes against humanity, war crimes and genocide. The preamble, for instance, speaks of South Africa's commitment to bring "*...persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic law where possible*". And Section 3 of the ICC Act defines as one of its objects the enabling, "*as far as possible and in accordance with the principle of complementarity…, 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*".

86. The Preamble provides the context to the enactment of the ICC Act:

"*MINDFUL that-*

* *throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;*

* *the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;*

> * *the Republic of South Africa is committed to-*
>
> > * *bringing persons who commit such atrocities to justice, either in a court of law of 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 ...*"

87. The preamble records that South Africa has an international obligation under the Rome Statute, to bring the perpetrators of crimes against humanity to justice, in a South African court under our domestic law where possible.

88. The Act makes it clear that it favours the prosecution of international crimes, if needs be by domestic prosecution in South Africa.

89. The first object of the Act recorded in section 3(a) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa.

90. The second object of the Act, recorded in section 3(b), is to ensure that anything done in terms of the ICC Act, conforms with South Africa's obligations under the Rome Statute, including its obligation to prosecute the perpetrators of crimes against humanity.

91. Another object of the Act recorded in s 3(d), is to enable the NPA to prosecute, and the High Courts to adjudicate, cases against people accused of having committed crimes against humanity, both inside South Africa and beyond its borders.

92. Although such a prosecution may only be brought with the consent of the National Director of Public Prosecutions, he is obliged in terms of section 5(3), when he considers whether to institute such a prosecution, to:

> "*give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime*".

The Respondents failed to appreciate the nature and extent of their statutory obligations

93. I am advised that the discretion of the Respondents to refuse to initiate an investigation and/or prosecution is significantly curtailed under the ICC Act.

94. The Respondents' failure and/or refusal to take action is inconsistent with the aims of the ICC Act, the primary objective of which is to secure prosecution of individuals alleged to be guilty of crimes against humanity, war crimes and genocide.

94.1. The Preamble to the ICC Act records that the obligation imposed on South Africa authorities under the Act is to "*[bring] persons who commit such atrocities to justice, either in a court of law of 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*".

94.2. Section 3 (Objects of the Act) stipulates that one of the Act's objects is "*to enable, as far as possible and in accordance with the principle of complementarity … 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*".

95. The Respondents' failure and/or refusal to take action is inconsistent with South Africa's treaty obligations under the Rome Statute of the International Criminal Court.

95.1. The weight of this obligation is made clear under Section 5(5) of the ICC Act: "*[i]f the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority [the Director-General: Justice and Constitutional Development] with the full reasons for his or her decision and the Central Authority must*

forward that decision, together with the reasons, to the Registrar of the [International Criminal] Court."

96. The Respondents' failure and/or refusal to investigate is inconsistent with the NPA's Prosecution Policy and their obligations under the National Prosecuting Authority Act:

96.1. The NPA Prosecution Policy (as amended on 1 December 2005) states in its preamble that "*[p]rosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process*". The Policy then provides as follows in salient part:

> "*The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto*."
>
> "*The Prosecution Policy must be tabled in Parliament and is binding on the Prosecution Authority. The National Prosecuting Authority Act also requires that the United Nations Guidelines on the Role of Prosecutors should be observed*".

96.2. I highlight that the UN Guidelines on the Role of Prosecutors provides as follows in paragraph 15:

> "*15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly ... grave violations of human rights and other crimes recognized by*

> *international law and, where authorized by law or consistent with local practice, the investigation of such offences*."

96.3. Of obvious importance in this regard is that the State has chosen to create a Priority Crimes Litigation Unit in order that the crimes under the ICC Act are prioritised, investigated and prosecuted by a specialist and dedicated body of prosecutors and investigators.

96.4. The Prosecution Policy furthermore provides that prosecutions should ordinarily follow unless "*public interest demands otherwise*".

96.5. In terms of the Policy, when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

> "*The nature and seriousness of the offence*
>
> *• The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.*
>
> *• The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.*
>
> *• The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public. ...*".

96.6. I am advised that these considerations indicate that an investigation or prosecution under the ICC Act should ordinarily follow and that there

must be compelling reasons of public interest to forestall or prevent such action by the prosecuting arm of government.

96.7. In deciding on what is in the public interest an overriding consideration ought to be the gravity of crimes such as genocide, crimes against humanity and war crimes, their universal condemnation and the international community's commitment to repressing them.

96.8. Similarly, South Africa's interest in not becoming a "*safe haven*" for perpetrators of such crimes should form part of the overall "*public interest*" in prosecuting such crimes.

96.9. Furthermore, I submit that in the circumstances of this case the First Applicant's torture docket presented substantial and compelling evidence of very serious crimes. In all the interactions with the Respondents, the contrary has never been suggested, nor could it be. It was incumbent on the Respondents to accord appropriate weight to the docket, since the evidence therein shows that identified individuals committed serious ICC crimes and that those individuals visit South Africa with sufficient regularity as to make their arrest and prosecution a real prospect.

96.10. Additionally, I submit that the Respondents failed entirely to respond, let alone appreciate, the offer expressed by the First Applicant in its 15 December 2008 letter wherein it tendered to offer specific assistance in

respect of any investigation that the PCLU initiated on the strength of the evidence provided by the First Applicant in the torture docket. It will be recalled that the First Applicant undertook to:

96.10.1. assist the PCLU in identifying witnesses and other individuals who can corroborate the provided evidence of systemic torture by specific Zimbabwean officials;

96.10.2. make necessary arrangements, including covering travel and accommodation costs for identified witnesses so that they are available to the PCLU in furtherance of the investigation;

96.10.3. provide the NPA with additional information regarding continued torture by Zimbabwean officials, and to assist the PCLU in seeking to obtain evidence and testimony corroborating such information.

97. I am advised that the impugned decision(s) – amounting to a refusal and/or failure to institute an investigation and/or a prosecution – constitute(s) "*administrative action*" within the meaning of PAJA, alternatively fall(s) to be reviewed under the constitutional principle of legality as derived from the rule of law.

98. I respectfully submit that through the ICC Act, Parliament – in compliance with South Africa's international obligations – has provided the means by which international crimes are to be investigated and prosecuted in South Africa.

99. I further respectfully submit that in the torture docket, the Respondents were provided with a comprehensive and substantiated basis for initiating an investigation into torture as a crime against humanity. Their prolonged refusal and/or failure to act in conformity with their obligations under the ICC Act must accordingly be reviewed and set aside on the following grounds:

99.1. by virtue of section 6(2)(e)(ii) of PAJA on the basis that "*the action was taken … for an ulterior purpose or motive*";

99.2. by virtue of section 6(2)(d) of PAJA on the basis that "*the action was materially influenced by an error of law*";

99.3. by virtue of section 6(2)(e)(iii) of PAJA in that "*irrelevant considerations were taken into account or relevant considerations were not considered*";

99.4. by virtue of section 6(2)(e)(vi) of PAJA the decision was taken "*arbitrarily or capriciously*";

99.5. by virtue of section 6(2)(f)(ii) of PAJA the decision is "*not rationally connected to (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator*";

99.6. by virtue of section 6(2)(h) of PAJA the decision is "*so unreasonable that no reasonable person could have so exercised the power or performed the function*"; or

100. Furthermore, on repeated occasions the First Applicant requested reasons in the event of an adverse decision. No such reasons have been provided by the Respondents and accordingly I submit in accordance with the provisions of section 5(3) of PAJA that it is to be presumed in these proceedings that the Respondents acted without good reason.

101. Independently of PAJA, the prolonged refusal and/or failure by the Respondents to act in conformity with their obligations under the ICC Act, as well as their obligations under Section 179 of the Constitution read with the requirements of the National Prosecution Authority Act, violates the constitutional principle of legality.

102. In addition, the inexcusable delays by the Respondents violate Section 237 of the Constitution which requires all constitutional obligations to be performed diligently and without delay.

FULL RECORD OF THE IMPUGNED DECISION(S) TO BE DISCLOSED

103. In their refusal and/or failure to investigate the crimes detailed in the torture docket, the Respondents have not provided any reasons for their decision(s). That is so notwithstanding the First Applicant's repeated requests that any negative decision by the Respondents be accompanied by comprehensive reasons.

104. I am advised that in any event, the ICC Act requires that "*[i]f the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority [the Director-General: Justice and Constitutional Development] with the full reasons for his or her decision and the Central Authority must forward that decision, together with the reasons, to the Registrar of the [International Criminal] Court*."

105. In the circumstances, I submit that it is be incumbent on the Respondents to disclose a complete Record to the Court and the Applicants (in terms of Rule 53) in order that the impugned decision(s) be reviewed and assessed against the Constitution's standards of administrative fairness, justice and legality. I submit that the full disclosure of these records is also in the public interest: the public is entitled to know why the South African National Prosecuting Authority and the South African Police Service are refusing and/or failing to comply timeously and appropriately with their obligations under an international treaty and the ICC Act

in response to fully motivated representations for the investigation and prosecution of individuals responsible for torture as a crime against humanity.

106. Accordingly, the Applicants bring this application under Rule 53 of the Uniform Rules and seek complete records of the deliberations and the decisions of the First, Second and Fourth Respondents, which would include any deliberations and decisions of the Director-General of Justice and Constitutional Development (the Third Respondent), in relation to the First Applicant's representations in the torture docket.

107. I am advised that it is trite that the applicant in review proceedings is entitled to the full record of the proceedings sought to be set aside. The purpose of filing the record is to enable the applicant and the court fully to assess the lawfulness of the decision-making process. It confers real benefits on the applicant to scrutinise the decision and, if necessary, to then amend his or her notice of motion or supplement his or her grounds of review under Rule 53.

108. I have been advised that in terms of the relevant case law (with which the Respondents are no doubt familiar) it is appropriate to require the production of all documents that were/are "*at the Respondents' disposal*" and relevant to the impugned decision(s) as well as documents that "*are by reference incorporated in the file before [them]*".

109. Naturally, once the Record has been delivered by the Respondents, the Applicants will if so advised seek to amend their notice of motion and supplement their founding papers in accordance with Rule 53(4).

RELIEF TO BE SOUGHT AT THE HEARING OF THIS MATTER

110. In its Notice of Motion the Applicants seek an order declaring the impugned decision(s) to be unlawful and invalid, together with an order reviewing and setting aside the decision(s).

111. Given the delays already experienced by the First Applicant in response to its representations to the Respondents and the refusal/and or failure by the Respondents to act appropriately in response to their obligations under the Rome Statute, the ICC Act and the Constitution, I am advised that the Applicants are additionally entitled to an order remitting the decision with clear directions on at least the following matters:

111.1. An indication that the Respondents are required to consider South Africa's international law and domestic law obligations in relation to the investigation and prosecution of international crimes;

111.2. An indication that under section 179(2) of the Constitution the NPA is entrusted with "*the power to institute criminal proceedings on behalf of the state*" and that under section 237 of the Constitution such obligation "*must be performed diligently and without delay*".

111.3. An indication that the NPA is required to act in compliance with its own policy commitment under the NPA Prosecution Policy as read with the National Prosecuting Authority Act by giving due attention to the "*prosecution of crimes committed by public officials, particularly … grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences*".

PRAYER

112. For the reasons set out above, the Applicants pray for the relief set out in the Notice of Motion to which this affidavit is annexed.

_____

DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit/declaration, which was signed and sworn to/declared before me at JOHANNESBURG on this the of ……. 2009, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS